

MEDIATION WITH OUR OWN COLLEAGUES?

Cooperation between courts, prosecutors and mediators

Presentation by Dr. Borbala Fellegi at the Mediation Conference, Warsaw, December 7-8, 2009.

If we believe in the efficiency of mediation, probably we do believe that parties in a conflict should cooperate in finding solutions. But do we, as professionals in the justice system, cooperate with each other? If so, what is our motivation to do so? If not, what is the reason for it and how could it be improved?

The presentation intends to provide an overview on the possible challenges and supportive factors of the inter-professional cooperation. In order to avoid becoming too abstract, the presentation is based on the recently started Hungarian victim-offender mediation (VOM) practice.

Firstly, the legal framework of the VOM system will be summarized. It will be followed by highlighting some major attitudinal factors within the judiciary. Finally a SWOT analysis will be given to show the main strengths, weaknesses, opportunities and threats of the current VOM system, with special regards to the level of cooperation between the judiciary and the VOM service.

1. Legal and organisational framework of VOM

The Act LI of 2006 modified the Criminal Procedure Act and the Criminal Code in order to introduce mediation in criminal cases. A newly added article (art. 221/A) in the Criminal Procedure Act contains the most important conditions and regulations concerning its application. The Act CXXIII of 2006 on Mediation in Criminal Cases (the Mediation Act) contains the detailed regulation of the mediation procedure. It regulates the definition and the purpose of mediation proceedings, the role and obligations of the mediator, and the detailed rules of the procedure (deadlines, reports, confidentiality, costs etc.). These regulations created the procedural and substantive base for the application of victim-offender mediation in Hungary. They came into force on 1st January 2007.

Based on the 1/2007 Decree of the Minister of Justice and Law Enforcement victim-offender mediation can only be conducted by probation officers, who have completed two periods of training. These comprise thirty hours of practical and ninety hours of theoretical training. They are also required to participate in the mentoring system established within the Probation Service as well as in regular case group meetings and supervision. However, from 1st January 2008 attorneys are also allowed to sign up for the mediators' roll.

Mediation is applicable to crimes against the person, traffic offences or any crime against property punishable by imprisonment of up to five years. This means mediation is applicable to around 110 different crimes or offences, including theft and serious violence against person.

There is a list of conditions under which mediation is inapplicable, amongst which the most emphasised is cases connected to organised crime or committed by a repeat offender or a habitual recidivist, in other words when the perpetrator has already committed many or at least one similar crime. The last stage at which victim-offender conflict-resolution can be carried out is the court of first instance; later, including during the execution of sentence, it cannot be applied.

It is mainly the public prosecutor who refers cases to mediation; if not, then the judge may, but only until the sentence of the court of first instance is handed down. In addition, either the public

prosecutor or the judge may suspend the proceedings for maximum of six months, referring the case to the competent (county) Probation Service. Mediation is not applicable during the investigative phase or during the execution of the sentence.

In case of *adult* offenders, where the offence is punishable by up to three years' imprisonment, the public prosecutor must drop the charges. If the crime is punishable by up to five years' imprisonment, the public prosecutor shall draw up the indictment and proceed with the prosecution, but the judge can reduce the punishment without limitation.

In case of *juvenile* offenders, successful mediation requires the prosecutor to drop the charges in any case where the offence is punishable by up to five years' imprisonment, provided that the offence is not so serious that proceedings should continue.

2. Some results from 2008

In 2008 2976 cases have been referred to VOM. 82% of the cases was referred by the Prosecution Service, 18% was referred by Courts. Agreement was made in 80% of the cases, and 91% of the agreements was successfully fulfilled. Based on a voluntary survey amongst the participants conducted in 2007, 96% of offenders and 99% of the victims, who responded to the survey, were satisfied with the service.

However, besides the positive results detailed above, still only 1,5% of all recorded criminal cases goes to mediation. Furthermore, there are huge differences amongst the different jurisdictions concerning the number of referrals. Based on some research (Ivanyi, 2008; Fellegi, 2009) one can conclude that the willingness of both the Prosecution Service and the Courts to refer cases to VOM significantly depends on the individual attitude of the chief prosecutor/judge of a certain jurisdiction.

As a last remark, VOM is applied only in 12% of the cases that involve juveniles (in general 10% of offenders are juveniles). It shows that the possible positive impact of VOM in juvenile cases has not yet been recognised by the judiciary.

The above-mentioned difficulties relate to the challenges of communication between the gatekeepers (prosecutors, judges), the mediators, the policy makers, and the researchers working in the field of VOM.

In the following, let us highlight some thoughts that generally influence the level and quality of communication within the judiciary.

3. Challenges influencing the communication with and within the judiciary

The following thoughts indicate the most important issues that need to be taken into account, while considering the main challenges in the effective communication with and within the judiciary.¹

a) Independence vs. cooperation

Judges are particularly concerned about maintaining their independence. However, the concept of judicial independence, unquestionably a key criterion of democratic systems, is also used to justify the commonplace avoidance of interdisciplinary and inter-agency cooperation concerning sentencing. Since restorative justice can hardly be effectively implemented in a society where there is no dialogue between the different professions, services and agencies dealing with those concerned with crime, the implications of judicial independence remain an important challenge for the implementation of mediation.

¹ This summary is based on an in-depth interview-based research with 46 judges and prosecutors on their attitudes towards VOM (Fellegi, 2009), and other studies by Kerezsi (2006) and Fleck (2006).

b) Trust vs. discretion

According to the recently introduced Hungarian legislation on VOM, referral to mediation is a matter of discretion for the prosecutor or the judge. Hence, the law acknowledges the existence of a degree of independence not only for the judge, but also for the prosecutor. However, the law limits the range of crimes to which mediation is applicable to offences punishable with not more than five years' imprisonment. As a result, burglary, for example, is currently excluded; by contrast this common and distressing offence is often the subject of mediation in other countries' systems. Some legal practitioners feel that the legislature mistrusts them; as they say, on the one hand, it trusts the judiciary (by giving them discretionary power) but on the other qualifies its trust by the inclusion of unreasonable limitations to its exercise.

c) Cooperation with extra-judicial agencies

Some studies highlight the issue of the lack of transparency in sentencing and of openness to self-criticism within the judiciary (Fleck, 2006). These factors also contribute to the professional closeness of the judicial system. There have, however, been some important recent improvements in this field. As an example, a pilot project has started with the cooperation of local courts and the Hungarian Mediation Association (the civil umbrella organisation for mediation) focusing on how to effectively offer the possibility of mediation for parties, who would otherwise turn to civil courts with their disputes.

As mentioned in the previous section, there is certain mistrust about involving extra-judicial agencies in the criminal justice system. The implication is that the judiciary remains sceptical about cooperating with private organisations in the field of sentencing. It seems that the view of a pluralist justice system is still a long way ahead.

d) Restorative principles as priorities

Further difficulties include the strong offender-focus character of the criminal justice system in which the victim's position is still very weak. Recent legislative and institutional reforms have increased the protection and support for crime victims², but concrete measures designed to support victims have still not achieved priority in the criminal justice system. Another important aspect that determines judges' and prosecutors' attitudes is that they usually do not have any follow-up information on the offenders with whom they have been dealing. Legal practitioners often say, *'I only know about an offender if he/she gets back to me again because he/she re-offended.'* One possibility for increasing the judiciary's openness towards restorative justice might be if the effectiveness of their work could be measured by victims' satisfaction and by the impact of the criminal procedure on offenders' future lives.

e) 'Nice theories, but who will do the work?'

Concerns about extra-judicial measures are often prompted by the lack of resources available in the correctional phase of the criminal justice system. Even if there is a legislative framework provided for applying individual sanctions and alternative measures (e.g. community service, restorative justice programmes), these interventions cannot be delivered if there are insufficient financial and human resources to deliver adequate services.³

² By adopting the Act CXXXV of 2005 on Crime Victim Support and State Compensation and by setting up the nationwide Hungarian Crime Victim Support Service operates within the Office of Justice. For more details, see section B1.

³ As an example, due to financial constraints it is not exceptional that probation officers who were trained to become victim-offender mediators still have to do probation work with a high number of clients (40-50 on an average) parallel to providing mediation services.

f) Knowledge about restorative justice

Finally, legal practitioners' training systems are far from being restorative justice-friendly. Although, due to the recent legislative changes in mediation, some useful workshops have been integrated into their training curriculum,⁴ there is still a general absence of courses related not only to restorative justice, but also to such other subjects as psychology, law, social work and self-awareness. Improving legal professionals' basic and in-service training alongside these disciplines might significantly increase both their understating about the objectives of restorative justice and their cooperation when applying restorative principles within criminal justice proceedings.

4. Supportive factors that might help the effective communication

Based on the previously referred research (Kerezsi, 2006; Fellegi, 2009), in general it can be assumed that while there are certain difficulties in making the judicial system more open to restorative justice at the organisational level, at the legal practitioners' individual level a considerate openness can be perceived.

A number of prosecutors and judges appear to welcome new initiatives into the criminal justice system that have the potential to lift some of the burden from their shoulders. They would be able to focus on the more difficult cases and undertake more qualitative work, rather than just working through large numbers of cases. Their main concern is whether these informal mechanisms are able to secure the same legal safeguards for those who participate as do the judicial procedures. Their primary condition for supporting restorative interventions is the need to be convinced that if their cases are diverted to extra-judicial procedures, the parties' interests continue to be legally safeguarded, and that the procedures are delivered and documented to a high standard.⁵ A further supportive factor lies in prosecutors' and judges' generally high level of satisfaction with the Probation Service, with whose officers they routinely work and upon whom they rely for good quality input into sentencing decisions.

Reinforcing criminal justice practitioners' dissatisfaction with the conventional judicial process, their frequently experienced lack of cooperation on the part of victims and witnesses perversely serve as a further supportive factor in favour of restorative justice. Such lack of cooperation often results in substantial delays in criminal proceedings, notably when victims or witnesses do not attend trials. It seems that legal practitioners would welcome initiatives that have the potential to increase citizens' cooperation with the authorities. If all parties involved consider restorative justice to be a fair procedure in which mediators offer a highly personalised service, it is realistic to expect that the application of restorative justice will also increase citizens' trust of and cooperation with the criminal justice authorities.

Currently, it seems that the main issue is not whether criminal justice professionals are or are not open to restorative justice. There are some clear reasons why the judiciary is prepared to welcome restorative justice, but also some well-defined concerns can be found in their narratives. However, what most of them stress is that there is a clear expectation that the legislature should make criminal justice reforms long-term and consistent.⁶ As they put it, if there are too many legislative and institutional changes during a short period of time, the justice system's actors are likely to lose control

⁴ By, for example, the recently established Hungarian Judicial Academy.

⁵ An often-expressed concern is: how to ensure that the victim is not coerced by the offender (either physically, emotionally, verbally, or financially) to take part in mediation and sign an agreement.

⁶ As it is known from the literature (e.g. Aertsen *et al.*, 2004; Fellegi, 2005), primary conditions for effectively integrating the restorative approach into the justice system (such as establishing an adequate training and recruitment system; raising awareness amongst the professionals and within the public; ensuring legal safeguards in the procedure; establishing well-functioning multi-agency cooperation) can only be set up by long-term and consistent reforms.

over the processes. Consequently, if the gatekeepers feel uncertain about the procedure and frustrated by a frequently changing environment, they might lose their sense of competence and become demotivated in trying out the new instruments. But this does not mean there is no need for reform. On the contrary, there is a pressing need for change. However, for the sake of successful reform, long-term, clear and well-defined strategies are needed from the legislators. In other words, law makers need to find the balance between ‘moving’ and ‘stabilising’ the system.

5. Where are we now? SWOT analysis of the current VOM system in Hungary

By highlighting the main strengths, weaknesses, opportunities and threats of the current VOM system, we can also gain a more detailed picture about the underlying reasons why the communication might or might not work between the gatekeepers and the mediators.

a) Strengths

- Multisectoral operation: VOM projects and research in Hungary have initially been started by the NGO and academic sector, but they could not get into the mainstream for almost 20 years. However, thanks to the EU Framework Decision (2001/220/JHA) and other international influences, in 2007 the government has implemented our nation-wide system for VOM, resulting also in a partnership – unique in the justice field – amongst the NGO, the academic and the statutory sectors.
- Nation-wide availability: the legal and organisational background ensures the nation-wide availability of VOM.
- Legitimacy for the judiciary: VOM service is provided by the professionals of the Probation Service, a statutory agency, well embedded in the justice system, hence well-accepted by the judiciary.
- Standardised and high quality service: nation-wide uniformity in the VOM service’s methodology, training requirement, standards, documentation, mentoring and recording system.
- “Age-blind system”: though under different circumstances and possible outcomes, VOM is available for both juveniles and adult offenders, hence providing general availability for victims, regardless of the age of the perpetrator.
- Not only diversion: VOM is available in case of more serious offences, punishable with up to 5 years of imprisonment.
- Basic principles: confidentiality, voluntariness and impartiality of the mediator is defined by the law.
- “Learning by doing”: high number of cases (approx. 3000 mediation/year), more and more experiences.

b) Weaknesses

- ‘Jumping in the deep water’: lack of preparation, pilot programmes, awareness raising, information-sharing about RJ towards the judiciary, the policy makers and the society before implementing the nation-wide system of VOM.
- Lack of knowledge on the basic principles of restorative justice within the judiciary: no recognition of the importance of the victim-focus; the issue of voluntariness; the bottom-up, participatory decision-making process; the role of supporters and the community; the active

responsibility-taking by offenders; the power of symbolic restitution; the reintegration of all parties affected by the crime; the belief in citizens' competency in resolving their own conflicts; multi-agency partnership in combating and preventing crime etc. VOM and restorative justice is more understood as one measure in the criminal justice system and not as a different paradigm to punishment.

- Offender-focus: lack of recognition of the victims' interests. It is most visible while excluding certain cases or limiting certain aspects of the practice.
- 'Lawyerisation': the 'myth' that only lawyers can take active role in the justice system (as a result, besides probation officers only lawyers could become mediators in criminal matters, hence, well-qualified mediators with other professional background are excluded from the system)
- Top-down mistrust: on the one hand, mistrust by law-makers towards the legal practitioners, the mediators, and the future parties of VOM, on the other hand, mistrust by legal practitioners towards the mediators and the parties. As a result, the law limits the application of VOM with unnecessary over-regulation. Examples:
 - exclusion of serious criminal offences punishable with more than 5 years of imprisonment
 - maximum 2 supporters can be taken to the VOM meeting by the parties, hence, the possibility for applying the conferencing method is excluded.
 - exclusion of cases in which offenders plead guilty after the investigation phase
 - rigidity: prosecutors cannot assign any task to their assistants concerning the personal hearing of the parties about their voluntary participation. As a result, VOM means extra work for prosecutors de-motivating them in applying this measure.
 - in many cases (in all the juvenile cases, and in the less serious cases involving adult offenders), if the perpetrator fulfils the agreement, the case needs to be dropped automatically (the law-maker took the decision out from the prosecutor's hand). As a result, prosecutors prefer to use other, more long-term diversionary methods (eg. the postponement of accusation), than VOM.
 - the law and the internal regulations provide wide discretionary power for judges and prosecutors 1.) when deciding on referring a case to VOM; 2.) when approving or taking into account the agreement of the parties into the final decision. As a result, case referral and the outcome of the VOM are largely based on the knowledge, openness and attitude of the individual judge and prosecutor. It is the main reason why there are significant differences amongst the judicial districts concerning the number of VOM cases.
 - competency-clash: legal practitioners want to discuss too many details with the parties before deciding about the referral (e.g. they want to see if the offender has sufficient income in order to provide compensation for the victim), instead of leaving it to the mediator and the parties within the framework of the mediation process. As a result, prosecutors (seen as authority) often give exact advice to victims on what to request through the mediation, preventing victims from articulating their *own* needs.
 - Material-focus: over-emphasis on the material compensation and lack of recognition of the importance of symbolic reparation. Referral to VOM is excluded if there is no

realistic possibility of the material compensation. This is one of the reasons behind the low application of VOM in case of juveniles who has no income.

- Exclusion of cases in which the offender has committed multiple offences.

c) Opportunities

- Openness towards joint trainings for mediators, prosecutors, judges, lawyers and other, criminal justice professionals
- “Learning by seeing”: legal practitioners (and any other interested person) have the opportunity to sit in VOM meetings and observe the process in real cases. Experiences show that this is the most effective way to make legal practitioners more positive and open to restorative justice.
- Slow but gradual change in attitude of legal practitioners, policy makers and of the citizens.
- Support for evaluation research both on the VOM system and the criminal justice system at large.
- Good results of VOM can support the wider application of mediation in civil matters, too.
- The increasing number of serious violence and the inefficiencies/dysfunctional operation of the criminal justice system highlight the importance of widening the scope of restorative justice.
- VOM requires stakeholders to work in multi-agency cooperation and to accept an interdisciplinary approach in dealing with crime. This pressure might increase, in the future too, criminal justice professionals’ skills and openness towards maintaining and creating multi-sectoral partnerships.
- International exchange and networking can have a positive effect on the legitimacy and acceptance of VOM nationally, too.

d) Threats

- that weaknesses don’t change
- further changes will be made in the legal and institutional system without any preparation and involvement of the stakeholders
- no feedback to and from the stakeholders about the efficiency of the current VOM system
- routinized practice, overburdened and burnt-out professionals forgetting understanding and applying the RJ principles both with their clients as well as with their colleagues
- lack of information sharing and awareness raising amongst the legal practitioners
- lack of quality insurance (lack of continuous supervision, mentoring, interdisciplinary partnerships and the possibility to frequently revise the practice)
- inefficient cooperation amongst the professionals: fear of losing their competency, power, tendency to jealousy, blocking information-sharing
- power games and rivalisation instead of cooperation
- sensation-chasing media, political populism in the criminal justice policy.

6. Conclusion

This presentation intended to give an overview on some of the factors that shape the attitudes of the legal practitioners towards VOM and a SWOT analysis of the current VOM system in Hungary. Its purpose was to highlight the dimensions on which the communication can be effectively improved between prosecutors, judges, mediators and all the other stake holders within and out of the judiciary

To sum up, our communication can significantly be improved, if we build on our system's strengths, recognize and respond to the weaknesses, have a vision and use the opportunities, and are aware of the threats that our system might indicate.

But before we start this work, it is worthwhile to think once more about all our expectations that we have towards our clients in mediation. These include: *the sense of security, self-esteem, responsibility-taking, honesty, articulation of own needs, trust, taking care of others, recognising, listening and understanding the other side, cooperation, partnership, giving and requesting feedback, ability to self-criticism, giving another chance, communication skills, belief in the win-win outcome, openness and trust towards an impartial mediator, reflection to the principles, supporting others in making amends, etc.*

While thinking about our communication, one cannot avoid raising the question: do we, ourselves, represent the above-listed principles in our daily work with each other?

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Dr. Borbala Fellegi

PhD in Sociology (ELTE University, 2009), MPhil in Criminology (University of Cambridge, 2004), MA in Social Policy (ELTE University, 2002)

Dr. Fellegi is a researcher, mediator and facilitator. She wrote her PhD thesis about the implementation of restorative justice in Hungary. From 2004 to 2006 she coordinated an AGIS project on behalf of the European Forum for Restorative Justice (Forum) focusing on the implementation of restorative justice in Central and Eastern Europe. Currently she is chairing the Research Committee of the Forum.

Between 2002 and 2006 she has been the Hungarian representative of the COST Action A21 on the 'European developments of restorative justice'. She has been working, among others, as consultant for the Council of Europe, the UNODC, the National Crime Prevention Board and the Office of Justice in Hungary. She gives trainings and courses at various universities, colleges and institutes for further education in justice affairs about the theory and practice of restorative justice.

From 2008 on, as executive of the Foresee Research Group (<http://foresee.hu>) she is in charge of Hungarian and EU programmes researching the potential application of mediation in community conflicts and in the prison settings. Besides numerous published articles she is the author of the book '*Towards restoration and peace*' (Napvilág, 2009), one of the first comprehensive studies on the implementation of restorative justice in Hungary.

Her publications and activities are available in detail on her website: www.fellegi.hu.