Mediation in Criminal Cases. Restorative Justice

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Restorative Justice – a move away from the «zero sum» logic

- From the late 1980s, victims’ rights groups began to advocate that specific legal rules be introduced to give greater weight to victim’s interests, and to provide them with restitution and compensation
- Various European countries established institutions, legal frameworks, and policies aimed at providing redress, justice and restitution to victims at crime
- Emergence of restorative justice
What is restorative justice?

• Some focus on developing a theory of restorative justice, others – attempt to define restorative justice by practices, describing as «restorative» any new initiative that does not follow the typical trajectory of arrest, prosecution, conviction, and punishment

• The absence of universally agreed definition of «restorative justice»

• Values, aims, and processes to repair the harm caused by criminal or other types of anti-social behaviour
What is restorative justice?

- Restortion addresses emotional and material loss, safety, damaged relationships, and the dignity and self-respect of victims and other stakeholders.
- Restorative justice is concerned with ensuring appropriate reparation to victims and their communities.
- Restorative justice is aimed at lessening fear of crime, strengthening the sense of community, and addressing the needs of all of those harmed, including the perpetrators.
Examples of restorative justice

1. Victim – offender mediation

2. Restorative or family group conferences (conferencing)
   - These practices involve a face-to-face meeting between the victim and offender in a safe environment to discuss the incident, the harms it has caused, and how these harms should be repaired
   - Conferences, unlike victim-offender mediation, typically include supporters of the disputants and other concerned community members, and sometimes representatives of the state – police officers, social workers, housing officers, etc.
Examples of restorative justice

- Meetings should be empowering and inclusive, and enable all stakeholders to reveal fully how the incident has affected them, with no-one silenced by domination.

- Restorative justice can also be facilitated through indirect or «shuttle» mediation, where victims and offenders discuss their case individually with a restorative facilitator, who then feeds information back to the other party.
Differences among countries

• Mediation is the primary response to domestic abuse in Austria and Belgium, but in England and Wales only a handful of schemes use restorative processes for abuse in the family.

• Restorative processes and used for sexual violence in some American states (Arizona) and in New Zealand, only a few cases of sexual violence are dealt with by way of restorative meetings.
Developments

• The police use of restorative approaches for minor crimes is likely to increase, because they will benefit financially as well as seeing directly benefits to victims and offenders.

• Using restorative justice instead of issuing a reprimand saves many hours of officer time, and considerable amount of money per case.
Restorative justice: a victim-centric approach

- Research suggests that many victims want a less formal process where their views count, more information about the progress and outcome of their case, to participate in its resolution, and to receive material reparation and emotional restoration, including an apology.
- Victims are more satisfied with a restorative process, where their anger and fear towards their offenders are respected.
- Victims can, and often do, receive explanations, apologies, and occasionally compensation.
Restorative justice: a victim-centric approach

- Small portion of victims feel even worse after restorative process
- The largest portion of victims who meet offenders in the presence of other affected parties are much more likely to feel that they had experienced a fair and inclusive process than victims involved in the «shuttle mediation», whereby trained mediator passes information from one party to another
Restorative justice: a victim-centric approach

- Restorative justice is principally about victims
- Statistics show that offenders who participated in restorative schemes committed significantly fewer offences in the subsequent 2 years than offenders in the control group
Integrating restorative justice and criminal justice

- Early restorative treatises, that saw restorative justice as a «new lens» through which to see crime, were aspirational, even evangelistic, but rather unsophisticated
- In reality restorative justice is – and should be – part of the criminal justice system
- Difficult question about place of restorative justice in the criminal process and relationship to the state, including who should facilitate meetings
Reintegration and remorse

• The process may not neglect victim needs and welfare
• Offenders often fall short of giving victims the emotional reparation, apology
• Where no apology or other signs of remorse is forthcoming, victims naturally come to focus on the limits of strictly material reparation
• Crime creates a vacuum of sorts and where offenders fail to acknowledge responsibility and show remorse, that vacuum is soon filled in by demands of high measures against them
Reintegration and remorse

• An apology is most likely to be forthcoming when victim and offender meet face-to-face, not in the emotionally defensive atmosphere of the courtroom, but in the neutral and safe other premises
Directive 2012/29/EU

Directive 2012/29/EU

• «[...] In all contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.» (Preamble, (9))
Directive 2012/29/EU

- «Information and advice provided by competent authorities, victim support services and restorative justice services should, as far as possible, be given by means of a range of media and in a manner which can be understood by the victim. Such information and advice should be provided in simple and accessible language. [...]» (Preamble, (21))
Directive 2012/29/EU

«Restorative justice services, including for example victim-offender mediation, family group conferencing and sentencing circles, can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. [...] Factors such as the nature and severity of the crime [...] , which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process. Restorative justice processes should, in principle, be confidential, unless agreed otherwise by the parties, or as required by national law due to an overriding public interest. [...]» (Preamble, (21))
Directive 2012/29/EU

- «[...] Member States should ensure such training for police services and court staff. Equally, training should be promoted for lawyers, prosecutors and judges and for practitioners who provide victim support or restorative justice services. This requirement should include training on the specific support services to which victims should be referred or specialist training where their work focuses on victims with specific needs and specific psychological training, as appropriate.» (Preamble, (61))
Directive 2012/29/EU

«[...] Relevant statistical data can include data recorded by the judicial authorities and by law enforcement agencies and, as far as possible, administrative data compiled by healthcare and social welfare services and by public and non-governmental victim support or restorative justice services and other organisations working with victims of crime. Judicial data can include information about reported crime, the number of cases that are investigated and persons prosecuted and sentenced. Service-based administrative data can include, as far as possible, data on how victims are using services provided by government agencies and public and private support organisations, such as the number of referrals by police to victim support services, the number of victims that request, receive or do not receive support or restorative justice.» (Preamble, (64))
Directive 2012/29/EU. Objectives:

• The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.

• Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings.

• The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.
Directive 2012/29/EU. Definition:

- Restorative justice is any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party. (Article 2(1(d)))
Directive 2012/29/EU. Right to safeguards in the context of restorative justice services (Art.12)

1. Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:

(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;
 Directive 2012/29/EU. Right to safeguards in the context of restorative justice services (Art.12)

(b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

(c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.
Needs. Concerns. Expectations

1. Divide into groups of 2 persons.
2. Write your concerns, needs and expectations connected with this summer.
Needs. Concerns. Expectations

• Mediator may not provide to the parties false, empty hopes & expectations
• Mediator must explain before mediation to the parties the process, possibilities, rights
• Mediator must ask to the parties before mediation session about their concerns, needs and expectations
Process

- In criminal case mediation, the process is more important than the result.
- Most popular concerns of victims: repeated attack of the perpetrator (therefore mediator can meet each party of mediation separately and let them out of the room separately. Parties are not to be left alone in the mediation room).
- Mediator does not:
  1. Support any of the parties
  2. Agree with any of the parties
  3. Judge the parties
How to change caused damage in a crime?

1. Satisfaction of all needs of the victim;
2. Aimed to cooperation and integration of the perpetrator in the society;
3. Taking responsibility (different from guilt);
4. All parties are involved – victim, perpetrator, society
5. Respect towards all parties and their decisions. Mutual respect.
Various approaches

1. Judging
2. Reckless
3. Permitting
4. Restorative
Settlement in the criminal proceedings is possible, when:

1. The accused recognizes what he/she has done
2. The victim and the accused agrees to participate in mediation and go for settlement
Secondary victimization

If victim is not efficiently heard:

1. False expectations
2. Dishonour of promises
3. Later control over situation
4. Lack of respect towards victim
Victim’s concerns


2. Attacks from the side of perpetrator. – Do not give hopes about certainty of agreement.

3. To get confused during mediation. Lack of ability to protect himself/herself. – To get a supporter.
Perpetrator’s concerns

1. Public hearing and public humiliation (mediator explains rules and doesn’t allow offences)
2. Fears from public speech (mediator speaks simply)
3. Emotional pressure (a break is possible in mediation)
4. Will the process be effective
5. Wide-spread information about process (confidentiality is observed)
Perpetrator’s parents’ concerns

1. The child will be punished
2. What society will think about their child?
3. Will they be able to cover damages?
4. What will be the future of their child?

Therefore mediator shall:
• create safe environment
• explain the process
• provide information
Concerns of professionals (police, teachers)

1. How it will affect my environment? – Necessity to settle the environment
2. How will affect the future? – Mind the reason
3. The professional will be blamed about bad performance. – Explanation that a breach of offender is reviewed, not the performance of professional.
Gains for the victim in mediation:

1. Directly express to the perpetrator his/her opinion and feelings
2. Receive answers to questions
3. Maintain neutral relations with the perpetrator
4. Faster receives compensation and apologies
Gains for the perpetrator in mediation:

1. Possibility to explain reasons and undertake responsibility
2. Possibility to understand and evaluate amount and consequences of damage
3. Possibility to compensate for the damage in money, in-kind, work
4. Released from criminal liability
5. Minimizes severity of penalty
Gains for the society in mediation:

1. Savings of tax-payers money
2. Possibility for society to change and to improve life level
Bibliography:


Thank you!

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