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The Role of Victim-Offender Mediation in Probation

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Victim-offender mediation in a maximalist perspective

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Introduction: mediation beyond experimentation:

Mediation is generally defined as a method for resolving inter-human conflicts. A neutral third party – the mediator – provides the parties with a safe and confidential setting in which they, voluntarily and in mutual dialogue, can arrive at the formulation of conditions and commitments that result in a lowering of tensions and restoration of the relationship. Mediation is by no means something entirely new. It belongs to all times. Thus, we see already in the Middle Ages, and even in antiquity, the appearance of the figure of the mediator, the neutral third party who, together with the parties concerned, searches for a reasonable settlement in order to prevent an escalation of the situation.

Relatively new, however, is the application of mediation to the criminal justice context. The usefulness of communication on an equal footing between offender and victim indeed appears to conflict with the vertical, exclusively offender-focused, penal culture present within traditional judicial thinking. Mediation, however, has increased its scope under strong inspiration from the Anglo-Saxon world. The European institutions, especially the Council of Europe, have explicitly recommended mediation in a criminal justice context.[2] In the meantime, traces of victim-offender mediation can be found throughout Europe, sometimes as experiment, sometimes in a more formally judicial form.[3]

All of these practices thoroughly demonstrate that the application of mediation is genuinely possible and that the supervised dialogue between offenders and victims of criminal offences carries with it considerably more potential than was believed initially. This applies to minor crimes, but also to the most serious forms of criminality.[4]
Thus, countless studies show that the level of satisfaction of citizens is much higher after mediation than after traditional criminal proceedings. In a considerable number of cases, the mediation results in a formal agreement between the parties. Other studies suggest, in a more nuanced away to be sure, a certain level of correlation between participation in mediation and a decrease in recidivism.[5]

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[2] Council Of Europe, Mediation in Penal Matters, Recommendation No R(99)19.
[3] D. Miers and J. Willemsens (eds.), *Mapping Restorative Justice; Developments in 25 European Countries*, Leuven, European Forum for Victim-Offender Mediation and Restorative Justice VZW, 2004.
[4] We refer in this regard to experiences in the United States and Canada and the groundbreaking work of people like M. Umbreit (Minnesota), D. Gustafson (Canada) and D. Doerfler (Texas).
[5] See among others:

Given the disbelief with which this idea was initially received within the traditional system, the practice of mediation is predominantly a success story. And this is no different in Belgium. Mediation offers opportunities in considerably more criminal justice cases than was thought initially. With this, it appears that the “experimental” phase of mediation has successfully ended.
These findings present an interesting problem for the judicial policy in the various countries. The question here concerns the relevance to the criminal justice system of this new possibility.

a. Mediation in Belgium: an overview::

a.1. Mediation for youngsters: Mediation and juvenile justice (Laws 2006)

The first experiences with communication and mediation between offenders and victims in Flanders date back to the end of 1987 and concerned **offenders who were minors**. The initiator was the not-for-profit organization Oikoten. Together with the public prosecutor of Leuven and the juvenile court, a creative search was initiated for new forms of societal reaction to juvenile delinquency. On the basis of this, a model was developed to give young persons the possibility to take up their responsibility in a tangible and constructive way in the process of restorative justice. This strongly pedagogical insertion explains why this manner of working has received a place in recent years within Special Juvenile Assistance. Since 2006 mediation is foreseen by law as an important measure in the context of juvenile justice, especially at the level of the public prosecutor, where a referral to mediation is foreseen by law as a prior step before prosecution.
Also the Juvenile Judge can refer a case to mediation.
Mediators are employed by independent NGO’s, specialised in juvenile assistance.

a.2. “Penal mediation”: Mediation as a “diversion” at the level of the prosecutor (Law 1994)

This form of mediation is part of a wider offering on the part of the public prosecutor within the framework of the awarding – with conditions - of a termination of criminal proceedings[6]. To this end the law of 1994 foresees the appointment of judicial assistants to each legal district, civil servants of the Ministry of Justice, linked to the offices of the public prosecutor. Their mediation offer is restricted to offences of limited seriousness[7] . In addition to an agreement between offender and victim, pursuant to this arrangement, engagements to specific educational and treatment programmes may also serve as conditions for the termination of the criminal proceedings.

J. Braithwaite, ‘Restorative Justice: Assessing Optimistic and Pessimistic Accounts’ in M. Tonry (ed.), *Crime and Justice: A review of research*
L. Kurki, ‘Evaluating restorative justice practices’ in Von Hirsch A., Roberts, J. V., Bottoms , A. E., Roach, K. and M. Schiff (eds.) *Restorative justice and Criminal Justice, Competing or Reconcilable Paradigms,* Oxford, Hart Publishing, 2003, 293-314.
J. Latimer,, C. Dowden, and D. Muise, *The effectiveness of restorative justice practices: a meta-analysis,* Ottawa, Research and Statistics Division, Department of Justice Canada, 2001.
Restorative Justice Consortium, *The positive effect of Restorative Justice on Re-offending,* London, Restorative Justice Consortium, 2006.
[6] Code of Criminal Proceedings, Art. 216 ter.
[7] The law prescribes that it must concern offences for which the public prosecutor would not demand more than a two-year prison sentence.

Since the coming into force of the law in '94, each district has this offering available. Thousands of cases are settled annually using this form. Its introduction as form of settlement within the judicial proceedings, however, places a mortgage on the depth and the quality of what can be offered in the way of communication. In this context, mediation risks to be "instrumentalised" for criminal justice purposes.

a.3. "Mediation for redress": towards a generalisation of the mediation-offer (Law of June 22th 2005)

In the spring of 1993, within the Research group Penology and Victimology of the K.U.Leuven, an action research project was initiated with the title 'mediation for redress'. The researchers were strongly inspired by the questioning of victims of serious violent crime. In this they heard from the victims an explicit wish to be more closely involved in the settlement of the offence. At the same time, they were impressed by the often present need for interchange with the offender. The above-mentioned action research also had as object a verification of the possibilities for mediation and offender-victim communication in relatively serious criminal cases in the phase **prior to the judgement.**
This research was the occasion within the district of Leuven for the coming into being of an ongoing practice of 'mediation for redress'. In the meantime, by order of the federal minister of Justice, similar offerings have been initiated in eight of the thirteen Flemish districts. In the Walloon provinces in Belgium, mediation for redress was experimentally offered in a number of districts.

Since 1996, in a few Belgian cities there are also **mediation projects at the police level.** It concerns an offering that is very strongly focused on material compensation in offences with little relevance to criminal justice. Very often the intervention of the mediator is then also followed by a classification of the dossier without further practical effect.

Finally, since 2000, had limited experience of **post-trial mediation**, and particularly **during the course of the detention**. The communication possibilities offered to the parties here usually concern the most serious penal offences, up to and including rape and murder, and usually have a very profound, quasi-therapeutic character.

These three above-mentioned forms of mediation arose in a collective dynamic, often even originating with the same group of initiators, in close collaboration with the various competent judicial bodies in the field. There was also solid scientific support.

2005 was a special year for mediation in Belgium. In that year the Belgian parliament passed a law that added new articles on mediation to the Code of Criminal Proceedings.[8] This law generalised the application of victim-offender mediation as a possibility. If offender and victim are prepared to participate, mediation is possible in all phases of the judicial process and to all forms of crime. Mediation can be initiated at police level, immediately after the offence. It can also take place during the judicial inquiry phase or during the punishment phase. This law puts a strong emphasis on the principles of confidentiality, neutrality and voluntary participation. The mediators are therefore not linked to the Criminal Justice System. They are part of independent NGO's, specialised in mediation and restorative justice and officially recognised by the Minister of Justice.

[8] Act of 22 June 2005 introducing stipulations in the area of mediation in the Introductory Section of the Code of Criminal Proceedings and in the Code of Criminal Proceedings, *Belgisch Staatsblad,* 27 July 2005.

b. Some findings, based on experience and research:

Mediation for which offences?

It seems to us that primarily criteria of a *formal* nature are relevant to making mediation applicable and meaningful.
Thus, work can be done only with offences that constitute the object of a **formal confession** on the part of the offender. The absence of this would place the mediation efforts entirely within the scope of the investigation. Partial confessions only permit mediation regarding those aspects that constitute the object of these confessions.
Furthermore, mediation requires an identifiable and **personalizeable victim**.
Negotiations with purely legal entities, after all, do not have the character of interpersonal communication necessary to mediation.

The practice of mediation does not provide any *content-oriented* criteria for exclusion.
Indeed, currently mediation is being successfully offered in cases ranging from shoplifting and vandalism to murder. Nevertheless, caution must be used with offences that intrinsically stem from an imbalance of power between the parties concerned. The mediation itself would be in danger of mirroring this imbalance of power. Here we think, among others, of cases of stalking and incest. These sorts of cases appear to us to not absolutely exclude mediation, but require of course additional methodological guarantees.

Mediation for whom?

We note that the capacity for mediation is relatively independent of age, sex, social status and background of the parties concerned.
Even for seriously traumatized persons, it appears that *the offer* of mediation is often meaningful, if only in order to communicate the powerful message of refusal to the offender.
To be sure, the mediation must guarantee a certain equilibrium between the parties. For this, together with the mediator, the "contexts" of offender and victim must also assume responsibility.
Thus, when dealing with minors or with mentally or psychologically weaker persons, the active involvement in the process of mediation of parents, an ombudsman or lawyer, is often indispensable.
However, even with the support of "intermediary third parties", one encounters limits. Thus, with non-native speakers, an obvious communication problem can stand in the way of the mediation. Mediation using an interpreter does not provide an obvious solution… In addition, some plead for the exclusion of mediation for offenders with a psychopathic personality.
Rather than being seen as definitive limits to be respected at all costs, both problems appear to us to be significant methodological obstacles which, however, can be overcome. They do not dissuade us from the thesis that mediation in principle *can* be meaningful for any offender and any victim. They also do not represent a reason not to leave the actual choice of whether or not to participate to the *parties themselves*.

At which phase of the criminal proceedings to act?

Here again experience provides no reasons for exclusion. Some cases appear the perfect candidate for mediation at police level, others require a clear framework from the public prosecutor or court, or even a prior legal judgement in a defended case.

Of course, some aspects are not related to the seriousness of the offences. Rather it concerns a balance between, on the one hand, the will to actively participate and influence, and on the other hand, the need for safety and the safeguarding of rights. The farther along mediation is situated in the process of judicial decision making, the greater the (juridical) clarity regarding the positions between the persons involved, but the smaller the judicial ‘impact’ of the results of mediation.

It seems that here also *the parties themselves are in the best position* to judge. It is nevertheless also the responsibility of the mediator to limit unnecessary risks. Thus - by way of example - it sometimes happens that mediation in the run up to a jury trial is only justifiable subject to additional procedural guarantees, insofar as also subscribed to by the defence for both parties. The same seems to us to be the case, despite the high level of demand and the very clear need, in cases of fatal road accidents.
In any case, interference by the process of mediation with a judicial inquiry in progress must be avoided. After all, this is also in the interests of the parties concerned.

A neutral answer to a real need?

Experience teaches us that mediation is to a large extent positively received.
Resolute refusals to cooperate occur relatively seldom.
Regarding the victim, only rarely does the offering lead to the feelings of secondary victimisation that some put forward as a major disadvantage to offender-victim mediation. On the contrary, the mediator appears extremely welcome, and perhaps even more so the more offences are felt as serious.
Regarding the offender, the offering is more popular when the offences are lighter. Serious offences leave the offender little room for influence. In this case, participation in mediation requires a great level of moral engagement from the outset.

Nevertheless, when the positive response is great on both sides, this initially often has to do with a general need to know what type of person one is dealing with on the other side, often also with the need for answers to specific questions regarding how the offence transpired. Furthermore, at the outset mediation provides concrete information concerning one's own rights and possibilities, through which the parties are gradually better orientated regarding their own case. [9]

An effective offering?

An answer to this question depends directly upon the expectations of the person addressing the question. It must be admitted that there is still much discussion regarding which criteria should be used to measure the effects of mediation. Thus, we will treat this a bit superficially. However, the following can nevertheless be argued:
First of all, mediation appears in very many cases to be the occasion for a formal or informal agreement between the parties concerned. This is very clearly the case with lighter offences, but also in more than one third of more serious cases.
However, the most important conclusion is of course the very great level of satisfaction on the part of the parties that have participated in mediation. This satisfaction is found both on the side of the offender and that of the victim, and even appears to be relatively independent of

[9] See also: I. AERTSEN, L. VAN GARSSE and T. PETERS, *Herstelbemiddeling; Onderzoeksrapport periode 1/1/1993 – 31/10/1994,* K.U.Leuven, Faculty of Law, Dec. 1994, p. 37-42.

the extent to which a formal agreement was mutually achieved.[10] This conclusion is confirmed to a large degree by the experience and research results of offender-victim mediators from very diverse countries. The importance of this criterion must be measured against the general climate of cynicism and loss of credibility with which the traditional judicial proceedings are everywhere faced.

A generalizeable offering?

It cannot be denied that mediation presupposes a considerable level of investment, not only on the part of the parties, but also on the part of the mediator. In its full implementation, mediation appears to be a labour-intensive method. This raises questions regarding the feasibility of its generalized application.
On the other hand, experience teaches us that not every form of mediation must include house visits and a months-long process of separate and collective contact with the parties. The possibilities contained in the so-called "indirect" forms of mediation must not automatically be seen as inferior. The elaboration of a flexible "multi-stage" form of mediation, ranging from a simple telephone or written interchange to repeated joint meetings by the parties, could be considered. It must again be pointed out that also here the parties themselves of course are best placed to judge concerning the nature of the mediation that seems appropriate to their case. Thus, experience teaches us that the "criminal seriousness" of the offence is only a very partial and usually deceptive indicator of the nature and the depth of the questions that lie hidden behind it. Openness and respect for the individual character of each concrete case is then also an absolute necessity.

c. Towards a "maximalist" approach ?

The relative success of mediation presents an interesting problem for the judicial policy in the various countries. What can be expected of methods such as mediation? The possible benefits on the (inter)personal level have been demonstrated extensively by research in many countries. But, what is the relevance of mediation for the system as such ?

The answer can be addressed in **a minimalist or a maximalist way.**
Some continue to believe that the dialogue between the parties involved in the offence must be considered a highly personal matter. They hold that criminal law and the penalties foreseen by it must be strictly applied to the penal offence. In this approach, mediation indeed is only to be appealed to in very exceptional circumstances.
In many countries mediation is seen as a weapon against the quantitative overload of the judicial system. The method is used here to lessen this load: successful mediation thus takes the place of short, unsatisfactory judicial proceedings or dismissal of the case. Of course, mediation is then only applicable in cases minor crime. And referral to mediation needs a decision of the criminal justice authorities.

Some, however, include positions that are more radical. Under the heading "restorative justice," the perspective is invoked of a criminal justice system that would focus above all on lowering aggression and restoring relations, with the target group including both offenders and victims. In this reasoning, the offer of mediation is linked to the legal principle of "subsidiarity": Punishment as an 'ultimum remedium'. Due to this principle, if between victim and offender there appears to be an obvious capacity to deal with the event and restore

[10] See also: ib. p. 64-66.

their relation in a socially acceptable way, this should al least be taken in consideration by the judiciary.

Interesting is the fact that with the Act of 22 June 2005, the Belgian legislator has adopted an entirely new position with respect to the importance of mediation. The Act of 1994 saw mediation as a means to release pressure from the judicial system, and therefore limited its applicability to specific types of crime. The Act of 2005 goes further and makes mediation complementary to the judicial proceedings, at whatever level in the proceedings this might occur. The explanatory memorandum emphasised not only the benefit of the service with respect to personal redress to the victim, but also the social relevance of mediation with a view toward promoting respectful relations throughout society.
The magistrates now also have a legal role to play in making the possibility of mediation known, and an agreement submitted during the course of the judicial proceedings may not be ignored.

The Belgian policy in this area largely follows the recommendation of the Council of Europe with respect to mediation in a criminal justice context, as well as the regulations contained in article 10 of the European Framework decision of 15 March 2001 concerning the position of the victim in judicial proceedings. Mediation in general is not only a service provided, but it also offers the offender and the victim the opportunity to take part jointly in the judicial proceedings in the form of their agreement. This is always done with respect for the independence of the judiciary. But, at the other hand, it challenges judges and prosecutors to somehow relate their decisions to what people, directly concerned with the event, can consider "right and fair".

This law over the longer term brings into view a "right to mediation," with citizens actively playing a role in the judicial proceedings and having an partial influence on the impact and the nature of the judicial decision, be it a probation, a fine or an imprisonment. This influence is more than a mere opportunity for citizens who request it, but could even be considered a quality criterion for administering justice in an open, constantly evolving and dynamic democratic society.

But let's be honest and humble as far as the Belgian situation is concerned: voting a law is one thing, but putting it into practice is something else. Facts and figures on mediation in Belgium show that, all together, mediation still is a marginal offering in some thousands cases a year. The promising and visionary "maximalist perspective" might have been present in the mind of the Belgian legislator, to make it part of every-day social and criminal justice-policy, an enormous lot of work is still to be done.

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