

VICTIM - OFFENDER MEDIATION IN CUSTODIAL SETTINGS

The purpose of this presentation is to highlight what are the main issues at stake in a mediation process at the stage of the execution of a prison sentence. This analysis stems from three years experiment carried out in several French-speaking Belgian prisons by a non-profit organization named "MEDIANTE".¹ Now, I will just summarise the main conclusions of this experiment in order to assess with you if the problems I'm raising are specific to the Belgian penal system or if they can be found more generally in other similar context.

Briefly some words about **the background of this experiment**

In 1998, the Belgian Federal Ministry of Justice started to finance a "*National Pilot Project*" in order to promote victim-offender mediation programmes alongside the penal procedure, generally **before sentence**. "MEDIANTE" was assigned to implement the project in the French-speaking Belgian judicial districts. This project is called "**Mediation after prosecution**", it is still operating and is about to be regulated by law.

I have to precise that in Belgium, the only existing legal procedure related to victim-offender mediation is regulated by the law on "penal mediation", which in fact is not a specific law on mediation. It provides that the prosecutor can divert less severe criminal cases from prosecution if the offender fulfils one or more conditions (training, therapy...). Reparation to the victims is just one of these conditions.

So the national pilot project "Mediation after prosecution" was a first step to make mediation available in more serious criminal cases at a further stage of the procedure.

In this programme, the major issue at stake in the mediation process is to achieve a compensation agreement that could be taken into account at the trial. However, beyond the obvious interest of such an agreement, the project was based, from the outset, on the following principle:

mediation can be usefully applied in very serious crimes provided that it is proposed to the parties as a dialogue process between them and does not directly aim at a reparation settlement or any forgiveness attitudes. On that basic principle, we considered that mediation might be a relevant offer at all stages of the penal procedure, including **in a prison context**.

Let us come now more specifically to the experiment in prison

In 2001, the opportunity to experiment mediation in the framework of the execution of a prison sentence was given by the Belgian State, when the former Minister of Justice created a new function of "restorative justice counsellor" in each Belgian prison. These "counsellors" were assigned **to promote a detention oriented towards reparation**. The majority of the Belgian French-speaking counsellors considered that the management of the relation between the detainee and the victim should constitute an important aspect of their task. In consequence, they rapidly were interested to settle a partnership with the

¹ This organization was created in 1998 to implement and support victim offender mediation programmes in the French speaking part of the country.

NGO "MEDIANTE" in order to set up a victim-offender mediation program involving detainees.

So far, this programme has dealt with **233** victims and **167** detainees, located within 16 different prisons. These mediation involved serious offences such as murders (38%), armed robberies (28%) attempted murders (8%), sexual assaults (8%). But I do not want to go further with a statistical description of the project. I have some tables available if you are interested in.

Above all I want to discuss with you the **two main conclusions** we drawn from this experiment.

Firstly, both the victim and the detainee involved in serious crimes may **badly feel the need of a personal communication to deal with fundamental questions**. Mediation defined **as a dialogue process** as mentioned above can fulfil this need.

Secondly, such a dialogue between the parties is not always confined to a private exchange without any impact on the penal justice system like ...let's say a *spiritual support* provided by a chaplain...or a mediation offered to detainees sentenced to death. I mean that in most cases mediation **proves to be an important tool for both parties in order to manage the parole release procedure in a more consistent way**.

Let's specify these two main impacts of mediation.

I found particularly relevant to show what happens when mediation is not available to meet those important needs

1) As long as a **personal communication** is concerned.

Mediation offers a safe and useful setting to organize this dialogue.

Some **detainees** may want to express some feelings to the victims or their disposal to answer any important question raised by them.

But so far, without an available mediation process, if a detainee wants to do that, he is often in a delicate situation. On the one hand, his initiative to approach the victim by himself (e.g. by sending a letter) may be awkwardly managed. It risks to be interpreted as a **harassment attitude** both by the victim and the prison authorities. On the other hand, if he does not do anything, he may be suspected of **not feeling any remorse**, especially when a restorative spirit is spread in the prison. Mediation may help to clarify what is more advisable to do towards the victim.

As for **the victims**, the need of communication is to be found in their willingness to express painful feelings, and above all, to get answers to fundamental questions not clarified by the trial. This is confirmed by the relatively high rate of face-to-face meeting in murder cases (30%). More often when a face-to-face meeting occurs, it is only due to the willing of the victim even if it is the offender who initiated the process. This need of communication is

often expressed in these words "he is the last one who saw my (relative) alive...". The figures of the programme show that most of the mediation processes are initiated by the detainees (84%). But this seems essentially due to the fact that the information about mediation at this stage of the procedure is more available in prison than outside the walls. So far, unfortunately our experience shows that victim support services themselves are reluctant to recommend mediation to their clients, fearing a "re-victimization" phenomenon.

2) As for the interaction of mediation with the conditional release procedure.

We must say that at the beginning of our experiment we did not imagine that such an interaction was so suitable. To the contrary, the general feeling was that the link between mediation and the conditional release procedure had to be avoided in order to preserve the genuine character of mediation and to prevent the victim from being deceived.

But, rapidly, we found out that this assumption would prove to be harmful for both the victim and the detainee.

For the detainee, such a position could increase an existing *paradoxical situation in the detention context*. Soon or later, the majority of detainees are involved in a conditional release procedure. Among others criteria, according to the same restorative spirit, they will be assessed by their positive initiatives towards the victims. In such a context, they often face a double bind situation. On the one hand, if they undertake such an initiative (e.g. a mediation process), they are often suspected to be **self-interested**. On the other hand, if they do not undertake anything, they **do not fulfil the parole release criteria**.

So, in order to help them to get out of this dead end, we came to consider that, detainee's requests to participate at a mediation process have to be **admissible in any cases**. Moreover, the victim should be given the opportunity to assess *his/her* interest in reacting to the proposition. It is more relevant to consider that the offender should be judged according to the way he fulfils an agreement towards the victim and not according to his subjective position in the initiation of a mediation process.

For the victims, we also found out that mediation could help to get them out of *another kind paradoxical situation created by the parole release procedure*. In the last decade, several provisions have been made in Belgium in order to improve the legal status of the victims in the penal procedure. One of them, according to another interpretation of restorative justice, allows the victims to make a statement about release conditions of the detainee at a victim support service. The problem is that the victim is asked to give his position about the release at the very moment he/she is informed of *the principle of the conditional release procedure* and without any information about the present and *real state of mind* of the detainee having spent several years in prison.

So, we can understand that this kind of statement is rightfully overwhelmed by anger or resentment linked to what has been undergone in the past and the

indignation of a too early release. In such a situation, nobody will be surprised that victims' expectations may often contain **unrealistic conditions** to be imposed to the detainee (*imposing a large security zone*). And that inevitably leads to *more frustration for both sides*.

On the one hand the victim will not understand why his/her expectations are not taken into account by the parole commission and then will feel a real "re-victimization" phenomenon, which is a bad paradoxical effect for a victim support service.

On the other hand, the detainee will not understand some hard conditions unrelated to his real intentions, so, he may come to consider the victim as his tormentor and become reluctant to fulfil those conditions.

In this context, it is relevant to consider that mediation by providing a better knowledge of each part's state of mind, proves to be a very effective way of *more satisfying and realistic release conditions related to the victim interest*. (*eg.* Reaching an agreement on how to behave if they happen to meet each other by chance is more reassuring for the victim than claiming a security zone, a detainee is more likely to accept a forbidden zone that takes into account some requirements of his rehabilitation program.)

Antonio BUONATESTA

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