

Victim-offender Mediation

A right or a favour ?

INTRODUCTION

Background:

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Pedagogue

Experiments on Mediation :

In close collaboration with the university of Leuven (action-research):

'87: Youngsters

'93: Adults, pre-trial

'93: Adults, mediation as diversion-measure

'96: level of the police

'00: Adults during detention

Global Result:

Some experience with mediation in almost every crime and every stage of the judicial intervention;

'98: establishment of Suggnomè, Forum for mediation and restorative Justice

Mission:

- + promotion of Restorative Justice
- + implementation and generalisation of mediation
- + stimulating the government to provide proper legislation

'93-'94: Actively involved in a working-group preparing a draft-law on mediation during the CJ- procedure.

Result: law of June 22e 2005.

Today's theme:

Puts us back in the position of a working-group on a draft law on mediation.
Fundamental question on the legal status of the mediation offer

Two options:

Favour:

Mediation to be applied in some specific cases only.
Cases (or parties) should somehow be selected by an official body.
Some requests for mediation should be refused.

Right

It should be a legal right of every victim and offender to have access to mediation.

- Not just a matter of a radical “Yes” or “No”
There is not a good answer available
It's a matter of consideration in every country, taking into account

- ideology behind mediation
- experience out of practice
- Juridical arguments
- pragmatic arguments

It might as well be a continuum of possibilities.

An brief exploration on three levels:

1. Filosofical – conceptual level
2. Reflexion based in the mediation practice
3. A look at recent Belgian legislation: focus on the law of June 22e 2005.

Res.: No answers, but an introduction in the complicity of the theme.

Goal: to stimulate reflection and discussion.

A. CONCEPTUAL EXPLORATION:

1. Restorative Justice and the principle of subsidiarity (“ultimum remedium”)

- RJ:

Victim and offender and “their“ conflict., their solution
State comes in the second place.

- Fits with the principle of subsidiarity
State intervention as last possible outcome

- Explains “curiosity” of the CJS: they have a direct interest in mediation.

- Application of subsidiarity-principle should not depend on the nature of the crime.

- Res.: The logic of a general right of mediation as appeal to the citizens to contribute to justice

2. Mediation and the principle of equality:

- Framework Decision of the European Union 15 march 2001:
Mediation can be of influence

- Direct consequence: access to mediation is a matter of equal treatment

- You can't give this possibility in one case and refuse it in an other.

3. The right-approach and the principle of free participation : a tension .

- Free participation is fundamental in mediation

- Broad access might create pressure:

- The right of one party does not engage (or oblige) the other party.

- Res.:

Not a right to have mediation, BUT:

Only a right to ask for it and to propose it to the other party

Conclusion: There is a lot in favour of a rights-approach ,

BUT: Not that much the right to benefit from mediation

Rather the right to invite the other party and to engage in mediation

With the insurance that this effort will be respected by the CJS

can be a way to be taken into account by the CJS

B. REFLEXIONS BASED UPON MEDIATION PRACTICE

1. Mediation: a recognisable and a “neutral” answer to concrete personal needs.

Is there a need for mediation

Cfr. Our own test:

In 70 % of all cases that were going to court, at least one party asked for an intervention of the mediator.

Amongst them as many victims as offenders.

2. Mediation applicable in all sorts of crime ?

Same test:

The questions for mediation reflect almost perfectly the nature of delinquency in the region.

Own experience:

Mediation can be an answer in cases of robbery, but also in cases of murder.

No reason to limit there.

BUT:

Mediation meets its limits in cases with structural imbalance of power (Incest, “stalking”...)

The more serious the emotional impact of the crime, the more process-oriented mediation is.
The less serious the emotional impact, the more “technical” and “result-driven” mediation will be.

The judicial qualification of the crime is a very poor indicator of the nature of the mediation process to be expected.

Even the content of the judicial file is a poor indicator for the underlying needs.

Res.:

We don't see any reason to restrict the nature of the cases for mediation.

The parties themselves can select their cases.

BUT:

Ethical code and methodological modifications in working with some specific cases

3. Mediation applicable in every stage of the criminal procedure ?

Practice shows questions for mediation in every stage.

The choice to make:

The sooner you enter mediation, the more and the broader “external effect” mediation can have. F.i.:

The estimation of the damage

The estimation of the “guilt” .

The nature of the punishment to be imposed (as an completely unbinding suggestion to the judge)

The later you start mediation, the more “security”

F.i.:

after conviction no discussion on guilt any more.

Imprisonment can be a useful ‘time-out’ (working-distance between parties)

Again: Parties themselves should make this decision.

BUT:

Negative interference with the judicial investigation is sometimes possible.

Vb; Offender denies any responsibility: can we mediate ???

Vb.: The interest of the investigations require a period of absence of contact amongst parties.

SUGGESTION OF A SOMEWHAT RESTRICTED “RIGHT”:

Access to mediation should be the rule: let parties make their own decision

Judiciary should have the possibility *not to suspend* but to *postpone* the access to mediation.

4. Mediation and the opportunism of the offender:

Shouldn't we protect the victim ?

Opportunism is always part of the motivation of victim and offender.

Opportunism is not in contradiction with authenticity and often is a better entrance than remorse.

The invitation to mediation gives at least the opportunity to refuse (empowerment)

To refusal by external instancies to a victim (or an offender) to give permission for mediation can be very victimising: In term of Christie: the conflict is “stolen” again.

BUT:

We're aware of ethical limits.

5. To resume: Also practice gives al lot of arguments in favour of a ‘rights-approach’.

C. REFLEXION ON RECENT LEGISLATION OF MEDIATION IN BELGIUM

Cfr.. Law of May 15e 2006 on juvenile justice

Cfr. Law of June 22e 2005 on mediation for adults.

1. Radical approach

- Adults:

Mediation possible in every stage of the CJ-procedure

Mediation possible in the context of every crime.

Initiative to mediation lies in the hands of victim and offender , independently from the judicial authorities .

Judicial authorities have the responsibility to

+ inform parties on the offer of mediation

+ to respect the confidentiality of the process

+ to respect the outcome by taking notice or actively taking into account.

- Youngsters:

At the level of prosecution: Mediation = explicitly the first option .

Not-referring to mediation has to be explicitly motivated.

At the level of the judge: referral to mediation still is possible and explicitly recommended .

2. Challenges for the near future:

How to implement these laws in a credible way ?

Information of the public on the mediation -offer is crucial

The price of the rights-approach: Is mediation sufficiently **available ?**

Management of the mediation-service : difficult **balance between efficiency and quality**

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DISCUSSION:

Thinking of the implementation of mediation in your country,
taking into account

the Criminal Justice culture
the existing experience with mediation
the perception of the public and the policy-makers
your own opinion

How defensible are the following statements ?
(-3 = “out of the question”, + 3 = “absolutely defensible”)

1. Participation in mediation should be considered a right in cases of all sorts of crime.

-3 -2 -1 0 1 2 3

2. Participation in mediation should be considered a right in all stages of criminal procedure.

-3 -2 -1 0 1 2 3

3. Participation in mediation should be considered a right for every offender.

-3 -2 -1 0 1 2 3