

**Eötvös Loránd University of Sciences
Faculty of Law Doctoral School**

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The conflicts of postmodern society and the restorative justice.
The practice of criminal mediation in Hungary

**PhD Dissertation
THESES**

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I. The aim and objective of the dissertation, summary of the research activity

Due to the introduction of criminal law mediation, the legal institution, which is based on the theory of restorative justice, appeared first in the Hungarian public law, specifically in criminal process.

Besides the novelty, the legal institution attracted my attention because, mediation enables the defendants' social reintegration in a way that it pays significant attention to the aspect of the victim, and to the understanding of the offense. Considering its means, it is suitable to reveal the cause of the crime committed, as well as for ending the conflict. The significance of the restorative method lays in the fact that it emphasizes the active participation and the responsibility of the defendants but also the pain of the victims and the unnecessary stigmatization.

In my opinion, it is the duty of criminal proceeding to reveal the defendants' way to committing a crime and also to mobilize the persons and institutions, who were inefficiently involved in a particular case or problem, in order to prevent further crime commissions. I find it important, that during the early phase of a criminal process, the damage of the injured has to be revealed, the injured party has to be properly informed and provided with opportunity to have compensation for the damage suffered. „ With the development of science, crime science and criminology, it can be seen that the current justice system is unfair in many aspects, since most of the times, it is not connected to the victims' damages. Not to mention the fact, that nowadays it is a widely- accepted principle by most of the professionals that the justice system can only be fair if it does justice for the victims as well.”¹ Although, achieving

¹ Vigh József: A kárhelyreállító (restoratív) igazságszolgáltatás. In: Magyar Jog, 1998/6. 328.

the above mentioned goals cannot lead to the point where criminal law becomes private law. The official authority has to stand up against the crime if the public interest, the social order, and the protection of person and property requires.

I spent the first four years of my professional practice in a region where most of the cases that belong to the local court's jurisdiction, were conflicts of traditional crime (such as crime against person, property and public peace). In addition to the urban crime, I faced crime that had been committed in smaller village communities. The accused persons of crimes committed by adults and juvenile offenders, belong most of the times to socially excluded groups. It occurred, that a defendant stood in front of the court and failed to understand the reason for criminal process. They thought that due to the reconciliation with the injured party, the criminal process became unnecessary. Although they cannot order their cases. All these lead us to the questions, to which I am trying give answers in my dissertation.

The aim of this dissertation is to introduce the practical experience of the Hungarian criminal law mediation. In my thesis I carried out the quantitative as well as the qualitative analysis of the mediation. On the one hand, I looked for the answer to the question about the position of criminal law mediation within the field of criminal justice. I also wanted to know about its role in the penalty system and how it contributes to the social reintegration of the defendants and victims. The question in other words is, whether criminal law mediation is suitable to solve the conflicts that occur at the dividing line of the social structure and whether it is able to counterbalance the social changes caused by globalisation. In other words, the question is, how the particularity of the postmodern society appears in the practice of mediation.

The thesis presents what rate of the Hungarian criminal law is affected by criminal law mediation.

That is why I analysed the practice of applying penalties, which entered into force after the democratic change, in the case of adult and juvenile offenders. Further investigations were carried out about the Hungarian antecedents of the restorative law. The thesis also answers to the question about the effectiveness of the basic principles which were elaborated by the theoreticians of mediation and constituted in the documents of international organisations. The thesis provides further answer to the question that what level does the Hungarian criminal law reach restoration.² Therefore, the thesis analyses the features of such cases, which were referred to mediation and includes why the above mentioned practice emerged. The thesis compares the Hungarian practice with the known mediation practice of the members of the European Union.

II. Research methodology: completed investigations and methods of processing

“We can truly understand the problems of justice, realise its direction of development and implement the reforms if we have a clear overview about the present and past of the investigated phenomenon on the international and Hungarian scale as well.”³

The second chapter of the thesis provides an overview of social consequences of the welfare state’s crises and globalisation, with the help of the historical method. Based on the principle of the historical

² Daniel W. Van Ness: The shape of things to come: a framework for thinking about a restorative justice system. In: Restorative justice. Szerk: Elmar G. M. Weitekamp – Hans-Jürgen Kerner. Willan Publishing, 2002. 1-17.

³ Víggh József: i.m.328.

method, the following issues were introduced: the change in poenology, the treatment's crises symptoms, community sanctions and how criminal populism affects crime itself.

The third chapter presents how the philosophy of restorative justice emerged from a historical viewpoint. Besides, it also shows its background and the theoretical space which the restorative justice serves. The third chapter clarifies the correlation of the restorative justice to the criminal justice with the document-analysis and on the basis of the conceptual framework. After that, it sets forth Van Ness's model about the restorative values. The historical and the document analysis method helped to overview restorative methods and criticism, then I wrote down the special prevention effects of restorative justice on the basis of desk research of summaries.

The fourth chapter presents the international organisations' (UN, Council of Europe, European Union) professional guidelines related to mediation, then presents the mediation practice of the members of the EU. Essentially, the analysis elaborates the results of organized researches by the European Forum for Restorative Justice. The diversity of the use of terms and the fact that there is no statistic about European mediation, made the comparison difficult. The latest comprehensive research was carried out by the European Forum for Restorative Justice about the juveniles therefore, the thesis elaborates on that topic within the international practice.

The fifth chapter reveals the social transitions and the Hungarian peculiarities of the modernization with the help of the historical method. By analysing documents, the levels of social integration and dividing lines of social integration were presented. In case of revealing the features of crime and defendants and also in the case of presenting the practice of penalties, I relied on the statistics published by the Supreme Prosecutor. In addition, I also analysed and evoked studies related to violent crime, crime against property and traffic crime. On the basis of

desk researches, I wrote down the results of domestic researches about the attitudes of penalties and legal interpretation. I presented the development of Hungarian criminal politics with the method of dogmatic analysis.

In the sixth chapter, I took down the Hungarian traditions of restorative justice by using document-analysis, then I show by using the dogmatic method why the penalty of community work cannot be seen as a restorative method. The application of mediation had also been presented by using the dogmatic method. The statistical data related to the application of mediation are based on series required by the Ministry of Justice.

The first phase of qualitative research of mediation consist of the empirical analysis of the judicial practice between 2007 and 2010 in order to get familiar with the initial application of this legal institution. The Justice Institute of Szabolcs Szatmár Bereg county provided me with a list of mediation cases. Dr. Kovács András, the General Prosecutor of Szabolcs-Szatmár-Bereg county, Ig.431/2010/1., Dr. Gyulai Gábor, the president of the Court in Szabolcs-Szatmár-Bereg county, 2010.El. V.I.140/3., Dr. Sándorfí György, the Director General of the Justice Institute, gave me permission under the number Ig.14. E/85-2/2010 to carry out my research.

I studied and analysed the contents of mediation procedures that were ordered in the area of Szabolcs-Szatmár-Bereg county between January 1 2007 and December 31 2010. The choice based upon the list (sampling frame) that was provided by Justice Institute. It included the annual number of accused persons who are related to mediation cases in a chronological order (depended upon when the case came in the institute). During my research the sampling at the prosecution of the county capital can be characterized by probability systematic sampling. Besides this, the researches that were carried out at other prosecutions outside the county capital, can be seen as fully representative, since I

had studied most of the cases and the same is valid for those mediation cases that were ordered by the courts. In the case of questionnaire investigation, I coded and ranked the observed units on the basis of the questionnaire itself. During the analysis of the questionnaire, I focused on their manifest and the pronounced contents. In some cases, I took the latent contents also into consideration during the coding process. The result of the coding is numeric.⁴

I took the view, that during the analysis the practice executed by the Prosecution and the Court, need to be presented separately, in their own way. The reason for this is that on the scale of the crime indicators in the county, the number of cases that had been referred to mediation, is relatively low if we separate the different types of crimes. When it comes to traffic crime, it was only the city of Nyíregyháza that dealt with this type of crime, therefore only this data would contribute to the practice of such cases in the county. It leads to the conclusion that because of the previously mentioned facts, the cases of traffic crime cannot be compared with the practice of Prosecution outside the county capital.

In the case of analysing the judicial practice, I preferred to use the unified analysis because of the low number of cases. The change and development of practices can be presented only in the cases of traffic crimes and crimes against property. The fact in itself is representative that there are some courts that in the above given time period did not order mediation at all. In my view, when it comes to groups with low case numbers (such as the mediation ordered by the court due to the

⁴ Earl Babbie: A társadalomtudományi kutatás gyakorlata. Balassi Kiadó, Budapest, 2008. 744.

crime against persons) cannot be properly described with the above-mentioned methods, but they can be processed as a case study.

In order to complete the empirical research, I got more information about the later mediation practice relying on interviews made with mediators in September 2017. The permission was given by dr Szeiberling Tamás, who is the Deputy State Secretary (Ministry of Justice). The target group of the questionnaire, are mediators with at least 5-year experience, who filled out the questionnaire voluntarily. 12 mediators filled out the questionnaire, which was followed by an interview. Eight mediators have worked as mediators for more than 10 years, and four of these mediators has worked for more than 2 years. The questionnaire looked for the answer to the question of how the basic principles and values of mediation apply. The content of the questionnaire took into consideration the conclusions of the first empirical research.

Because of the exclusiveness of mediation, I could only make conclusions about what happens at mediation meetings, based on the data related to concluded agreements and mediation itself. There is no protocol written during the mediation meetings, therefore there is no other way to reconstruct what had been said. A few times I had the opportunity to take part in mediation meetings, at such occasions I noticed that the basic principles of mediation were implemented.

It made the process of research difficult that there is no comprehensive and representative research about violent crimes and crime against property, which would show the tipology of violent crime and crime against property. Because of this in July 2017, I made a claim to the National Institute of Criminology to provide me with statistical data that show us what kind of sociodemographic features could describe the defendants and injured persons of crime against persons, crime against property and traffic crime, if the penalty for such crime can be a 3-5-year imprisonment. Although, the National Institute of Criminology

could not provide such information because it would have meant a research for the institute as well. In the light of these considerations, the thesis could not compare the sociodemographic features of defendants related to mediation with the sociodemographic features of typical defendants of the other crime types. Furthermore, the analysis could not be carried out in the cases of the injured persons either. Conclusions could be drawn only on the basis of results of earlier researches about the amount of defendants who had the opportunity to require mediation. To be more exact, it could be concluded whether the members of the excluded social groups participate in mediational processes or not.

The conceptual framework of the research and the thesis structure

The current thesis structure and its reasoning was defined by the means of restorative justice which is seen as the solution for the conflicts of the postmodern society. That is why the paper places strong emphasis on introducing the public sphere, which is the main field of mediation. The second chapter of the treatise shows the social changes of the crises of welfare states in the United States and in Western Europe. The reason of this is that these social changes led to the development of the new theories of penalties, and the development of restorative justice. The thesis also mentions the social consequences of modernization after the regime change in Hungary and the changes in criminal policy. The reason for this is that some parallel can be observed between the phenomena in the western and the Eastern European societies.

The thesis indicates the change in penalty related theories, the crises symptoms of treatment and the new directions of penalty philosophy in the second half of the 20th century. I also analysed the peculiarities of criminal policy and poenology, the phenomenon of criminal populism

and its consequences. The second chapter is about the philosophy of community penalties, its place within the criminal policies of international organizations and its practical application.

The third chapter shows the philosophy of restorative justice, the theories about penalties that affected its origin and the branches and movements of criminology. The theory of restorative justice, its connection to the retributive justice and the basic principles and values of restorative justice had been carefully analysed in a detailed way. The paper sets out Van Ness's model about the restorative values and how these values can appear in case of penalties. As the method of restorative justice the thesis presents the mediation, the conference method and the circle model. The thesis also shows how these methods affected crime prevention. The chapter ends with the professional criticism about restorative justice. The paper primarily focuses on the works of the representative of the European restorative justice and therefore does not include the restorative practice of different countries outside Europe.

The fourth chapter introduces the European institutionalization of mediation. Restorative justice occupies an important place in the criminal policy of the Council of Europe, United Nations and European Union, since the application of restorative justice has been required by these international organisations. The thesis outlines the models of the application of restorative justice in the European member states on the basis of the Summaries of European Forum for Restorative Justice. If we take a look at the summaries, it can be seen, in what specific cases, in which phase of penalty, how often, and within which institutional framework has mediation been applied.

The main objective of this paper is the presentation of the practice and legislation of criminal mediation in Hungary (Chapter V and VI.), until it became part of mediation involved in civil cases and in other cases in Hungary. Besides this, it also presents other restorative practices (such

as peacemaking circle, sentencing circle, prison mediation, group conference, and intercultural mediation) that are used in cases of penalty and misdemeanour.

III. The Summary of scientific results and their utilization

1. The incidence of mediation

The crime mediation is a successful legal institution in Hungary. It is proven by the fact that since its introduction, mediation has been ordered in more and more cases, year by year. In the year 2007 mediation has been ordered in 2451 cases. In 2011 a sharp increase can be observed, then in 2016 there were 4625 cases which ordered mediation. Since January 1st 2014 mediation can be used in cases of misdemeanour as well. The number of misdemeanour has been increased year by year, in 2014 a mediator acted in 1798 cases, and in 2428 cases in the year 2016. Within the framework of mediation, the amount of financial reparation has been increased. In 2014 it approached half a billion Forints. According to mediators' experience in most cases of mediation, it reaches its aims and implements the principles.

Mediation did not bring the breakthrough when it comes to the number of charges. In most of the cases it is the court that imposes the penalty. This way the adult and juvenile offenders cannot avoid the trial and it has a stigmatization effect on the accused persons. Regarding the cases of trials followed by diversion, it can be observed that in more than three quarters of the cases, which is related to accused persons being charged, the court imposed the penalty at the trial. It means that in the

judicial phase diversion had been rarely applied.⁵

Mediation has an inconsiderable role when it comes to the application of penalties. It means that it can be much more widespread than it is in the current incidence. It would be ideal, that in cases on juvenile offenders the cases did not close primarily with probation decisions, but with application of the restorative methods. Namely, there is no need for a compulsory patron in case of probation juvenile offenders, if their constant monitoring is unnecessary. Therefore, in my opinion it would be the more frequent application of mediation that made it specific to the offenders. In addition, mediation would make it possible to differentiate among cases of adult offenders as well.

Mediation plays a crucial role in the cases related to juvenile accused persons. Since the introduction of mediation, the statistical data clearly show that there is no greater frequency in applying mediation in cases of juvenile than in cases of adults. When it comes to the cases on juvenile accused persons, the scarcity of forms of possible reparation and the parallelism of case specific diversions created the practice that in case of juveniles, the incidence of mediation is similar to the incidence of mediation in cases of adults. One quarter of mediators think that the lack of differentiation when imposing a penalty, is problematic.

The criminal mediation did not reduce the number of persons sentenced to imprisonment. It had been applied in such cases where without mediation, the accused person would have been sentenced with, either probation, financial penalty or community service. Exceptionally, the cases of suspended imprisonment managed to apply mediation

⁵ The main data about prosecutor activities in front of the criminal court.II. The activities in 2016 8-10 <http://ugyeszseg.hu/kozerdeku-adatok/statisztikai-adatok/buntetobirosag-elotti-ugyeszi-tevekenyseg/>
Download:June 10 2018.

successfully.⁶

In the penalty system it is common to impose imprisonment. In 2016, 63.542 out of 77.109 adult offenders were sentenced.⁷ The highest rate of penalty was imprisonment, which was imposed in more than one third of the cases.⁸ Financial penalty was the second most common penalty, which was followed by driving disqualification, community service and probation.⁹

Confinement as a new way of penalty has not been so wide-spread, yet.¹⁰ Other ways of penalty such as admonition, reparational work and prohibition to exercise professional activity, have been imposed in less than 1 percent of the cases.¹¹ Alternative penalties have been imposed significantly often in cases of juvenile accused persons as opposed to the cases of adult accused persons. Nearly half of the cases on juvenile offenders closed with probation.¹²

One can see from the beginning that when it comes to applying mediation, that judicial order plays complementary role as opposed to the prosecutor's order. Most of the judicial order took place in the year when mediation was introduced. In that time the courts ordered

⁶ The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 54.

⁷ The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 54.

⁸ The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 57.

⁹ The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 59.

¹⁰ The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 56.

¹¹ The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 56.

¹² The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 56.

mediation in 922 cases. As the number of prosecutors' order started growing, the number of judicial orders started decreasing. Therefore, the main judicial forum considered mediation and the jurisdiction as a complementary process. I agree with the idea that mediation has to be applied primarily in the early phase of the process, since in the case of the various forms of diversion the criminal policies of international organisations require to do so. Not to mention the fact, that stigmatisation can be avoided by acting according to this requirement. This means that, especially in the system of criminal justice of juveniles, many cases should be closed in their prosecutor phases, hence in regard of the more frequent application of mediation, the application should be considered in the prosecutor practice. Despite this, I find the idea useful, to keep the jurisdiction that makes the mediation available, because besides the wide jurisdiction of prosecutor, it would mean assurance for the victims and defendants as well. An interesting fact in the prosecutor statistic, that the rate of declining mediation requests is just as high as the order for mediation.¹³ The statistic cannot show the reason of denials of the requests, therefore it cannot be concluded whether the lack of objective condition (acknowledgement, repeat offender) of the law or strictly the prosecutor's (subjective) decision led to the denial.

According to the results of my research, the common factor of the cases that were ordered for mediation, is the active participation of the power of attorney who proposed for the mediation. It clearly shows that the judges and the public defenders were not interested in ordering mediation for more and more cases. Although a request of either the victim or the defendant is asked to that.

In my paper I analysed how the practice of judges and prosecutors

¹³ The main data about prosecutor activities in front of the criminal court. I. The activities in 2016 54.

interpreted the definition of mediation. In my point of view, the aim of introducing criminal mediation was to put all three basic values and the principles of mediation into practice. Among the three elements the most emphasized one is the proceeding-centered approach, because mediation is strictly regulated and carried out by specially educated mediators. In the Hungarian practice the result is important as well, since it is not the participation at mediation but the fulfilment of reparation is what creates consequences regulated by the law. In the Hungarian legislation the transformative elements do not occur. There would not have been any opportunity to regulate this element, since mediation is taking shape in its process, so does the aspect of the defendant and the victim, whose change must not be ordered. The definition of mediation itself carries the possibility of change as its aim, since mediation is a process of solution for conflicts.

According to the results of my research the practice of the prosecutors and judges in case of criminal mediation accepted the reparative, namely the result-centered approach. In the prosecutors' practice, reparation is interpreted as a legal term, because the theoretical background of restorative justice does not appear in our legal interpretation. The aim of the legislature independent of the above mentioned factors but can be reached by activity of mediators if the participants of the conflict are open to an actual meeting, to solve the conflict, to express the anger, the pain, the regret and to conciliate. During the process of mediation, it is important to clarify the reasons and consequences of the crime and that the reparation reflects to these reasons.

The above mentioned result-centered interpretation is coherent to the explanation of why mediation has not become more widespread. One of the reason might be that both the prosecutor and the judicial practice, at a theoretical level, narrowed down the cases that can be required for mediation. It is proved by the interpretation in the Memento and the

Criminal Judges Opinion number three, which is set in common structure which ruled out mediation consistently in the cases of private motion and other crimes. The above presented documents do not show the theoretical background of restorative philosophy. Within the Hungarian prosecutors' and judicial practice when it comes to ordering mediation in criminal cases, choosing the case and considering the result of mediation, the institutionalization of mediation does not reflect entirely the fulfilment of philosophy of restorative justice. The prosecutor and judicial practice did not provide priority to solving the conflict, not even in case of the reparation of the injured.

It is proven by the researches about the attitudes of prosecutors and judges. According to these researches the prosecutors and the judges do not consider the representation of the injured person's damage as their duty. In practice the problem-solving approach did not appear, which was meant to affect on the reasons of the conflicts. In certain cases, mediation had the function of the withdrawal of allegation and was one of the diversional instrument that was applied in case of equal right preconditions. The prosecutor's decision about applying the penalty can differ in many cases from the judicial one. That is why the punitive aspect of prosecutor must had a negative effect on applying mediation. The interest of the institutes and the rapid closing of cases also made it difficult to apply the time consuming mediation. The legal interpretation, which gave no opportunity for the reparation to the defendants who have no income, without looking the circumstances, made a negative effect on the participation of marginalised social groups. It also created a discriminatory effect both on the defendants and victims.

The lack of information also contributed to the difficulty of applying mediation. People, especially the injured persons were rarely provided with proper information after the year of introducing this legal institution. The reduced forms of reparation also created a difficulty to

make the problem-solving process successful, e.g.: the injured person insists on damage which the accused person cannot fulfill or in case of juvenile with no income. In case of crime against property the problem is that when it comes to injured persons, they refuse mediation consequently despite the fact that in their shops there were multiple thefts.

Regarding to the practice of European countries, it can be observed that in the European practice the restorative method does not hold a central position when it comes to penalty, yet it still plays a more significant role than in the Hungarian practice.¹⁴ Exceptions are England and Wales, where in case of first-time juvenile offender, the legislative provides priority for restorative measures as opposed to other criminal measures and penalties.¹⁵ Besides the anglo-saxon practice, the German practice is another positive example, where 70 percent of such cases close by diversion. As a result of this, about 41 percent of juvenile offenders do community work of restorative character. In 2000 in Germany about 20-30 000 mediation took place, in two-third of these occasions accused juveniles could participate.

Regarding the main-objective of mediation, we can state that in line with the European practice, mediation is being ordered most of the time in relation to crime against property. When it comes to misdemeanour,

¹⁴ Frider Dündel- Andrea Parosanu: Germany. In: European research on restorative juvenile justice. Research and selection of the most effective juvenile restorative justice practices in in Europe: snapshots from 28 EU member states. Szerk.: Adelaide Vanhove – Giulia Melotti. Brüsszel, 2015.75-80.

¹⁵ Jonathan Doak: England. In: European research on restorative juvenile justice. Research and selection of the most effective juvenile restorative justice practices in Europe: snapshots from 28 EU member states. Szerk.: Adelaide Vanhove – Giulia Melotti. Brüsszel, 2015. 53-60., 119-125.

mediation is ordered most of the time in case of misdemeanour against property. Although mediation is not applied in case of illegal prostitution and vandalism, which are also common and in most cases the defendants are juvenile. In the European case-law it is also the crime against property and crime against physical safety where mediation was applied. According to the results of my researches there is no consistent practice in the first four years in case of crime against property (theft, fraud, copyright infringement, arbitrary possession of a vehicle). Mediation was also required in case of higher damage, the agreements and financial reparations were not fulfilled in many cases. The defendants usually have no income, or are unskilled unemployed people with clean criminal record.

The judges and prosecutors preferred to order mediation from the beginning in cases of traffic, one-third of the cases belonged to this category on average. Nowadays crime against traffic build a huge proportion of mediational cases. According to my researches, the most common case is related to unintentional road traffic accidents where mediation was ordered. The judges and prosecutors ordered it only in exceptional cases if there were advantageous personal circumstances related to the defendant. In spite of the fact that drink-driving is the most common crime against traffic, the prosecutor practice excludes it consistently from mediation.

In case of violent crimes against persons, mediation is rarely ordered. On average, less than 20% of mediational cases was crime against person. Based on the results of my research in the first four years of criminal mediation, when it comes to violent crime it is the conflict between the acquaintances, especially the family members, that is solved by this instrument of mediation. The common attribute of cases that involved mediation, is the small harms, the low seriousness of the actions and the preliminary forgiveness of the injured person.

In my research in the cases of accused juveniles, it was a significant

experience that the financial reparation was fulfilled by the parents instead of the child. Also it had a huge importance of who was the defendant because the defendant could propose such form of reparation that could not penalize the parents. The crime types which involved mediation does not reflect the structure of crime because in case traffic crime, mediation has been ordered in great proportions whereas in cases of crime against property and person, mediation has been ordered in much lower numbers.

As a result of mediation in most cases the parties concluded an agreement and even more of the concluded agreement become fulfilled. The amount of financial reparation increased year by year, in 2014 it was almost half a billion Forints (496.818.946 Ft). The Ministry of Justice during the annual data collection does not collect information about the ways of reparation provided by the accused persons. According to the data from 2007 about 10 percent of the accused persons accepted non-financial reparation. In mediational cases the defendants undertook that they do not consume alcohol or they would consume less alcohol in the future. Based on the feedbacks of the injured persons, the defendants abided by the rules. In a few cases, the accused person made an apology as a way of reparation, for the injures caused by the crime. The dominating way of reparation was providing financial reparation along with an apology.

2. Do the basic principles of mediation implement in practice?

Mediation, that can be involved in criminal proceedings, can be characterized by the basic principles and values of restorative justice, but further principles has also occurred. Based on legislation, the basic principles of mediation are the following: the impartiality of the

mediator, volunteering, secrecy, the temporary autonomy of mediation and the reparation.¹⁶

The restorative proceeding assumes that both the defendant and the injured person participate in the mediation voluntarily and conclude the agreement also willingly. The criminal policy of the Council of Europe represent the viewpoint, that it is the duty of the judicial authorities to ensure that the parties are not affected by any influence when the decision is being made about the objective of contribution.¹⁷ The agreement concluded within the rules of mediation has to be maken voluntary as well, however it is important to bear in mind the principle of proportionality, namely the reparation provided by the defendant has to be directly proportional to the responsibility and to the seriousness of the crime committed.¹⁸

The research results show that the parties involved in conflicts take part in mediation on their own will, therefore the parties are under no pressure when they make a decision about the participation in mediation. The withdrawal of declaration is exceptional. Most of the time, the case is like as the withdrawal of contribution, when the parties do not present at the mediation meeting and hence it has to be treated as the withdrawal of declaration, based on the legal provisions. Concluding agreements cannot be considered as an entirely voluntary process in practice. On the one hand, it originates from the legal representative, who is involved in the case, and from the advice of the counsel for the defense. On the other hand, it leads us back to the

¹⁶ Görgényi Ilona: i.m. 155-160.

¹⁷ see above the introduction of the criminal policies of the Council of Europe.

¹⁸ Pelikan, C. – Trenczek, T.: Victim offender mediation and restorative justice. The European landscape. Handbook of Restorative Justice. A Global Pespective. Szerk.: Dennis Sullivan- Larry Thiff. London - New York, Routlege Taylor and Francis Group. 80.

practice of prosecutors and judges according to which the cases are „priced”. Because of this, the injured person as well as the accused had an idea, way before the mediation process, about the amount of money with which the accused can be exempted from the sentence. In practice the mediators do reveal the reason, the consequences of the conflict even when it comes to „priced” cases. They inform the parties of the conflicts that the aim of mediation does not lie in agreeing about the amount of damages. At the same time, it also depends on the parties how open they can be in front of the mediator and how they express their feelings during mediation. The principle of proportionality becomes extremely significant, where the mediator has an important role. According to the mediators’ experience, the presence of the lawyer impedes the success of mediation. The principle of volunteering can be infringed in such cases, where the accused has to choose between the mediation proceeding and being detention and being brought before the court.

Mediators reported that the representatives of multinational companies require 50 000 Forints reparation even in the case of thefts of lower values. (According to the experience of legal practitioners, the multinational companies, who become the injured party of thefts very frequently, participate in mediation in exceptional cases, most of the times they do not agree it.)

The principle of secrecy means that the communication between the accused and the victim is not public. In practice the mediator does not write an official report about the meetings and the discussions, so what happens during a mediation process is not documented. The exact of appointment of mediation is provided by the mediator informally and is reported in the papers. After this, the mediator informs the judicial authority about how often the parties of the particular case met, whether they concluded an agreement and whether it was fulfilled or not. The secrecy of proceeding in itself expresses the autonomy of mediation

within criminal procedure.¹⁹ Based on the reports of mediators the above-mentioned issues occur entirely put in the Hungarian practice.²⁰ The principle of general accessibility means that mediation processes have to be institutionalised at a national level. Compared to the principle of accessibility, at all level of the criminal proceeding means that mediation has to be accessible at most phases of criminal proceedings. In the Hungarian practice mediation is an instrument of diversion, which, in case of its efficiency, the penalty can be alleviated without any limit and can terminate the proceeding. The act number XC in 2017 brought a change of model in the history of Hungarian mediation. Because of this, mediation can be required as well even if it does not have the above-mentioned legal consequences but a successful mediation process can only be evaluated as a mitigating factor.

The code of criminal proceedings narrowed down the jurisdiction of mediation in another way, because until 30th June 2018 the rules of criminal proceedings made it possible at the judicial phase at first instance to require mediation at the level of jurisdiction. The new code abolished this possibility, and because of the exclusive prosecutor jurisdiction, the principle of accessibility cannot be put into practice at most levels of criminal proceedings.

Mediation is accessible at a national level because the mediators themselves are accessible in most counties. When it comes to applying mediation, similarly to the practice of imposition of sentence, we found significant regional divergence. In certain parts of the country mediation has been ordered in much less cases than the average.²¹ Examples for this are Zala and Vas counties, where mediation has been

¹⁹ Görgényi Ilona: i.m. 158.

²⁰ See the result of the results of the research with mediators

²¹ Az Igazságügyi Minisztérium Statisztikai adatszolgáltatása a közvetítői eljárásról 2017. szeptember

applied in less than 100 cases in a year. Mediation has been applied very often in those parts of country where the crime occurs frequently such as Budapest (in 2016 in more than one thousand cases), Pest county, Szabolcs-Szatmár-Bereg county and Borsod-Abaúj-Zemplén county.

The access to the law and mediation is limited by the social situation of the parties participate in mediation. To these parties the participation in the mediation processes, the appearance, the travelling and travel expenses mean difficulties. The mediators managed to overcome this problem. If they get prior information from the parties, as a „travelling authority” the mediations were carried out at the local authority of the parties’ place of residence.²² The principle of autonomy of mediation includes conditional autonomy within criminal proceedings, and also includes the autonomous organisational framework. Mediation can be carried out by professional mediators. It needs to be emphasized that in the Hungarian practice, mediators have been trained in advanced education. Similarly to the German practice, mediators were recruited from the former civil servants, who used to be a defense inspector. The advantage of the Hungarian practice is that mediators, who are involved in criminal proceedings, attend only criminal and misdemeanour cases but do not attend civil cases. In Poland the mediators are also involved in family conflicts not just in criminal cases.²³ Not every country in Europe managed to provide special education for mediators, for example in Sweden social workers and non-professionals can also proceed as mediators.²⁴ The domestic organisation of mediation is

²² Az Igazságügyi Minisztérium Statisztikai adatszolgáltatása a közvetítói eljárásról 2017. szeptember

²³ Az Igazságügyi Minisztérium Statisztikai adatszolgáltatása a közvetítói eljárásról 2017. szeptember

²⁴ Maritha Jacobsson - Lottie Wahlin: Az áldozat-elkövető mediáció fejlődése Svédországban. In: A helyreállító igazságszolgáltatás európai jó gyakorlata a büntetőeljárásban. Szerk.: Gyökös Melinda,

under the control and management of the Ministry of Justice and government agencies. When it comes to the organisation, the mediators are separated from the court, the prosecution and from the police. In Hungary there is no opportunity to get mediation run by volunteers.²⁵ Similarly to the Hungarian practice, this services has been provided by state institution in the member states of EU. Sometimes, foundations and projects can provide these programs. The Hungarian organisation needs development because the current human resource is not sufficient to carry out the task of a mediator properly and the supervision of the mediators' job has not been established.

The autonomy of mediation cannot be analysed only on the basis of organisational function but also on the basis of the practice of mediational cases. According to the data of empirical researches, it is less common that mediators represent a different viewpoint from the judges and prosecutors' point of view when it comes to suitability of a case for mediation. The difference in legal interpretation is rather significant about the forms of reparation. Therefore I do not find it reasonable to give the power to the mediator to revise a decision about the suitability of a case for mediation, as they do in the Italian practice.²⁶ How the reparation will be provided within the process of mediation, depends on the purposes of the parties. In many cases in the Hungarian practice, the accused persons undertake financial reparation. The community appears in mediational programmes, namely it is not the state but civil organisations (Foresee research group, Jóvá Tett Hely Voluntary Centre Foundation) which undertake the programmes that are seen as a form of reparation.

Klopfer Judit, Lányi Krisztina. Igazságügyi és Rendészeti Minisztérium, Budapest, 2010. 217.

²⁵ Maritha Jacobsson - Lottie Wahlin: i.m. 217.

²⁶ Maritha Jacobsson - Lottie Wahlin: i.m. 217.

3. Do the basic values of restorative justice implement in practice?

Hereinafter, I introduce on the basis of Van Ness's model how the basic values of restorative justice implement in the Hungarian mediational practice. The four basic principles of restorative justice are networking, reparation, reintegration and inclusion.²⁷

The peculiarity of the meeting of the accused person and the other participants of mediation is, that in practice, a consensus is created and fulfilled. That is why the restorative nature of mediation applies on a higher level.

In the Hungarian practice the apology, which includes mediation as well, is the most common form of reparation. The highest level of reparation, which includes the change in behaviour of the accused, takes place only exceptionally.

In practice during the mediation the accused as well as the injured get respect from the mediators and are provided properly with information about their rights. The primary source of help is also the mediator, although their opportunities are limited. Supporters can take part in mediation meetings but it is uncommon. In the future, it would be important to provide the accused ones with help when it comes to the implementation of reparation. Currently, the respect is what is given during mediation, but only the injured persons are given assistance, the defendants are not. In practice of mediation, the parties participate in the mediation meetings (whether it is direct or indirect). This is where the parties face to the other party's viewpoint, where it is possible to approximate the different point of views and to create a consensus.

In my viewpoint, the restorative values are mainly implemented in the

²⁷ Daniel W. Van Ness: i.m. 1-17.

practice of criminal mediation. The procedures focusing on reparation can provide a more complete form of reparation to the victims than the form of financial reparation. The procedure itself, the communication between the defendant and the injured can help to digest the idea of being a victim and helps to be more familiar with the consequences of the actions. The complete values cannot be found in every cases in practice, because the circumstances of a specific case do not make it possible. The Hungarian mediation practice correspond to the moderately restorative proceeding, which includes the opportunity for the parties to meet, and makes it possible that reparation has a more significant role than just community work and restitution. Furthermore, the parties respect each other during the mediation.

On the basis of my research results due to the lack of the necessary statistic data, I did not manage to completely compare and contrast the sociodemographic data of the defendants who take part in mediation, the educational attainment, the criminal record and the living circumstance of defendants who committed the same crime. However, one can see on the basis of the above-mentioned comparing aspects that the value of inclusion in case of a mediation procedure can be infringed in the practice.

When it comes to the value of inclusion it is important to raise awareness to the fact that social changes, which are caused by globalisation, have a huge effect on the criminal and misdemeanour mediation. It can be observed mainly in the collaboration of communities and the lack of solidarity. The practice of mediation was not influenced by the fact that solving a conflict, is a tradition among the people who live in Roma communities in Hungary. The research did not analyse the ethnicity of the people involved in mediation. Although none of the empirical researches show whether the tradition of romani crisis would have influenced the initiative of a mediation process. Because of this, the tradition did not support the institutionalization of

mediation. In spite of fact that the restorative justice wants to support the social cohesion, its operation due to the lack of solidarity still faces a number of obstacles. The „local social contracts” cannot be concluded if there is no communication between the parties. A huge amount of the crimes are the delicts about minor offences against property, which are typical at the social division line. The multinational companies, as the most frequent injured of crime against property, refuse to participate in the mediation process and that is why the mediation cannot be implemented in most of the cases. Therefore, it is necessary to make the society receptive, to enlighten it, and to make the corporate sector sensitive and interested in it in the future. It can be achieved by an inclusive criminal policy that takes social justice into consideration, which would ensure the participation of the socially excluded group.

In my opinion the criminal mediation is a successful legal institution. In its 10 year-old practice the basic principle of mediation and restorative justice are mainly implemented. Mediators experience that mediation can fulfill its function, the parties communicate with each other and the defendants take the responsibility for their actions. The prior mentioned analysis is not enough for presenting the practice because the experience could be described through stories, to which the participants of the conflicts, the recipients of the reparation, the local communities and the mediators obtained.

I consider, that criminal mediation managed to contribute to take the victims’ aspect into consideration and to the reconciliation between the parties of the conflicts. In most of the cases, communication and solving the conflict was much more emphasized than the reparation itself, and these two components had a crucial role in protecting the parties’ human dignity and to ensure their social membership.

4. The future of mediation in Hungary

Accepting the act number XC in 2017 about criminal procedures created a change in the model. Mediation can not only be implemented if the regulations about active regret can be implemented, regards to the accused person, but in any other criminal proceedings if the conditions of procedures subsist. The new code opened the subject matter of mediation but putting the prosecutor practice into highlight, it excludes the cases of private motion from the mediation procedures. Widening the jurisdiction of applying mediation seems to be a positive tendency. Because of the change of law, mediation will be applied in more and more cases. If we consider that the judicial practice considered the damages and the reparation as a mitigating factor way before the change of this law, we cannot expect that in the case of more serious penalties than a 5 year –long imprisonment, mediation process would be initiated in huge numbers. The damages can be carried out regardless to this, and in these cases, the accused person is less interested in solving the conflict because the procedure cannot be terminated even if the mediation is successful.

The change in the code of criminal process, according to which mediation can be carried out only before charge, can be seen as a withdrawal. Excluding the judicial order will lead to the domination of the prosecutor order, which is different from the judicial decision in many cases when it comes to imposing penalties. As opposed to punitive aspect of the prosecutor order, the judicial order is more reasonable and apply mild penalties. The prosecutor interpretation of law currently cannot interpret the restorative philosophy properly, that is why the basic principles may be infringed in practice. Most of the European countries apply the diversion model of criminal mediation and is usually ordered in the procedure phase before the charge. Although it can also be ordered in the phase of the judicial trial in cases

of the juveniles. I find the Polish example an effective practice, which is worth to follow, where there is an opportunity for mediation until a definitive court ruling, so the mediation can be ordered at first instance and on appeal as well.

Mediation needs to be applied in the cases of private prosecutions as an alternative of peacemaking.²⁸ Comparing to the previous regulations, the most significant change in the new code is that the consensus created among the injured and the accused persons can be repealed by the prosecutor. The right to repeal the created consensus allows the volunteering of the accused and injured parties in the consensus. Therefore, the mediation partly loses its aim and role. Due to the previously mentioned factors, the procedure can lose its victim-centered approach.

Initiating the right for invalidation of the prosecutors is unnecessary, because the mediator at the mediation meetings warn the parties that the agreement has to be rational and has to comply with morality (the injured cannot take advantage of his or her situation). The prosecutor invalidation right makes the successfulness of mediation dependent upon the approval of an external party that is why the conditional (temporary) autonomy of mediation cannot implement. In this regard, the agreement during a mediation process may fall to the level of a civil court settlement.

²⁸ Wojciech Juszkiewicz: A jóvátétel enyhítő körülményként való figyelembevétele a büntetés kiszabásakor – mediáció Lengyelországban. In: A helyreállító igazságszolgáltatás európai jó gyakorlata a büntetőeljárásban. Igazságügyi és Rendészeti Minisztérium, Budapest, 2010. Szerk.: Gyökös Melinda, Klopfer Judit, Lányi Krisztina.120.

5. Suggestions

In my opinion the parties of the conflicts need to be provided with information in a much more effective way in the future. Already at the beginning of the procedure, at the time of the first interrogation, the information about the mediation process must be provided. It is significant, that provided information should not be misleading, so that the investigating officials, the prosecutor and the counsel for the defense cannot „price the case”.

It is necessary that in the future to explain the aim and operational mechanism of mediation at the trainings. The enlightening campaign can be an instrument to inform the population.

It is important to make the members of the private sector and the multinational companies interested in participating in mediation if they become the injured in large numbers when it come to crime against property. It would be ideal if in case of shoplifting mediation were more often applied.

Regarding the European practice, it would be important to apply mediation more often in case of criminal cases of juveniles, because the specific prevention is a particularly important aim when it comes to juvenile accused persons. Because of the specify, at the time of creating a study on the circumstances, the necessary measure which serves the juveniles' interest, the opportunity for mediation and the possible standards of conduct should be drawn up. When it comes to the application of mediation, priority should be provided for the restorative process. Implicating the French example it would be practical in the cases of juveniles because the probation officer and the mediation office can both initiate mediation. The reason for this is, that the probation officer during the time of expressing his/her opinion and creating a study on the circumstances, the probation officer receives information on the basis of which he/she can make a proposal for a penalty that

facilitates the special prevention.²⁹

It is necessary to make it transparent why the proposal for the mediation process is rejected in large numbers in the phase prior the charge. I think that the appropriate remedy in this case would be a judicial remedy. With the lack of this, in the future, it would be practical to make the order of mediation possible in the judicial phase of the criminal procedure. According to the previous practice, that was the case regarding to more than 100 cases in a year alone. The exclusive right of order cannot be maintained because most of the times, it is different from the judicial practice when it comes to imposing the penalty.³⁰

In my opinion there is a need for instruments that would make it possible to fulfill the agreement that was concluded during the mediation process. One of the biggest problems of the Hungarian mediation is the non-financial reparation, its fulfillment becomes difficult. The same problems occur as in the case of carrying out community work. That is why it is important to make the communities inclusive when it comes to carrying out reparation and with that they could appropriately support the civil organisations. The Slovakien and the Spanish examples show that the juveniles conciliate the community by cleaning parks and public domains and also conciliate the civil organization by doing charitable activities for the libraries and hospitals.

The way I see it the injured persons cannot be deprived from the

²⁹ Isabella Mastropasqua: *Fiatalok ügyeiben alkalmazott igazságügyi mediáció Olaszországban: Jelenlegi helyzet és jövőbeni kilátások*. In: *A helyreállító igazságszolgáltatás európai jó gyakorlata a büntetőeljárásban*. Szerk.: Gyökös Melinda, Klopfer Judit, Lányi Krisztina. Igazságügyi és Rendészeti Minisztérium, Budapest, 2010. 158.

³⁰ The main data of prosecutor activities in front of the criminal court. I. Activities in 2016, 31.

damages just because the accused is not able to pay. I find it reasonable to establish a fund for damages which would contribute to the payment for the financial losses of the injured. In Belgium, Flamand region and in Germany a special fund helps the juveniles to be able to provide reparation. Since the defendants take the responsibility personally, it is important that the defendants give the financial reparation to the injured in person. After that, the amount has to be refunded in one of the different ways (by working or repaid). It would contribute to the participation of the defendants in mediation processes and would prevent the mediation from turning into the privilege of people with more fortune.³¹

Similarly to the Italian model, it would be reasonable to create a mixed structure of the mediation services. With this, besides the public institutions, civil organisations can also take part in the implementation of mediation.³² Based on the notices of mediators, there is a need for a supervision and a monitoring system of the mediators. The Finnish and the Czech model could be a good example to follow, according to which, the Ministry is responsible for the supervision cooperating with the local government, public institutions, civil organisations and while a professional organisation is monitoring the mediation itself.

For the sake of the further education of mediators, an umbrella organization which is coordinated by the center would be necessary. It would make recommendations about the methods and would summarise the „good practice”. The common training and education of

³¹ Arthur Hartmann: A helyreállító igazságszolgáltatás jogszabályi háttere Németországban. In: A helyreállító igazságszolgáltatás európai jó gyakorlata a büntetőeljárásban. Szerk.: Gyökös Melinda, Klopfer Judit, Lányi Krisztina. Igazságügyi és Rendészeti Minisztérium, Budapest, 2010. 127.

³² Isabella Mastropasqua: i.m. 156., 159.

mediators is implemented in such countries, where the institutional conditions are provided at state level (such as in Austria, Czech Republic and Norway). Since mediation is a „young” legal institution, there is need for a central coordination and they are not allowed to carry out the professional supervision independently. In many European countries after an appropriate professional coach, volunteers fulfill the task of mediators. The way I see, the participation of volunteers would make fulfilling of the supervision and the training difficult in the Hungarian system. Therefore, it would be logical if the civil servants along with civil organisations, which are under the same professional control, kept fulfilling the task of mediators.

It would facilitate the researches about mediation in the future if the statistic data collection included various data about the content of the consensus, the form of reparation and the period of completion. A followup would be also practical, because that would make it possible to analyse the reintegrational effect of mediation.

V. The List of publications related to the topic of the thesis

A mediáció elmélete és gyakorlata Szabolcs-Szatmár-Bereg megyében.
In: Kriminológiai Közlemények 69.(szerk. Dr. Kadlót Erzsébet).
Budapest, 2011. 342-352.

A dél-afrikai átmenet igazságszolgáltatása. In: Themis – az Eötvös Loránd Tudományegyetem Állam – és Jogtudományi Karának Elektronikus Jogi Folyóirata. Budapest, 2013. 215-234.

Miben különbözik az eredményes mediáció a polgári jogi igény teljesítésétől? In: Jogtudományi Közlöny. 2013/7-8. 383-389.

A szülő és a gondozó felelőssége a gyermek által okozott kárért – néhány évtized bírói gyakorlata. In: Magyar Jog. 2015/7-8. 417-420.

A büntetőjogi mediáció – „az élő jog”. In: *Jogalkotás és jogalkalmazás a XXI. század Európájában (konferenciakötet).* Szerk: Zoványi Nikolett. Budapest, 2014. 268-277.

Mediációs gyakorlat az erőszakos bűncselekmények körében. In: Themis – az Eötvös Loránd Tudományegyetem Állam – és Jogtudományi Karának Elektronikus Jogi Folyóirata. Budapest, 2015. 317-342.

A közlekedési bűncselekmények mediációja. In: Belügyi Szemle 2015/9. 69-91.

A fiatalok büntető igazságszolgáltatása és a resztoratív igazságszolgáltatás. In: Jogi Tanulmányok. Jogtudományi előadások az Eötvös Loránd Tudományegyetem Állam-és Jogtudományi Kar doktori iskoláinak konferenciáján. Szerk: Fazekas Marianna. Budapest, 2016. 390-400.

A resztoratív gyakorlatok szerepe a roma közösségek integrációjában. In: Belvedere Meridionale. 2018/3. 105-119.

A média és a resztoratív igazságszolgáltatás. In: Kriminológiai Közlemények, Budapest, 2018. 153-159.

Figure 1: The distribution of mediation cases ordered by the prosecutor

	Crime											
	crime against person				crime against property				traffic crime ³³			
Prosecution	2007	2008	2009	2010	2007	2008	2009	2010	2007	2008	2009	2010
Prosecution of Nyíregyháza city ³⁴	-	3	7	10	4	15	28	62	1	7	16	24
Prosecution of Kisvárd ³⁵	-	1	-	-	2	1	1	-	-			
Prosecution of Fehérgyarmat	-	5	4	1	4	1	3	4				
Prosecution of Nyírbátor	-	3	2	2	16	6	8	8				
Prosecution of Mátészalka	5	11	4	1	4	6	5	8				
Prosecution of Vásárosnamény	-	1	-	2	1	2	4	16				
Total:	5	24	17	16	31	31	49	98	-			
	62				163				48			

³³ During the investigated period, the prosecutor and the court at the county capital had exclusive jurisdiction about cases related to crime.

³⁴ The case numbers mark all the accused who participated in mediation, in the case of this prosecution the analysis was based on systematic sampling.

³⁵ In the case of further prosecutions the analysis is completely representative.

Figure 2: The distribution of mediation cases ordered by the court

Court	Crime											
	crime against person				crime against property				traffic crime			
	2007	2008	2009	2010	2007	2008	2009	2010	2007	2008	2009	2010
Nyíregyháza	4				9				38			
Kisvárd	-				10				-			
Fehérgyarmat	-				1							
Nyírbátor	-				-							
Mátészalka	-				1							
Vásárosnamény	-				-							
Total:	4				21				38			