

**Resolving Disputes  
in the 21<sup>st</sup> Century**

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Slávka Karkošková  
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**Authors:** Slávka Karkošková, Lenka Holá, *et al.*  
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Prof. Jozef Matulník, PhD. (*St. Elizabeth University of Health and Social Work in Bratislava, Slovakia*)  
Prof. JUDr. Milana Hrušáková, CSc. (*Palacký University Olomouc, Czech Republic*)  
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## Foreword

This publication is the main outcome of the LLP project Grundtvig – REDICT (2011-2013). The project itself was initiated and led by Mrs. JUDr. Marie Boháčová, Chair of the Board of the European Institute for Reconciliation, Mediation and Arbitration with the seat at Křtiny, Czech Republic. The organizations participating in the project were: Foresee Research Group (Hungary), University of Prešov in Prešov, Greek-Catholic Theological Faculty (Slovakia), Association for Adult Education (Lithuania) and Italian Institute of Collaborative Law (Italy).

The project was based on the perception that while mediation and other methods of alternative dispute resolution (ADR), such as for example collaborative practice or restorative practice, are common in Western countries, they are not so well-known and used as they could be in many Central European and Eastern European countries.

The project aimed to gain an insight into the current state of and prospects for ADR and to create a product for encouraging these methods among the professional and lay public. The members of the project team invited also other professionals to contribute to this volume. The final product consists of 26 chapters, which are divided into six main parts.

Part I - “Philosophical and ethical aspects of ADR” contains: a chapter that points to the selected characteristics of a postmodern society which are related to sources of conflicts as well as means of their resolution (*Kamil Kardis*); a chapter devoted to the issue of truth in its ethical dimension as a condition necessary for the peaceful coexistence of people and nations (*Arkadiusz Modrzejewski*); a chapter focusing on the biblical conception of justice as a necessary means to understanding the cultural–religious background of Europe and how it is widely influenced by Christian tradition (*Mária Kardis*); a chapter about misunderstandings over the issues of forgiveness and reconciliation which can play a crucial role in how we treat victims and offenders of serious crimes (*Slávka Karkošková*); a chapter focusing on values as philosophical assumptions which affect the purpose of mediation, its concept, course and outcome (*Lenka Holá*) and a chapter reflecting the hidden power imbalance in the mediation process (*Grethe Nordhelle*).

Part II - “An Overview of ADR in selected European countries” contains chapters describing the legal framework and state of implementation of ADR in the Czech Republic (*Lenka Pavlová, Eva Vaňková* and *Robin Brzobohatý*), Slovakia (*Renáta Dolanská* and *Slávka Karkošková*), Poland

(*Sylvia Pelc*), Hungary (*Eszter Posch* and *Borbala Fellegi*) and Italy (*Maria Francesca Corradì*).

Part III - “Mediation in the family setting” focuses on the meaning, state and prospects for this form of mediation in selected countries, particularly the Czech Republic (*Lenka Holá* and *Lenka Westphalová*), Slovakia (*Emília Halagová* and *Beáta Swanová*) and Poland (*Artur Łacina-Lanowski* and *Michał Szyszka*).

Part IV - “Collaborative law in Europe” brings attention to the new ADR procedure which gives the parties concerned the power to self-regulate their relations and assigns to their respective lawyers a central role in assisting them during negotiations aimed at finding a consensual solution to separation or divorce or the modification of divorce or separation conditions or the regulation of relations between unmarried parents. All authors who contributed to this part (*Marco Calabrese*, *Marina Petrollo*, *Novella Telesca*, *Laura Nissolino*, *Marina Marino*, *Desirée Giudetti*, *Maria Rita Consegna* and *Adriana Galimberti-Rennie*) are members of the Italian Institute of Collaborative Law.

Part V - “Victim-Offender mediation as a challenge” contains a chapter about practical experience of VOM in Hungary (*István Szikora*), a chapter describing the socio-cultural conditions of domestic violence (*Leon Szot*), and two more chapters that discuss the controversial topic of VOM application in cases of intimate partner violence and cases of child sexual abuse (*Slávka Karkošková*).

Part VI - “Toward a culture of meaningful dispute resolution” concludes the whole book with a chapter on how various media can be used for ADR awareness-raising (*Gabriel Pal'a* and *Martina Poláková*).

This publication should contribute to an improvement in the quality of adult education, especially students of various helping professions, as well as practising mediators, social workers, lawyers, judges, psychotherapists, counsellors and other professionals who participate in resolution of various interpersonal conflicts. The publication is also aimed as an inspiration for state bodies that are responsible for creating legislation supporting ADR methods. The final aim of our effort is to improve the quality of the social environment in Europe.

**PART ONE**

PHILOSOPHICAL AND ETHICAL ASPECTS OF ADR



## **THE MORAL ETHOS OF THE POSTMODERN SOCIETY IN THE CONTEXT OF CURRENT SOCIOLOGICAL THEORIES OF LAW AND FAMILY**

Kamil Kardis

### **Introduction**

Discussion about the essence of social changes in the highly developed societies of Western Europe has been a sociological topic for a long time now. According to some sociologists, Western societies are entering a new stage of development they call the postmodern; for others, this stage is just a continuation of the new, developed, radical, advanced, and reflexive later modernity. For some, postmodernity is a sign of a deep crisis in modern life and its values. Some authors see the genesis of the postmodern and its associated process of subjectivization and individualization in the sociocultural changes, which took place in Europe and North America during the 1960s. The basis of these changes was the elevation of the status of the individual and their subjectivity above that of tradition, institutions, objective truth or moral norms. In accordance with the premises of subjectivism, a person is understood to be a good, harmonious and non-conflictual being on the inside. This study aims to make a sociological analysis of the effects of modernity focussing on the crisis of the person and its manifestations in various areas of social life.

### **The Anatomy of Social Change**

Sociology as a science reflects social development which, since the end of the Middle Ages, has undergone many basic changes and has led to what we now call the modern or often, postmodern society. From its beginnings, sociology emerged as a science, which descriptively analysed not just the basic and key features of society but above all, the mechanisms and determinants of its development. This problem became conceptual in character and was examined in detail within sociological theory. According to Znaniecki (1988, p. 346), social change relates to changes in the social structure, not demographic generational changes. According to Davis (1957, p. 622), social changes occur in terms of social organization

and in the structure and functions of society, and include changes in various areas of a society's material and symbolic culture. According to Rose (1957, p. 322), social change comes with the emergence and development of new meanings, values and models in society. Social change is systemic and unrepeatable change and brings with it new elements and systems. Social change means the beginning or the end of new social manifestations (the demise of the traditional and the birth of the industrial society) or the transformation of a certain social phenomenon in its basic structural elements (Turowski, 1994, pp. 75-76; Van Ardenne, 2004, pp. 1-5). Sociological theory is thus a response to changes, processes, mechanisms and phenomena occurring in society. In general, the literature divides the development of sociological theory into three stages: classical, modern and current. The works of the founders of sociology form the first phase, works which offered a detailed description and conceptualization of the shift from the traditional, pre-industrial phase in the development of European societies to a capitalist society. Individual authors (Karl Marx, Emile Durkheim, Max Weber, Georg Simmel, Vilfredo Pareto) drew up a terminological framework together with theoretical and methodological premises, and presented the basic interpretative instruments, requirements and aims of sociology, showing how it should offer an objective vision of society and the mechanisms operating in it. The second phase in the development of sociological theory began in the mid-20th century with an attempt at a synthesis, reconstruction and transformation of the above. This was the period of sociological orthodoxy and orthodox consensus in which the so-called 'major sociological theories' (functionalism, interpretative sociology, conflict theory and historical sociology) and research projects (Šubrt & Balon, 2010, pp. 10-11) were dominant. After this period of relative stabilization and methodological and theoretical monism in sociological theory, there then came a shift away from orthodox consensus and the emergence of various, often conflicting sociological movements leading to the 1980s concept of *postmodernist rhetoric*. Current sociology is often seen as an attempt at synthesizing all these trends (Szacki, 2011, pp. 858-859; Šubrt & Balon, 2010, pp. 11-12). From the work representing the theoretical concepts of postmodernist rhetoric, we will present those concepts most closely related to the topic under analysis: the ethos and social principles necessary for a cohesive society.

In this context it is important to make reference to the so-called *late modernity* concept (Giddens, 2006, pp. 687-699) which directly follows on from the concept of *reflexive modernity* (Giddens, 2010, pp. 46-53). According to Giddens, modernity has not been superseded but instead is becoming increasingly characterized by features reflecting the tendencies

mentioned above. The effects of modernity are becoming more and more radical and universal; the late modern individual is condemned to a life of insecurity, a sense of loss and a permanent feeling of discontentment. S/he is confused by the weight of conflicting impressions and experiences and tries to integrate them into a picture of life which has a specific aim and direction. On the other hand, however, the fragmentation and multiplicity of life is positive. It brings deceptive but sublime feelings of liberty, freedom of choice, unlimited opportunities and a wealth of future sensory possibilities (Giddens, 2006, pp. 695-696).

These days we can feel a certain disappointment from the fact that many of the promises of the Enlightenment have not been fulfilled. The sovereignty of rational thought has been questioned and the idea of a rationally governed society has turned out to be utopian. Technological innovation is no longer automatically seen as progress and the importance of the Europe and the West is declining. These changes should not be understood as part of the concept of postmodernity (i.e. something distinctive from modernity), however, but as a result of the self-reflection of modern thinking and the death of certain traditions. We are going through a period of radicalization (Large Sociological Dictionary, 1996, p. 1203; Lužný, 2005, pp. 267-268). Despotism is appearing more often in the place of democracy. Together with prosperity and affluence, freedom is becoming more of a myth than a reality. Peace, security and safety have all disappeared. *“We have a crisis in the fullest sense of the word. We are in the middle of a great fire which is burning everything to ash. In just a few weeks millions of human lives have been snuffed out, in just a few hours ancient cities have been demolished, in just a few days whole kingdoms have been brought down. Wide rivers of human blood flow from one end of the earth to the other”* (Sorokin, 1993).

A. Giddens defines the four main effects of modernity:

- new forms of trust in various *abstract systems* reserved for specialized and highly qualified people but which are essential for ordinary people (communication and telecommunication systems, financial markets, multinational companies, international organizations, means of mass communication, energy networks);
- new forms of risk produced by modern society (radioactivity, greenhouse gases, microbes, pollutants) the effects of which we realize *post factum* (Giddens, 2010, pp. 75-101);
- the opacity, fluidity and insecurity of social situations manifested by the relativization of society's basic rules, norms and values;
- globalization (Giddens, 2010, pp. 23-38).

Within the above paradigm, Ulrich Beck has also developed his own concept of reflexive modernity. This is based on the idea that humanity is now living through a transitional phase similar to the one marking the shift from a traditional to a modern society. At present, modern society is entering its second phase, usually described either as the *second modernity* or *reflexive modernity*. The first phase was the period of industrial modernity. Modernization then was only partial and, according to Beck, primarily involved modernization of tradition. This new society was on the one hand industrial and yet still feudal at the same time. The existence of large social groups, or classes, was typical for this period. These groups expressed a common interest, similar lifestyle and the same values. Centralized state power grew up alongside, capital was concentrated and the division of labour changed. This all led to greater mobility, urbanization and mass consumption. Individualization occurred in three basic areas: the area of social relationships and connections (which became weaker, more formal and more focussed on specific tasks and goals); the area of traditional values, norms and models of behaviour; and the area of institutions (greater dependence on and commitment to institutions and organizations). The main reasons for modernization were the growing division of labour (both in terms of individual tasks and in terms of social organizations and subsystems), the emergence of self-referential subsystems (for example, those of economics, politics, education, law, art and religion) and the rationalized, impersonal rules for managing these subsystems (Nešpor & Lužný, 2007, pp. 177-178; Lužný, 2005, pp. 20-22).

Common features of the changes taking place are plurality and individualization, i.e. a growing diversity and differentiation of lifestyles. Any single lifestyle is just one of many which a person can choose from or create. In the process of individualization, a person becomes the active agent in their life. They can and must always choose and decide for themselves; the direct influence on their decision of the groups which they are a part of is decreasing. Individualization thus brings more freedom, more individual decisions, more self-reflection and a greater feeling of authenticity. The meaning of tradition is decreasing together with that of traditional institutions, whether religious or otherwise. The individual is continually forced to choose between different options and to consider the effects of these decisions; life, thinking and behaviour are all becoming reflective. The standard biography is becoming a selected one, freed from the influence of predetermination, open and dependent on one's own decisions. An individual life is an assignment which must be undertaken and carried out. In summarizing, we can say that a human identity is no longer set by outside factors; the individual is freed from some predetermined

and inherited social status and identity is becoming more of a purpose or an aim, something which needs to be decided on, chosen correctly and changed if necessary (Nešpor & Lužný, 2007, pp. 177-179; Lužný, 2005, pp. 267-269; Szot, 2010, pp. 9-22).

Together with changes in everyday life resulting from the ongoing industrial revolution, we are also subject to completely different networks of social interactions and relationships, lines of conflicts and political forms of cooperation. In this process of reflexive modernity, institutions in the industrial society are losing their former influence, meaning and historical foundations, they are becoming internally conflictual and dependent on individual predispositions and personal choices. Beck also points out how modern society produces more risks. Driven by the vision of ever-increasing performance and productivity, society is placing untold strain on the environment, the effects of which are slipping out of control. Whether they are in the area of chemical production, atomic energy or genetic engineering, the most modern technological approaches are often unable to be effectively controlled. The risks and fears associated with these cast doubt on the very legitimacy of modern society, a legitimacy gained thanks to the fact that this society was considered to be a unit capable of solving the problems of the individual and society with great effectiveness. Many organizations and institutions have been created with the purpose of helping to reduce poverty, social inequality and poor levels of education; often, however, such efforts at tackling these social problems have proven to be counterproductive (Keller, 2005, pp. 43-44; Szot, 2008, pp. 151-167).

Beck states that the modernization process gradually leads to:

- *the dimension of liberation* – to the unravelling of certain historical social forms and ties which are now becoming weaker and merely formal,
- *the dimension of disenchantment* – to the loss of traditional securities in the area of practical leadership, faith and guiding norms,
- *the dimensions of control or reintegration* – to a new form of social commitment. This form primarily brings greater dependence on institutions and organizations. Emancipated individuals are becoming dependent on the labour market and thus dependent on education, consumption, forms of security etc. People are becoming market individuals (Lužný, 2005, p. 71).

According to Beck, we are witnesses of a turnaround in the modern world. This differentiates it from the traditional industrial society and gives it new forms: those of a high-risk industrial society in which the modern is compared with itself and not with tradition. Elements of tradi-

tionalism were built into the foundations of the old industrial society; these are now breaking down, however, and causing a shift in the existing coordinate system. The coordinate system factored in human lives and the thinking of industrial modernity and was made up of axes representing the family, profession and faith in science and progress. The risk society is the result of its own internal modernizing dynamism and through it the industrial society has entered a second stage in modernity in which the process of modernization is becoming reflexive and a theme – and problem – in itself. The first stage in modernity brought a modernization of tradition; the second stage (what Beck terms the ‘risk society’) involves the modernization of the industrial society, or the ‘modernization of the modern’, or so-called reflexive modernization. Beck sees reflexivity as self-confrontation, not so much though as a deliberate attempt at exceeding the previous level of social development as a process operating with its own dynamic and advancing with the relentless tide of scientific and technical progress (Šubrt, 2007, p. 216; Pick, 2004, pp. 99-116).

The second (liquid) modernity is, according to Beck, the result of two world wars and the enforcement of totalitarian political systems. In the late 20th century, historical optimism tied in with the early phase of modernization found itself in crisis as it came to light that the above historical events were actually a part and an effect of the modern system not simply a result of its failure. This is the reverse side of the modern coin and has also involved shifts away from the freely competitive struggle between small traders/producers towards fixed, hierarchically-structured monopolies, from democratic individualism in the political sphere to the impersonality of prescriptive bureaucracy etc. The modernizing trend, a key element in the whole development of modernity, continued with the removal of barriers and different restrictions in many areas of life. Now it has advanced so far, there has been a visible qualitative change; we now speak of the postmodern, or of second modernity (Lužný, 2005, p. 74).

When analysing late modernity, the term ‘consumer society’ is used. This concept evolved during the 1960s and 70s when it started to be used to describe both the modern industrial society and the post-industrial society. The consumer society is defined primarily in economic terms and is a society in which the highest possible number of citizens have access to ‘consumption’. From the cultural point of view, the consumer society is one where one of the dominant values is seen as the feeling of happiness, where consumption serves as both a means of communication and of social identification. Consumption is thus part of the quest-for-happiness process and enables us to measure its intensity: the higher the consump-

tion, the higher our level of contentment and potential to achieve happiness.

A central value of the consumer society is therefore happiness. As a value, it has specific norms: owning a car, a television and travelling on holiday are all examples of behaviour which have become widespread in society since the 1960s. David Riesman uses the term ‘consumer norms’ to refer to the range of objects and services (car, furnished house/flat etc.) ownership of which is now considered normal. While microeconomists argue that people buy goods and services in order to fulfil a certain need, Jean Baudrillard perceives mass consumption as the purchasing of signs which make it easier for the individual to make contact with others. In his book *Société de consommation*, which came out in 1970, he equates consumption to language. Clothes, hairstyle, car and furniture all give the individual opportunity to show others what values they have and enable him/her to become part of a group. Just like language, consumption is a certain kind of social negotiation and a basis for interpersonal relationships.

Like language, consumption is governed by rules. These are given to the individual by the family but also, perhaps to a greater extent, by advertising and the media, both of which are socializing agents in today’s society. The method of internalizing consumer formulae has been studied by the American sociologist, John Galbraith, who rejects the traditional hypothesis by which companies are guided by the demands of rationally thinking individuals. Instead, according to him, large companies have completely turned this logic around and now manipulate the consumer through advertising (Montousse & Renouard, 2005, pp. 149-150).

Daniel Bell refers to the post-industrial society. According to him, the 1970s brought a relative shift away from the manufacturing of products to the provision of services. A basic feature of this society is the technological state of the material assets created – values and services. The results of automatization include a lower number of workers and higher levels of efficiency together with the need for what is often very expensive retraining, loss of work and a higher level of alienation and distance between the worker and the product. These changes in technology and methods of production are accompanied by changes in the structure of professions and in stratified systems. Employment in the third sector, i.e. in services, is rapidly increasing. Socioeconomic changes are reflected in the process of urbanization, which has changed people into primarily city dwellers. In the post-industrial society, the division (and opposition) of town and country is dying out. The post-industrial society is becoming a mass society in three senses of the word: economic, social and cultural (Harrington, 2006, pp. 342-343. Lužný, 2005, pp. 267-269; Montousse & Renouard,

2005, pp. 147-148). The question of basic values has grown in meaning in the context of new scientific and technological possibilities. New questions are posed by advances in areas like genetic technology, nuclear energy and artificial insemination (John Paul II, 2000, pp. 132-138; Piwoński, 1994, pp. 327-328; Szot, 2008, pp. 219-229).

The postmodern society is described by R. Inglehart as a post-materialistic society (Tižik, 2006, pp. 142-143). The author's basis for this is Abraham Maslow's theory about the hierarchy of needs and their fulfilment – starting with physiological needs and working up through needs of safety, love/belonging and esteem before arriving at the need for self-actualization. As soon as a generation brought up in a period of affluence matures, so this society's hierarchy of values changes. Because material needs are provided for, so attention shifts to the fulfilment of higher needs in Maslow's hierarchy such as the feeling of belonging, respect and intellectual satisfaction. The analysed changes do not apply to the older generation who have not enjoyed such affluence but to their children's generation. The experience of long-term affluence causes a change in society's system of values (Zdziech, 2007, pp. 41-53).

R. Inglehart, in analysing postmodern society, defines two groups of values which succeed each other: the materialistic and the post-materialistic. The first of these are associated with the fulfilment of physical or economic security and satisfaction and include the following: technological and economic development, work, money (as a basis for survival), the responsibility of the state for its citizens. Post-materialistic values are ones which become important after the achievement of economic security. These include: trust, independence, ecology, the rights of sexual minorities, women's rights, freedom of choice, tolerance, life satisfaction and self-actualization (Inglehart & Norris, 2006, pp. 33-38). The functions and meaning of tradition, family and religion are gradually taken over by the state and its bureaucratic system (Zdziech, 2007, p. 42). Various sociological surveys have shown, however, that the acceptance of prosocial values presented by the church has been undermined. Love, help and forgiveness are acknowledged and valued highly by young people. Much lower in their hierarchy are such values as respect and friendship, however, while values like salvation and peace are even lower. What is important, though, is that prosocial values are accepted by more and more young people who practise their religion. This partly results from the fact that the stronger a person's religious convictions, the greater their desire to be active and involved and to gain the acknowledgement of others for their good works (Bazylak, 1984, p. 98; Bąk, 2010, pp. 159-160).



Theories of reflexive, or late modernity give a diachronous/historical view of modernity, meaning they see modernity as a dynamic phenomenon going through certain developmental phases; from its early phases, modernity has evolved into its present form: late modernity (alternatively described using the virtual synonyms ‘ultra modernity’ or ‘post modernity’ – Lash & Urry, 1994). With the benefit of hindsight, we can now say that the processes which started during the period of early modernity and which appeared to be symptomatic of modernity as a whole were in fact only symptomatic of its early stage. Late modernity has partly continued in certain processes which began in early modernity but conversely has witnessed ‘opposing processes’ starting in reaction to the early stages of modernity. Naturally, completely new tendencies and processes have also emerged during this period (Giddens, 2006, pp. 696-697).

### **The desocialized identity of an individual living in liquid modernity**

According to many experts addressing the condition of contemporary society, people are losing their social dimension and consequently becoming “unsocial“. This is followed by the state known as anomie, effects of which we see in high levels of stress, displays of aggression, feelings of insecurity, distrust between people, problems of identity and errors resulting from disorientation. Desocialization leads to atomization, distance and separation, isolation, depersonalization and anonymity. *“Desocialization involves a process of loss and dispossession. The problem does not just lie in the fact that individuals become susceptible through being deprived of society i.e. desocialized, but also through the fact that whole potentialities of their inner self are in danger of being destroyed before they can even develop.”* (Fforde, 2010, p. 34). The modern age makes life incomparably easier for people, provides a kind of refuge and tells us just what we need to be happy and contented. Why then is the consumer lifestyle so often mentioned in a negative way? The basic aim of developed industrial societies is to provide the highest level of comfort. As Keller states, however: *“Their mentality forces people to consume more and more because what they have already consumed no longer satisfies them. The use of throwaway consumer goods and their replacement by ever newer goods creates an endless cycle of purchasing and consumption. And it is logical to state that however advanced means of production are and however rapid economic growth, no-one will be permanently satisfied in such conditions “* (Keller, 2005, p. 34).

The mass society has shattered a lot of the old social ties and in a certain way isolated individuals within their own territorial units. Once isolated, such individuals become easy targets for various manipulative

media practices which have become normal in our society. And despite the fact that references to the effect of a mass society create a prevailing image of a homogenized and standardized culture, a mass society is in fact made up of a huge number of individuals; although people may succumb to the influence of mass ideologies, they remain isolated beings in their essence. Under the influence of the mass society and as anonymous elements in the functioning of these covert ideologies, people protect themselves in their own way. In order to fight their fear of loneliness and social isolation, they assent to the rhetoric of these persuasive demagogues and seek refuge in an imaginary world of mass media production. Today's mass society is typified by the dynamic mobility of a social elite trying to separate themselves from people of lower social levels. Between the polarities of luxury and absolute poverty are the middle class, lured by the attractive world of excess wealth and discomfited by the world of poverty personified by the homeless, armies of unemployed and large sections of the population struggling to make ends meet. These feelings are largely a result of media pressure, of advertising campaigns aimed at inveigling their way into our minds. Gilles Lipovetzky addresses the phenomenon of individualism and its influence on current Western civilization and labels this an era of emptiness in which postmodern man, absorbed in the world of media and entertainment, is merely consuming his own existence. As an effect of the standardization of cultural creation, this pseudo individualization degrades the recipient and slowly erodes his/her freedom and creativity (Orfánus, 2013).

This lifestyle has resulted in an inversion or shift in values: so-called axiological chaos. Values traditionally recognized by the given culture are being superseded by the values of consumption. One effect of this is an environment unfavourable for full development of ethical or aesthetic values, the formation of which requires a wide range of experience and overcoming of obstacles, the price of which is often 'having to go the long way round' (Ďurek, 2011).

Pope Benedict XVI analyses the condition of today's postmodern society with great eloquence when he refers to the ever-increasing subjectivity and individualism of the age in which we live and talks about: *"cities where life is becoming anonymous and horizontal, where it seems God is not present and man is the sole master, creator and director of all around him. Buildings, work, economics, transport, science, technology – everything seems to be dependent on mankind alone. In this seemingly almost perfect world, however, shocking events often happen, either in nature or in society. Thanks to these we think that God has withdrawn and simply left us to our own devices* (Radio Vaticana, 2012).

In the postmodern society, this subjectivity and individualism can become counterproductive as they lead the individual towards estrangement and isolation, tearing him/her away from social relations and from a feeling of responsibility for the common good. This leads to a weakening of the most important natural institution of marriage. Fforde describes the situation accordingly: *“In its narrow sense, loneliness is one of the biggest punishments which the postmodern person has to endure in this desocialized world. In order to escape this state, which can be very cruel in its emotional impact, many people enter into relationships with members of the opposite sex or marry them but not so much out of love as out of self-interest”* (Fforde, 2010, p. 304).

We can find this tendency not only in marriage but also in friendship, desocialization causing a decline in friendly ties. People fight feelings of loneliness by creating pseudo friendships and entering into false relationships with other individuals. *“The demise of friendships and their short-term and unstable character are as much a typical feature of modern life as divorces and fleeting partnerships which are constantly beginning and ending. Both result from the same process: the self-interested escape from isolation leading to unstable relationships which only serve to take people back to where they started – or sometimes even further back”* (Fforde, 2010, p. 305).

A propos of the weakening position of marriage and the family in the postmodern society, experts refer to the crisis and collapse of certain important functions of the family. In his book *The Great Disruption*, Fukuyama focusses on the family in crisis and on the current collapse in values. Since the 1960s, the Western world has been going through a sexual revolution, a period of female emancipation and homosexual rights in which groups have been throwing off traditional social rules limiting their opportunities and freedom of choice. Fukuyama warns, however, that a society which is constantly repealing rules and norms in the name of individual freedom will become ever more disorientated, atomized, isolated and unable to fulfil its common goals (Revue politika, 2012; Kardis 2009, pp. 47-59). As he argues: *“The great disruption has even caused a long-term decline in the nuclear family which threatens its reproductive function. Unlike with economic production, childcare and education, freetime activities and other functions now carried out outside the family, it is not certain whether outside the nuclear family there is a good substitute for reproduction – which explains why changes in the family structure are having such serious effects on social capital. Most people are familiar with the changes which have occurred in Western families – these are*

*clear from statistics for childbirth, marriages, divorces and numbers of children born outside marriage“ (Fukuyama, 2006, p. 52).*

Over the long term we can see that the marriage institution is losing its popularity as the number of people cohabiting increases year by year. Fforde discusses the danger of cohabitation and sees it as being a major factor in the breakup of families: *“Relationships of this kind are highly unstable and are associated with what is a kind of very quick divorce. Marriage has lost its primacy as a generally approved context in which to have children“* (Fforde, 2010, p. 228). Desocialization also brings with it confusion in the area of sexual identity and orientation, witness the active propagation of homosexual cohabitation and partnerships. The truth remains, however, that the higher the number of homosexuals there are in society, the less able society becomes to stabilize the family institution. Another symptom of the decline in the natural family is increasing single parenthood. As more and more children are brought up by just one parent, so their risk of desocialization increases as they miss out on the other parent and their family. Another symptom of family breakup are the much higher numbers of people living alone now. Fukuyama looks at the importance of having both parents present in the family. The family structure is a decisive mediatory factor explaining a child’s poor or worsening results at school. Fathers have an important function in the family and serve as role models to their sons, the older man being there to show the younger man how to compete properly and do well. Fathers also have a key influence on the attitude of their daughters towards men. In the absence of a male role model showing proper levels of respect to his wife, however, daughters will have lower expectations of the future partner that they themselves choose. As the author states: *“(…) the father’s role is much more socially constructed than that of the mother and takes on various forms depending on each society and the individuals in it – from the minimalistic role of providing sperm and income to that of a caring parent with a leading role in the upbringing and socialization of his children“* (Fukuyama, 2006, p. 139; Truszkowska, 2005, pp. 377-387).

The source of the above symptoms of desocialization is faulty anthropology according to which *Homo sapiens* is perceived as some kind of walking intellect, human reason is the only intellect in the universe and there is no higher power than mankind, faith and wisdom being far less valuable and reliable. The essence of this process is the correlation between the advancement of rationality and freedom and the decline of religion in both the public (and subsequently also private) sphere. Consumption is becoming the key value and main aim of people’s lives as they ever more frequently look for fulfilment in material values. They are mov-

ing away from the values typical in traditional societies: family values (marriage and the family are often nowadays replaced by so-called open relationships), religious values (traditional religions are being replaced by alternative and new religions, or by spirituality) and patriotism (Sztompka, 2009, pp. 563-564; Kardis, 2008, pp. 45-58).

A feature of these trends is the elevation of the status of the individual and his/her subjectivity above tradition, institutions, objective truths and moral norms. This situation has, of course, been in progress since the new age; with the postmodern, however, the individual has stood up more radically against tradition, moral norms and institutions. Subjectivism has risen above any kind of objective reality surrounding us: its premises are that people are, on the inside, good, harmonious and non-conflictual beings. They assume God's attributes and alone determine the norms and values guiding their everyday life and behaviour. Subjective convictions, emotional experiences and efforts are always correct, justified and of the most importance. A person's subjectivity, their sense of self is becoming paramount and sometimes the only norm for their thinking, behaviour and sense of purpose. Within the postmodern perspective, a person does not have to, cannot, in fact, take account of and be guided by objective facts and determinants and does not even have to carry out logical analysis of his/her own behaviour. Subjective convictions, subjective conscience, the desire for instant gratification and paranormal experience are all becoming norms for human thinking and behaviour (OPOKA, 2012; Truszkowska, 2010, pp. 61-73). In this context John Paul II describes how today there are widespread efforts at presenting anthropology without God and Christ. A person is "the absolute centre of all being and erroneously assumes the place of God forgetting that it wasn't man who created God but God who created man. Our forgetting about God has led to a moral decline in people (...). A large space has been created in which nihilism can flourish in the field of philosophy, relativism in the field of knowledge, theory and morality, and pragmatism, even cynical hedonism, in one's everyday life". European culture creates the impression of a "silent apostasy" on the part of the satiated individual who lives as if God didn't exist (John Paul II, 2007).

The Swiss theologian, Georges Cottiere, presents the opinion that the main agent in the background of this cultural crisis is the revolution in models of humankind. He says that: *the cultural situation in which we find ourselves is actually characterized by a conflict between anthropologies... A person's transcendental dimension is being ignored... there is no doubt we are on the road to destruction. The banalization of abortions and euthanasia is a disturbing sign of the process of negation and is*

*a threat to people and our humanity... Perhaps our primary task now is to help discover, or rediscover, the beauty of the human mission in civilization. Stimulation these days of mere selfish interests and competitiveness feeds into the insidious feeling of our meaningless existences. Negation of the transcendental or its drift into oblivion leaves us with a bitter sense of emptiness and overall futility.*“ (Fforde, 2010, p. 12).

The processes of desocialization and anomie are reinforced by secularization – a sign of declining faith in religious institutions and the church – and the privatization of religion. In general, secularization is the process of the loosening of ties between society and religion and the move away from institutionalized forms of religiosity. Religion is losing its old status and influence on all aspects of human life (Słownik katolickiej nauki społecznej, 1993, p. 152). According to some sociologists (P. Berger, T. O Dea, Wilson, Whutnow), this modern-day process results in various areas of societal life (politics, the economy, science, philosophy, culture and education) becoming no longer subject to the control of religious institutions (Marianski, 2006, pp. 24-27; Halík, 2008, pp. 95-96). F. X. Kaufmann refers to the ‘indifferentism’ associated with the changes taking place in modern society. This is manifested, amongst other things, by an indifference towards religion bordering on the nihilistic. The author talks about the gradual disappearance of the *sacrum* (holy) in society. Society rejects and denies the *sacrum*, instead concentrates on the *profanum* (worldly) and values associated with it, even if they are unable to show us a clear path through life and give our life a sense of purpose (Piwowarski, 1996, pp. 181-183). Religion now primarily enters a person’s private sphere and has become each person’s private matter, hence we refer to ‘the privatization of religion’. Ties between religion and society thus slowly weaken. The sociologists above demonstrate this through research findings showing a decline in numbers of people attending church services and an increase in the number of people who do not belong to any religion. The church has lost its monopoly in the market of theological philosophies and models of life; the holy has been removed from both societal and cultural life (Nešpor & Lužný, 2007, pp. 82-86). On the other hand, however, following mass secularization during modernity, many countries are now witnessing a renewal in people’s desire to return to the “mystical world“, to a world which offers “metaphysical rescue bridges“. So just as the expression the ‘privatization of religion’ has been used in connection with secularization, so the phenomenon of the gradual revival of the importance of religion and its influence on societal and global political structures in the postmodern society have also been noted (the so-called deprivatization of the religious process) (Giddens, 2010, pp. 75-

101, 113-118). According to P. Berger, we are now witnessing an increase in religious pluralism that casts doubt on the credibility of traditional religious institutions, relativizes their universalist demands and undermines their exclusivity. Religious forms are becoming market items and religious traditions market products (Nešpor & Lužný, 2007, pp. 82-83; Berger, 2008, pp. 9-22).

### **Tackling society and the individual's crisis of identity**

A response to the crises of identity described above lies in a return to respecting basic values, amongst which human dignity is the highest. It seems this situation gives us space in which to reflect on the necessity to repersonalize interpersonal relations and the social life resulting from them.

In this context, the Papal encyclical *Evangelium Vitae* points out the importance of rediscovering the existence of human and moral values which pertain to the very essence of a human being and which express and safeguard human dignity. The Pope further emphasizes that these are values which no individual, majority or state can create, change or destroy; all must acknowledge them and help to promote and spread them further. This is a condition for the development of healthy democracy and the future of communities (EV 71; Orędzie biskupów polskich..., 1995, pp. 613-631). In pluralistic societies, where Catholics and Protestants, believers and non-believers all live and coexist, basic values create common ground serving as a foundation of mutual social understanding without which dialogue and consensus would be impossible. Pluralism means more than society being made up of many individuals and groups but also signifies that these individuals and groups act independently but with the same rights and compete with one another. This is why pluralism is still developing in all areas and activities of society: economic and social pluralism in competition between businesses, employment groups and their unions; cultural and scientific pluralism; religious and philosophical pluralism; political pluralism of parties etc. On the other hand, a free, democratic and constitutional state must be associated with certain values. For this reason, a parliamentary majority or government cannot arbitrarily decide about every question but is bound by the basic rights and principles laid out in the constitution. Sociologists thus recognize the need and importance of an ethical code which serves as the basis of politics and which enshrines key values. A pluralistic society is compelled to seek consensus in basic values. This is an indispensable condition for the existence and functioning of various social, cultural and economic groups (Sutor, 1999, pp. 184-185).

Human dignity is the highest value both in the life of the individual and of society. It is a value which no-one may decide about; not even the person himself may violate it. This applies both to society and to political power; this value is the basis of all values. The Christian tradition recognizes it as the foundation and core of social, political and national life, a truth confirmed by the *Gaudium et Spes* Apostolic Constitution of the Second Vatican Council: "But what is man? About himself he has expressed, and continues to express, many divergent and even contradictory opinions. In these he often exalts himself as the absolute measure of all things or debases himself to the point of despair. (...) The Church certainly understands these problems. Endowed with light from God, she can offer solutions to them, so that man's true situation can be portrayed and his defects explained, while at the same time his dignity and destiny are justly acknowledged." (GS 12) The Bible describes man as the master and ruler of all creation: "Yet thou hast made him little less than God, and dost crown him with glory and honour. Thou hast given him dominion over the works of thy hands; thou hast put all things under his feet." (Psalms 8:5-7) This truth about the dignity of mankind was repeatedly declared by Jesus Christ and is confirmed by the teaching of the Church. The basis for the Christian understanding of human dignity as a basic value are two truths: the truth about the creation of man in the image and likeness of God and the truth about Jesus as the Son of Man. Man was invited to Earth by God and will return to him. Human life is thus an absolute and inviolable value in itself, because man's beginning lies not in a nation but in God, who has saved and redeemed him. The history of the world and humanity has been witness to many negative and evil events during which human dignity has been violated and treated with contempt (Stimpfle: 26-27; Schooyans, 2000, pp. 279-308; Nešpor & Lužný, 2007, pp. 151-152). In this context, human dignity represents a central and basic value of a democratic society and is the most fundamental in terms of orderly and righteous human coexistence. Enshrined in this value are human rights such as the expression of the personal right to free development of one's potential in society. And because this development can only be achieved in coexistence with others, personal dignity and human rights also have a social and institutional dimension. Its basic values include the institution of marriage and the family, and a political system which can guarantee all aspects of the common good, specifically freedom, social justice and peace (Sutor, 1999, p. 188).

Specialized literature emphasizes the basic principles springing from the values mentioned above. It is generally accepted that these social principles are not just a divine proclamation but are primarily an essential re-



quirement for modern society and a natural legal norm. The literature refers mainly to four principles: the personality principle, the principle of the common good, the subsidiarity principle and the principle of solidarity (Piwowarski, 1993, pp. 30-131; Höffner, 1999, pp. 46-59; Strzeszewski, pp. 512-513; Herr, 1999, pp. 67-97).

Man as a person has an untouchable dignity which has to be respected, protected and glorified. Pope John XXIII argues that man is the creator and object of all social endeavours (*Mater et magistra*, no. 219). Pius XII in a radio message of 1944 said that man had long been a passive element in the life of society but that he had to become society's subject, foundation and aim. Human dignity has its deep roots in the truth of his creation in the image and likeness of God. It is this which determines his destiny both on Earth and in the afterlife. Man as a being endowed with reason and free will and as a subject of rights and duties represents the first basic value of the Church's social teaching and is the heart and soul of this teaching (*Gaudium et spes*. 12-22). Because of man's anthropological importance, he is the source of all other principles (Vragaš, 2013).

The common good principle applies to cooperation between various organs of social, political and economic life. The common good is seen as: "the sum of societal conditions which enable both groups of people and individuals to improve themselves in the fullest and most optimal way". Such conditions allowing self-development and actualization are material, civilizational and sociocultural (Turowski, 1994, p. 111; Piwowarski, p. 41). In the context of reflections on modern society, the common good has an important meaning. In the pluralistic modern world, where different interest groups and political, economic and national subjects are all competing with one another, the channeling of often disparate individual and group interests towards a common good is essential for building a society on strong and enduring foundations. These foundations should have an economic, social, political and moral aspect on one side and a common legal system on the other (Possenti, 2000, pp. 295-296).

One of the most important principles of modern society based on the idea of freedom and respect for human dignity is the subsidiarity principle. This is based on the tenet that the state, society and international institutions are only obliged to provide help and 'interfere' in the affairs and powers of smaller groups, or families, when these groups lack the power to tackle the specific problems and difficulties themselves. The state and its institutions should not take on all competences itself

The principle of subsidiarity or mutual support (from Lat. *subsidium* meaning reserve or deposit), as with the principle of a common good, solidarity and personality, springs from the Christian concept of the human.

This principle protects humanity, organizations and local communities from the danger of them losing their own entitlement to autonomy. It stresses the right and obligation to one's own responsibility and independence. If a smaller organ can tackle a problem itself, it should; it should only turn to a higher authority if it cannot cope with the problem alone. This represents the general law by which help and support can and should come down from a higher body to a lower i. e. from the commonwealth (state) to the individual and to communities. It was formulated by Pius XI. in the QA and negates both individualism and collectivism (KBD, 2008. Piwowarski, pp. 198-199; Höffner, 1999, pp. 56-57; Strzeszewski, pp. 512-513). A basic premise of this principle is that the state must never take over from the individual (or the association of individuals – be they family or company) what the smaller body is capable of doing by itself. The subsidiarity principle is a central principle of the organization of a state and respects human freedom and dignity. It binds the state and other institutions to helping smaller subordinate bodies to improve their position and to helping individual citizens promote the dignity of human life. At the same time the state will not interfere in the activities of these if they are capable of fulfilling their purposes by themselves. The subsidiarity principle is based on the anthropological notion that success in our lives depends primarily on a person's willingness and ability to seize opportunities, take risks, be dedicated to their work and provide a good service. The solidarity principle underlines the key importance of solidarity in a politics which respects human dignity. Solidarity is awareness of mutuality and a sense of responsibility derived from the personalist concept of a person. Whether the context is the family, society, business and economic relations, the state or international relations, coexistence with others is impossible without solidarity. Solidarity is both a virtue and also a structural principle of state organization. It is the ability and readiness of an individual to admit the dignity and rights of people close to them and to demonstrate this in their lifestyle and activities. Acting with solidarity on a societal level is effective if individual members respect one another as human beings. People are forced to be reliant upon one another in a whole variety of ways. This reliance must, however, be for the benefit of individuals as well as of the whole unit. Individuals must bear responsibility for others and for the whole commonwealth but the commonwealth also bears responsibility for individuals. The Church makes special provision for the poor (POSTOY, 2008; Herr, 1999, p. 69; Strzeszewski, pp. 524-525). This is especially true in the context of changes happening within the European Community and the postmodern society, where sociopolitical and economic pluralism are increasing. Together

with growing individualization, we also have to deal with loosening ties and the weakening solidarity between nations and people. Ultimately, even though they do not live in material need, more and more people are feeling isolated and abandoned (John Paul II, 2013).

In today's world, with social and economic inequalities growing all the time (through the contrast between rich and poor countries and social differences within individual countries), solidarity has to be a basic value closely tied in with the value of social justice. The second of these is not simply giving the poor what is left over but primarily is about actively involving them in the process of civilizational and economic development (John Paul II, 2000, pp. 132-138; Piwowarski, 1994, pp. 327-328, 337).

The question arises of whether it is actually possible for different social, political, cultural and multinational companies to collaborate in the current pluralistic reality of everyday life. To answer this question we need to look into our basic values. These form a basis for creating consensus about values which are universal and common to everybody, fulfilment of which does not depend on a person's ethnicity, religion, gender, culture or race. They are coded and form part of our natural make-up. Christians perceive them as coming from God.

In the context of this analysed crisis of humanity and disintegration of society, it is apposite to wonder which side of the debate Slovak society will incline towards. Will it be towards the newly-emerging culture divested of Christian tradition, influenced by various means of mass communication and indifferent towards the teaching of the Gospels and its universal principle and values or will it return to its roots and not simply declare but also genuinely protect and respect those moral and ethical principles based on the dignity of man created in God's image and likeness? The first of these, the so-called culture of death, is characterized by ever increasing religion agnosticism coupled with deep moral and legal relativism. This has its roots in the rejection of the idea that human life should be the basis for defining the inviolable rights of every individual (John Paul II, 2013).

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## TRUTH AS A CONDITIO SINE QUA NON OF PEACE

Arkadiusz Modrzejewski

### Introduction

Truth can be considered not only as a subject of epistemological divagation but also as an ethical and axiological category. On cognition theory ground the nature of the truth is perceived as a result of a cognitive process. Its opposite is the falsehood – a morally neutral category. However, in case of ethics the truth is connected with human behavior, which can be recognized as ethical when it subordinates to the truth which in fact is a synonym to honesty, truthfulness and authenticity. The opposite of the truth in an ethical sense is a lie which is an expression of a conscious and purposeful “prevarication”. A special place in axiological and normative systems is attributed to the truth in an ethical sense. It is then perceived as a value and also a norm of individual and collective behaviour. Therefore, in epistemology the issue of truth is of theoretical (cognitive) character, while being moved to the ethical ground it assumes a practical form due to the fact that it is connected with the sphere of human activity which is subject to evaluation and assessment. Nevertheless, opting for a particular epistemological notion affects the choice of ethical position. For that reason ethics is subordinated to epistemology to some extent. Ethical understanding of the truth is determined by the theoretical and cognitive attitude in which the truth is recognized in an objective and universal dimension or in subjective and relative one.

The aim of this article is to present the meaning of truth in an ethical category in the social thought of Karol Wojtyła, who was well-known as John Paul II. And essential if not the most crucial part of an international doctrine of John Paul II constitutes the contemplations on the issue of world peace. They assume a form of a generally normative philosophy of peace due to the connections with the anthropological and ethical reflection. John Paul II’s interest in the issue of peace certainly has its source in his biography (Modrzejewski, 2009, p. 75). Future Pope lived in the times of great international conflicts. World War II left its mark on him as he personally experienced the cruelty of war. As he confessed in one of the

interviews: “It was also my personal experience which I have been carrying with me till today” (Jan Paweł, 1994, p. 86). The issue of truth constitutes a key matter in his ethics of international relations. According to the Pope, the truth is a basic condition which mankind must fulfill in order to implement a peaceful order in the world. It should constitute an ultimate criterion of evaluation and assessment of international and interstate relations, which is connected with providing the reflections on the issue of peace with an ethical and personal dimension (Bajda, 2005, p. 71). He claimed that the truth is „power of peace” (John Paul II, 1980), indicating an inseparable “bond between *the work of peace* and *respect for truth*” (John Paul II, 2003).

### **Wojtyła’s conception of truth**

Wojtyła’s intellectual attainments allow to consider him as a representative of objectivism, realism and universalism in philosophy, and consequently in epistemology. He perceived the truth in objective and universal categories. In his encyclical *Fides et ratio* he ascertained: „Every truth—if it really is truth—presents itself as universal, even if it is not the whole truth. If something is true, then it must be true for all people and at all times. Beyond this universality, however, people seek an absolute which might give to all their searching a meaning and an answer—something ultimate, which might serve as the ground of all things.” (John Paul II, 1998, p. 27).

Truth is neither „locked” within the borders of any culture nor is limited by time and history. Wojtyła’s perception of epistemological issues inscribes him in the trend of classic philosophy, especially Aristotelian and Thomistic, in which truth was defined as conformity of cognition with reality. The definition of a Jewish doctor Isaac ben Solomon (845-940) who lived in Egypt is commonly known and it was repeated and specified by Thomas Aquinas: *veritas est adequatio intellectus et rei* (Krapiec, 2000, p. 289). In this definition there is a relation between a cognitive object and a thought. The object is always a really existing being, which is “something” that is, exists. The truth is perceived in an objective and absolute manner that is the object is a determinant of the truthfulness of cognition. A recognizing subject interiorizes the essence, the content of the object of cognition interior. The truth appears when the interiorized contents are adequate to the contents which are the property of the being itself, which is the subject of cognition. The truth on logical level, which is the uniformity of cognition with reality, is a derivative of truth in an ontological sense. The being itself which actually exists that is independently of cognition, of cognitive intellect, that is of subject, has its



own essence, content, which determines its existence. Therefore, it constitutes the truth in itself: *ens et verum convertuntur* (existence and truth are changeable values) (Krapiec, 1985, p. 175). Every object of cognition, even before it is recognized in a scientific or popular cognition, is true in itself. Therefore, truthfulness is a universal property – as Thomists claim a transcendental property – of existence.

### **Truth and peace in Wojtyła's philosophy of peace**

Peace in Wojtyła's evaluation requires a particular opening to truth, which often means examining own convictions and actions, rejection of what is unethical and immoral, what creates evil. It means an ultimate liberation from evil which is rooted in man and which, in Catholic theology, is a consequence of so-called an original sin, which is human tendency to sin.

The main virtue of truth in an esthetic dimension is applying it to the area of social practice, human activity, especially in its communal aspect, human relations, including international relations. The truth is associated with such features of character as honesty, truthfulness, sincerity and behavior in accordance with one's conscience and convictions (Wojtyła, 1994, p. 201). It implies, what has already been proved, references to epistemology, because truth in an ethical meaning is its derivative. John Paul II was aware that human conscience may be distorted, "*is not an infallible judge; it can make mistakes*" (John Paul, 1983, p. 62). Conscience belongs to subjective order and as such is an expression of human subjectivity. Nevertheless, conscience may also function in accordance with objective truth when by the act of cognition the subject becomes dependent on truth about the real value of people and things which he experienced. Therefore, functioning conscience becomes self-dependent on the accepted truth (Styczeń, Merecki, 1996, p. 46). In the encyclical *Veritatis splendor* the Pope stated directly that in order to have "good conscience" man must search for the truth and judge according to it because „In any event, it is always from the truth that the dignity of conscience derives. In the case of the correct conscience, it is a question of the *objective truth* received by man; in the case of the erroneous conscience, it is a question of what man, mistakenly, *subjectively* considers being true. It is never acceptable to confuse a "subjective" error about moral good with the "objective" truth rationally proposed to man in virtue of his end, or to make the moral value of an act performed with a true and correct conscience equivalent to the moral value of an act performed by following the judgment of an erroneous conscience" (John Paul II, 1993, p. 63).

In social practice accepting the truth as the most significant value as a criterion of ethical evaluation and assessment will be connected with the rejection of egoistic attitude, both in a personal and collective understanding. No interest, neither own nor collective, can become more important than universal truth. What does the acceptance of truth mean on international level? „Restoring peace means in the first place calling by their proper names acts of violence in all their forms. Murder must be called by its proper name: murder is murder; political or ideological motives do not change its nature, but are on the contrary degraded by it. The massacre of men and women, whatever their race, age or position, must be called by its proper name. Torture must be called by its proper name; and, with the appropriate qualifications, so must all forms of oppression and exploitation of man by man, of man by the State, of one people by another people. The purpose of doing so is not to give oneself a clear conscience by means of loud all-embracing denunciations - this would no longer be calling things by their proper names - nor to brand and condemn individuals and peoples, but to help to change people's behaviour and attitudes, and in order to give peace a chance again” (John Paul II, 1980).

The acceptance of truth in the field of international politics will be then connected with the rejection of the manner of thinking which assumes that the most important value is collective (ethnic, national or state) interest which “sanctifies” the application of all the means in order to achieve it. The subordination to truth in international sphere is reduced to its moralization. It excludes the justification of the application of the rule of the stronger one which imposes searching for just solutions on one or many parties. Moral and peaceful world which should be the aim of mankind is the world subjected to truth. It shows the essence of humanity overcoming the prejudices and suspicions. Searching for objective and common truth about man causes the formation of “peaceful people”. Falsity and lie – the former being an epistemological category and the latter – an ethical one – lead to violence and wars. Untruth is the contradiction of peace. The Pope believed that any form and on any level expressing lack, rejection and contempt of truth, and so a lie, incomplete or twisted information, biased propaganda, the manipulation of mass media is like that (John Paul, 1980). John Paul II noticed that violence, a phenomenon characteristic of 20<sup>th</sup> century interpersonal and international relations, is “rooted in lie”. Those who refer to it attempt to justify their practice by any means trying to convince the public opinion in their countries and abroad of the necessity of the use of violence. By means of skillful propaganda, manipulating facts, they conduct dishonourable acts (John Paul II, 1980).

According to the Pope, above all, the source of untruth is an erroneous notion of man. False premise on which it is based on disbelief in man, in his greatness and at the same time the necessity of liberating from moral evil. Karol Wojtyła opposed the doctrines and ideologies which propagated the opinions on the role of violence in the development and progress of mankind. Moreover, he was against so-called realistic theories of international relations which analyzed international relations from the point of view of power relations. He claimed that in fact they justify the use of violence and cause the formation of “dirty logic of violence.” This intellectual unrest does not lead to the establishment of peaceful world order, however not by peaceful means – because peace or rather *quasi*-peace can be achieved by means of intimidation, cold calculation of power or imposition. That is why John Paul II propagated the restoration of truth which will liberate man and the world from violence and revive the faith in the power of peace. Therefore, it is necessary to radically break off from the lie spreading in the public sphere as well as in international relations even if it is justified by noble intentions. However, it is crucial “To promote truth as the power of peace means that we ourselves must make a constant effort not to use the weapons of falsehood, even for a good purpose. Falsehood can cunningly creep in anywhere. If sincerity - truth with ourselves - is to be securely maintained, we must make a patient and courageous effort to seek and find the higher and universal truth about man, in the light of which we shall be able to evaluate different situations, and in the light of which we will first judge ourselves and our own sincerity. It is impossible to take up an attitude of doubt, suspicion and skeptical relativism without very quickly slipping into insincerity and falsehood. Peace, as I said earlier, is threatened when uncertainty, doubt and suspicion reign, and violence makes good use of this. Do we really want peace? Then we must dig deep within ourselves and, going beyond the divisions we find within us and between us, we must find the areas in which we can strengthen our conviction that man's basic driving forces and the recognition of his real nature carry him towards openness to others, mutual respect, brotherhood and peace. The course of this laborious search for the objective and universal truth about man and the result of the search will develop men and women of peace and dialogue, people who draw both strength and humility from a truth that they realize they must serve, and not make use of for partisan interests” (John Paul, 1980).

The truth in social and philosophical thought of the Pope has not only an epistemological and ethical aspect but it also has anthropological meaning, what bring some consequences for the world and man. The truth, John Paul II stated, is also the truth about other man. Readiness to

accept this truth leads to the understanding of the other person and this is connected with the rejection of aggression and hatred for the benefit of cooperation and love. Through the truth about the other man one discovers so-called good sides, that is proper and morally good aspects of his activity. At the same time, we observe the demonstration of what causes moral evil and what needs to be improved. Truth, however, brings people closer (John Paul II, 1980). It leads to forgiveness and reconciliation both in interpersonal and international relations. The Pope thought that forgiveness and reconciliation are out of question without the reference to truth. They do not oppose the truth, on the contrary they demand it because the evil requires to be recognized and if possible compensated. Referring to the experience of history John Paul II indicated so-called commissions of truth or international tribunals aiming to establish facts as the fulfillment of a requirement, which is involved in forgiveness and reconciliation (John Paul, 1997).

The opinions of the Pope John Paul II are not an idealistic utopianism due to the fact that they entail effort which is necessary to make in the process of inquiry the truth about the other man. He stated in one of his addresses on International Day of Peace: The path from a less human to a more human situation, both in national and in international life, is a long one, and it has to be travelled in stages” (John Paul II, 1980). However, the representatives of left wing and liberal parties do not often agree with the Pope’s interpretation of truth in social and international relations because for them the subordination to truth means in fact the enslavement by truth. They treat it as an attack on freedom, which is the most essential value of liberal society, every social notion accepting the existence of an absolute and universal truth (Pieronek, 2005, p. 119-124). They often perceived the Pope as a person with authoritarian features negating absolute freedom for the benefit of absolute truth. It certainly results from misunderstanding and ignorance or only a selective knowledge of the philosophical and social thought of the Pope. For Karol Wojtyła the truth was a certain idea which man should strive for. The imperfection of human nature causes that the cognition of objective truth requires great intellectual effort and readiness to intellectual openness towards the truth. Therefore, many people are simply satisfied with the subjective feeling. When the feeling does not come beyond the private sphere it may turn out to be harmful only to the subject himself and to the circle of people with whom this subject interacts. However, it often occurs that subjective convictions enter public sphere and are propagated as absolute truth. Such a way of thinking characterized and still characterizes totalitarian systems and ideologies which from make an ultimate truth from ”their own” truth. It is al-

so characteristic of every kind of interest groups which are convinced about the superiority of their own collective interests over the interests of others and over common good. According to the Pope, conflicts and tensions result from such an attitude. However, their source is not absolute truth but subjective truth which claims to be the only absolute truth. Various types of conflicts of interest can be reduced to the conflict of subjective truths. That is why Wojtyła's understanding of relations between truth and freedom neither negates nor depreciates the other value but somehow it makes the first a basic rule of social life, also of interpersonal relations on the international level and therefore it makes it *conditio sine qua non* of freedom which the Pope defined as true (Dulles, 2007, pp. 5-12).

The Pope John Paul II believed that the truth enlightens the mind and shapes the freedom of man (John Paul II, 1993: *Introduction*). He referred to the tradition of the New Testament in which the freedom of man is implied by the acceptance of truth and the subordination to truth: "You will get to know the truth and the truth will set you free" (J 8, 32). It will liberate from the lie, moral evil, egoism and etc. It is an attitude characteristic of the intellectuals raised in the spirit of classic philosophies and connected with the trend of philosophy deriving inspirations from religious and theological traditions. They think that "There is no freedom in the liberation from the value of truth [...] The more truth there is among us, there more freedom there is" (Tischner, 2011, p. 166). In case of Karol Wojtyła this ascertainment has also a reference to the international reality where peace is conditioned by the acceptance of truth as a rule governing the relations between the entities of international relations. The truth, especially the truth about human nature, about the rights of a person and community and the truth about the breach of them, will cause the elimination the injustice and evil in international relations, will free the world from such evil as wars, tortures, terrorism, abuse, imperialism, neocolonialism, totalitarianism fundamentalism and so on. As Maciej Zięba, a Dominican monk dealing with social issues, rightly noticed: "in John Paul II's perception, the truth as well as freedom have both anti-totalitarian character" (Zięba, 1997, p. 42). Therefore, the truth has liberating properties, also on the level of international relations.

### **Dialogue as a method of truth and peace**

Karol Wojtyła is recognized as a leading representative of philosophy of dialogue. He read into the sources of dialogue in human nature. Therefore, philosophy of dialogue has become a part of anthropological reflection and consequently has been moved shifted to the foundations of social

thought and dialogue has been recognized as a tool to implement social and international peaceful order. The author of *Person and Act* thought that despite the man's tendency to evil, he carries a great potential of good and trust and a dialogue jest, above all, a method of overcoming own weaknesses (Jędraszewski, 2004, p. 84). This ascertainment has a reference to both a personal existence and the life of community. Owing to a dialogue, what is "true and right" is extracted in the interpersonal relations (which can also concern international relations) "leaving aside purely subjective attitude or approach" which leads to tensions and conflict between people. "Truthfulness and rightness" always "deepen the person and enrich the community". A dialogue is not about the avoidance of conflictogenic phenomena but about the depiction of what is "true and right" in people, what can be the source of good for them (Wojtyła, 1994, p. 325-326). The essence of a dialogue in Wojtyła's understanding emerges from this anthropological thought. It is not the dialogue whose aim is to reach a compromise between quarreled parties which will satisfy them to a greater or lesser extent. Because "Truth is something different than an agreement to recognize something as truth" (Dębowski, 2003, p. 74). It is a dialogue whose aim often hard to realize is truth. It is situated in the heart of the authentic dialogue. The parties of a dialogue should not only be open to consensus but to the achievement of subjective truth which is the only guarantee of a real and permanent social and international peace. As the Pope felt: "Truth has no fear, either, of honourable agreements, because truth brings with it the light that enables it to enter into such an agreement without sacrificing essential convictions and values. Truth causes minds to come together; it shows what already unites the parties that were previously opposed; it causes the mistrust of yesterday to decrease, and prepares the ground for fresh advances in justice and brotherhood and in the peaceful co-existence of all human beings" (John Paul II, 1980).

Therefore, a dialogue is to lead to an inner revival of man, which is to the acceptance of objective truth. It must be conducted with the preservation of respect for conscience (Górzna, 2008, p. 61). It cannot lead to the attempts to breaking or bending someone's conscience in order to enforce own, subjective opinions expressed on the issue of the subject of the dialogue. The Pope suggested patience and gradualness in reaching objective truth. The truth discovered in a dialogue was not supposed to crush the parties of the dialogue. It is a particular preparation to the acceptance of truth and so its participants should respect one another, respect cultural, social, economic and civilizational differences, another emotional, ethical, esthetical and religious sensitivity. A dialogue should reveal the truth with peace and respect for mind and conscience of others (Jędraszewski, 2004,

p. 86-87). A dialogue leads people to a mutual acquaintance which eliminates tensions and conflicts replacing them with “the bonds of peace”. The cause of many conflicts is a lack of proper understanding of other party, existing prejudices and stereotypes, which can be overcome owing to a dialogue. Opening towards dialogue and dialogical inquiry of objective truth go beyond ideological and cultural divisions due to the fact that a dialogue enables people to associate with each other as members of one human family, realizes a particular metaphysical personal communion in which the subjects of a dialogue meet. Ultimately it contributes to the establishment of the culture of dialogue which is the foundation of a postulated “civilization of love”.

According to John Paul II a real, authentic dialogue requires the fulfillment of the following conditions from the parties engaged:

1. Being focused on searching for “*what is true, good and just*” for every man, for every group and every society which is a party of a dialogue
2. Expressing openness and readiness to the acceptance of arguments of every party – the subjects of a dialogue. Each of them has a right to express their own opinion but it is also required that they listen to the opinions and the assessment of the situation of the opposite party. The Pope recommends not only listening but also authentic listening and analyzing or empathizing in what the other party has to say about its rights, acts of injustice which were experienced and finally about the suggestions on how to solve the disagreement
3. Accepting and respecting mutual differences, subjectivity, reasonability, freedom and responsibility, what will prevent the objectification of any party of the dialogue
4. Searching for “what is and *will remain common for people*”, despite tensions, disagreements and conflicts. The parties of dialogic solution of disagreement should recognize the neighbours in themselves, appreciate mutual contribution and effort and share the responsibility “towards the truth and justice”. They should search for ways of a fair reconciliation “skillfully combining a just defense of interests and honour of a party they represent, however with a fair understanding of rights of the other party as well as the requirements of good common for both parties”
5. Accepting mutual dependencies in the field of economy, politics and culture
6. Searching for “good with the use of *peaceful means*”, that is with the use of negotiations, mediations and arbitration

7. Being free from utilitarian aims, from any arbitrary judgments (John Paul II, 1983).

## Conclusions

In the contemporary world often defined as „post-modern” the devaluation of truth has occurred. Truth in its ethical and social dimension started to be treated as utopia on one hand, contrasting it with political “realism”, *raison d’etat* or particular group and person interest, and on the other hand as a danger leading to authoritarianism and totalitarianism constraining the freedom of an individual, what is supposed to constitute a superior value.

Paradoxically however, both these approaches so different from each other in a political and axiological sense, through the rejection of the principle of truth in social and international relations cause the propagation of something which may be called “total truth”. In fact it is subjectivism raised to the rank of an absolute, constituting the only right doctrine.

The consequences of this seem to be unequivocal: the depreciation of human dignity, injustice in social and international relations, social exclusion and finally social and international conflicts. The Pope John Paul II seemed to notice the threats resulting from the rejection of truth in society and international relations. Therefore, he devoted many of his reflections and contemplations to truth in its esthetic and social dimension. Consequently it is treated by him as a *conditio sine qua non* of peace.

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## PRINCIPLE OF JUSTICE: ITS CULTURAL-RELIGIOUS AND SOCIAL BACKGROUND PREMISES

Mária Kardis

### Introduction

In order to understand the cultural–religious context of the principle of justice, it is necessary to point out its biblical conception. In the Bible, justice is one of God’s fundamental attributes and remains man’s ideal. All biblical authors are convinced that God is just and permanently acts justly the manifestations of which are: the protection of Israel; care for its freedom; liberation from enemies and, predominantly and above all, salvation from the slavery of sin. Man takes part in God’s justice not based on his own deeds but thanks to God forgiving his sins (Psalm 103:14n). Man’s justice, in conformity with the ideal of God’s justice, means obedience of Divine law and, at the same time, sensitivity towards the problems of another who needs help.

In the context of the contemporary era which is more and more characteristic of increasing social and economic inequality in the world (a contrast between rich and poor countries, social differences within countries), solidarity should be the first and foremost value connected with the value of social justice which does not only mean giving the poor what is left but, mainly, helping by getting involved in the process of civilisation and economic development.

### 1 Concept of justice in the Jewish tradition

Justice (Hebrew *šedeq*, *šedāqāh*, Greek *dikaioσynē*, Latin *iustitia*), together with covenant or being chosen, is among the most important terms in the religion of Israel and the Bible as such. Presumably, the term *justice* is derived from an Arabic root meaning “to be direct”, which gives the impression of a deed conforming to a certain norm. In the Bible, this term is understood in a very broad way and it would be difficult to translate the Hebrew or Greek word using a single word. It not only determines a criterion of the relationship between man and God but also a criterion for mutual interpersonal relationships and is even the measure of

man's approach to animals and the environment. It is the highest life value which on everything stands and falls. Contemporary professionals document the broad spectre of meanings, emphases and directions through the biblical *šedeq-šēdāqā*: spiritual health, ties in a covenant, fair actions, fair community, order, establishing order, redemptive order, prosperity, gift of salvation; devotion to community, Yahweh's deeds, his loyalty to the covenant, relationship; law, legal and soteriological procession of the court, amnesty and salvation, world order, establishing order by Yahweh, Yahweh's deed of salvation, which brings order, Divine covenant deed and direction required by the contract, Yahweh's actions towards Israel, towards individuals in a crisis, his deed of salvation in future; legal order, regulatory order in society, salvation-giving and liberating order. A great number of such scholars emphasise the idea of salvation-giving actions directed at the people of Israel and defenceless individuals – the poor, the oppressed, the widowed or the orphaned (Freedman, 1992, 724-726).

In Judaism, justice is existential and saves all human relationships and social institutions (Horyna & Pavlincová, 2003, p. 192). In the Bible, the notion of justice does not usually refer to a legal context, i.e. to give everyone what they deserve; it is rather a legal notion of the effort for holiness, right actions towards God and people (Hrbata, 1993, p. 213). A fair man is not someone exceptionally religious, but he who stands on the side of the law, i.e. at God's side, which means he strives for holiness (*Výkladý ke Starému zákonu I*. [Old Testament Interpretations], 1991, p. 288). The aim of Jewishness is to be fair; every man is required to be just. Nobody can be forced to love; however, everyone should be fair. Therefore, ideally, a Jew is fair (*šadik*). In order to become fair, he has to live by the values of Jewish ethics. Jewish life is directed by *mitzvah*, i.e. a religious law which blesses man. This holiness must be created. Mitzvahs should purify man's character and lead him to such intellectual perfection, which implicitly results in the cognition of God. Many mitzvahs engender a healthy respect to other beings and the world as a whole. Deeds by mitzvahs are not to be carried out by God, as He is perfect. Regulations are merely here for man (Lancaster, 2000, pp. 94-96).

How should justice be understood though? Does the Hebrew notion of justice have anything in common with the contemporary understanding of justice? To what extent are they equivalents and are they equivalents at all? Many have tried to explain the notion based on presumptions of the western mentality determined by its judicial understanding of justice, as good actions of man in compliance with a certain absolute moral norm, as a manifestation of authenticity standardised against the absolute idea of

justice. From this absolute norm, absolute laws and requirements were derived. However, one must ask what determines the absolute norm in the Bible. For one, the answer to this question is not to be found in the Bible, as an analysis of texts regarding the occurrence of this term proved that its use is not associated with any norm. In ancient Israel, one's actions were evaluated against a norm; however, this only applied to social relationships in which partners should prove themselves. The way this term is used in the Bible proves that it expresses and labels a relationship between two beings and not an object and an idea. Justice understood in the context of Hebrew conception is unheard of for the western mentality and also different in its common use. The failure to understand this meaning of the word in the present day might mainly be caused by viewing it in a legalist way (Von Rad, 1986, pp. 291-292).

The moral understanding of the term *justice* is much broader and stands for everybody being given what they deserve, even if the issue in question is not clearly given by law or convention. In natural law, the duty to maintain justice means sustaining equality in all changes and divisions.

In a religious sense, there are few terms expressing the idea of justice in comparison to the Bible. Nevertheless, it is in this language where two lines of thought can be perceived – (1) Justice from the perspective of judgement; and (2) Justice from the perspective of mercy.

The first line views justice from the perspective of judgement. First, the notion of justice evokes the idea of legal order. The judge pursues justice by making sure the convention or law is respected. In this line, it is possible to differentiate two aspects – human justice and God's justice. In it, justice is considered a moral virtue achieved by keeping all Holy commandments. For man, God is the model of justice first in His judicial role, manifested in leading the whole mankind and, consequently, in the role of the punishing or rewarding, depending on man's deeds. In ancient Israel, before the siege of Babylon, it was prophets who were called upon in order to point to the moral and religious dimensions of justice for the chosen nation as well as for the nations around. This did not merely concern breaking the law or convention; it was also an offence against His Holiness, Yahweh. This is why any offence or injustice entails more than just criminal sanctions; it is the reason for God's punishment. Prophets in their teachings emphasised that he is just who befits certain laws (cf. Jeremiah 22:3n; Hosea 10:12).

The second line of the biblical way of thought gives justice a broader sense and a direct religious value, as it presents God who applies his justice in his creation. Man's integrity is always a mere echo of God's sover-

eign justice, by which God leads the universe and uses it to save his creatures. Thus, God's justice which man achieves by his faith is, in the end, identified with his mercy. Just like mercy, justice also sometimes denotes God's attribute, another time a particular gift of salvation presented by His generosity. Such extension of the regular sense of the word *justice* can clearly be perceived in the translations of the Bible, but this hierarchical speech does not exceed the borders of technical speech in theology (Von Rad, 1986, pp. 291-294).

It follows that, from the biblical viewpoint, Divine justice is God's loyalty towards his community or the covenant manifested in his salvation-giving actions. It is understood as loyalty that one can fully rely on. It, thus, represents Divine redemptive acts (Porsch, 1993, p. 147).

It must be said that the interpretation of Divine justice has not always been unified and one comes across opinions that regard it as God's attribute. Justice exhibited by God is proved in his determining, or adjusting, man's punishment concordant to his sins (Romaniuk, 1983, p. 125). The idea of Divine justice, rewarding or punishing, in this sense is not to be found in the Old Testament. The cultural-social background for the biblical term is provided by the context of ancient cultures of the Near East and is predominantly derived from the notion of justice in ancient Mesopotamia, i.e. justice related to order established through divinity. The manifestation of justice demarked by giving people what they earned through their own deeds; and, at the same time, reinstating the status it had in the community through Divine order. What was known was rewarding and distributive, as well as liberating, justice, manifested in the care the king showed the poor, the widowed, the orphaned and when declaring amnesty.

It is necessary to point out the fact that the biblical understanding of justice is very broad; it is an expression of the relationship between God and man as well as among people (Psalm 50; Deuteronomy 24:13; Jeremiah 9:24; 22:3) (Nardoni, 1707). These two types of community are, to a certain extent, separate levels independent of each other. That is why it could be assumed that there were two notions of justice – religious and profane. Although, at present, they are perceived separately, originally they overlapped. God's Commandments were not some absolute law but salvation-giving life-regulating gifts. "*The just Lord is in the midst thereof*" (Zephaniah, 3:5), why is why Israel was considered a nation which God did not merely leave in the world of values – ideas but is also present in its history. God's Commandments are worshiped as just and salvation-giving commandments that are part of great Divine justice. A fair deed is an act that corresponds to the requirements of a given relationship and, at

the same time, leads to peace in the community. That is why, in the legal sense, it is related to the law; however, not only as a formal legal norm; it also emphasises the ethical character of the deed which must be supported by the legal system, as it serves the good of the whole community (Proverbs 14:34; Deuteronomy 1:16; Amos 5:7) (Von Rad, 1986, pp. 292-294; Douglas, 1996, 963). Justice is actually a principle for the distribution of good and evil. This must, however, be preceded by determining what is good and what is evil. In this sense, God can be considered just, provided he uses the Ten Commandments as the primary measure. The Commandments, God's requirements of justice, are expressed as invitations and commands. In relationship towards people, God expresses Himself in promises and commandments. The commands in the Decalogue are preceded by the announcement "I am your God" (Exodus 20:2) from which the commandments follow and have meant a certain moral minimum for mankind ever since (Brumlik, 2012, pp. 35-37).

Justice means the fulfilment of requirements within a relationship, be it a relationship with people or God. Every man is in a network of relationships. Each of these relationships brings about specific requirements, whose fulfilment is created by justice. The requirements can differ from one relationship to another. Justice in one situation can be perceived as injustice in another. Moreover, there is no norm for justice outside the relationship itself. When God or man fulfils the requirements assigned by the relationship, he is just. Mutuality arises that leads man to amazement over God's care for him.

It is the highest life value on which everything is based, which is the keystone of the whole life of a community as well an individual. With regard to this, a chronological development of this notion in individual Old Testament and New Testament traditions must be presented.

In ancient Israel, the idea of justice was related to God's inherence in the history of Israel, it was his salvation-giving justice that freed them from Egypt, by which the promises given to Israeli predecessors were fulfilled. This liberating act by Yahweh, the Exodus, became a paradigm of salvation, as it guaranteed God the Creator in the history of the chosen nation. That was why Israel with its hard situations turned to God with a plea to be liberated (cf. Isaiah 51:9n; Psalm 74:11n). The notion of liberating justice in the Old Testament is expressed by related terms: justice (*mišpat*), rightness (*sedeq*, *sedeqah*), kindness (*chesed*), loyalty (*'emet*), mercy, and goodwill (*chen*).

The liberation of Israel as an act of justice and Divine mercy became the keystone of interpersonal relationships in Israel, supported by the law in the Book of Covenant (Exodus 20:22-23:33). The commandments that

God gave the chosen nation are fundamental for the mutuality between the nation and God. It is based on them but is not replaceable. It requires some kind of motion necessary to meet God, a motion “*in order to place oneself at the level of God, meaning ‘face to face’ with faith that will, again, create the mutuality of the contract*” (Iskrová, 2007, pp. 21-22).

In Deuteronomy, this approach became the basis of care for the orphaned, the widowed, the poor and Levites, so that they could also be part of the country’s riches (Nardoni, 2001, p. 1707). This Old Testament book includes all legal regulations regarding religious-social life of Israel, which guaranteed efficient safety and integrity for the nation as well as every individual (Hays, 1992, p. 1129; Balabán, 2005, pp. 26-27).

*Prophet tradition.* Prophets were the nation’s consciousness and their influence on the social life of Israel had been increasing since the 8<sup>th</sup> century BC, when class differences significantly deepened. Prophets very clearly predicted the catastrophe of ordeal, as the decline of society had been greater and greater, institutions and regulations were not respected anymore. In the period when prophets were present, justice started to be, from a legal viewpoint, generally perceived as something that would stand its ground before any tribunal or judge, which corresponded with the Testament and social order. However, the meaning of justice in the Old Testament is yet much deeper. Especially the prophets of the 8<sup>th</sup> century (Amos, Hosea, Proto-Isaiah, Micah), who strongly opposed injustice, bribery, oppression and blackmail, the notion of justice acquires a meaning close to grace and mercy. Should justice be established in the world, God has to help those who bear injustice. Justice, thus, often means God’s help, liberation and salvation. God brings His justice by rescuing the needy from misery, he leads one out of anxiety, he listens to one’s prayers, he gives generously and provides for the poor; in short, he fulfils the promises he gave people with whom he made a covenant (Novotný, 1992, p. 954).

Justice also starts to express the idea of help for the poor and oppressed, as well as the concept of alms (Daniel 4:27; Amos 5). It was prophets who were the main supporters and protectors of the poor and oppressed (cf. Amos 2:6n; 5:21-24; Hosea 4:1-3; Isaiah 1:16n). The main criticism of the pre-exile prophets (such as Amos; Proto-Isaiah) pointed out social injustice in three aspects – the appeal not to do bad but good (the appeal of purification) as well as the protection of the oppressed and needy; the topic of social justice and law. Their proclamations sometimes had the nature of advice, warning and sometimes of judgment and punishment. The criticism of worship and social injustice is overtaken by the early prophets, for instance Jeremiah, who, with regard to the offences of

Jerusalem's inhabitants, predicts the town's destruction (Jeremiah 7). However, in the history of Israel it is obvious that God's punishing justice was not the final act, as the God Yahweh continued to take the initiative for the sake of Israel's salvation from an attack by the enemies in order to show his salvation-giving justice.

That is why Isaiah of Deuteronomy in his declarations on justice refers to salvation as well. As late as this prophet, justice becomes a synonym of salvation (*jēsā*) "*You heavens above, rain down my righteousness. Let the earth open wide, let salvation spring up, let righteousness (sedaqah) flourish with it*" (Isaiah 45:8; cf. 46:13; 51:6-8). A prophet's prayer is more than just asking for Israel to be freed from the captivity by Babylon; it prays for blessing, happiness, and justice, which will come from above just like the rain that makes the ground fertile. Therefore, the fruits of God's justice will save the ground, as the truth, salvation, and justice are the Messiah's goods (cf. Isaiah 61:1n). It follows from the above that the notion of liberating Divine justice is one of the key terms (Schnelle, 2005, pp. 455-456; Vawter, 1996, pp. 196-197; Slivka, 2007, pp. 236-237).

It is important to point out that prophets considered social problems theological; they were thought of as manifestations of dismissing Yahweh. That is why a social and religious change by means of conversion, not via a reform or a revolution, was the goal. As long as the nation does not turn to God again and does not live in true faith, no change will occur in the public life of the Israeli community. J. Leščinský's statement is clear: "*Thus, one cannot be astonished by the fact that, facing the impossibility of realising a different plan, prophetic predictions are moved to other unexpected fields. Moreover, there is something that could be named eschatological hope, in which a future solution was implicitly expected, the return of the Holy Kingdom and what is called the doorstep to the Messiah question in the Bible. The recess of prophets to the field of this eschatological future proves why their prophecies lack a strong revolutionary element as well as a naive tendency to some utopia and recalling withgone anachronistic times*" (Leščinský, 2007, pp. 98-99).

*Sapiential tradition.* In the Book of Psalms and Proverbs, justice is thematically connected to Jewish morality, which is not identified with ethics but wisdom (*chochmá*). Wisdom is the matron of all goods (Proverbs 8:21), life and happiness (Proverbs 3:13-18; 8:32-36; 11:18), wealth and justice (Proverbs 8:18n). Thanks to it, man builds his relationship with God (7:27n). Man will not benefit from any worldly treasure; justice, however, will liberate him from death (12:28). Here, justice is identified with life (11:18); its impact is also political and concerns the whole na-



tion. “*Justice raises the nation; sin, however, is the nation’s shame*” (14: 34) (Leon-Dufour, 1994, p. 463).

In the Book of Psalms, the term *the poor* (in Hebrew *‘anawim*; which is a plural adjective derived from *anh*, designating not only the poor, but also humble, modest, moderate, non-prominent; those who succumb) does not only label those who are poor but those who are humble, modest, moderate and those who succumb (Koehler, Baumgartner, Stamm, 2008, 849). These are those who, on the one hand, are oppressed and confess injustice from others; on the other hand, they experience salvation-giving Divine justice with deep trust and gratitude. All those who were, from the socio-economic viewpoint, oppressed by the superiors of the then society were considered poor. They had no means of defending themselves from the rich, whose goal was to accumulate power and wealth in their own hands. Their only salvation and comfort was their faith in God (cf. Psalms 35:10; 37:5-6). Three dimensions of poverty can be distinguished: ecclesiastical poverty; physical poverty and poverty as the realisation of one’s own limitations and the need for God’s help. In the Old Testament, the opposite of the poor were not just those financially well-off, but also those who believed they did not need God and his help – the arrogant and the proud. In the history of Israel, this term is formed gradually; there are hardly any mentions before the captivity. After the captivity, the term “the rest of Israel” gained importance; during the persecution, it was less and less associated with certain tribes of Israel and expressed such characteristics as “religiousness” and the “way of life” (Psalms 149:4; cf. Isaiah 49:13; 66:2). Religiousness was often related to church (Varšo, 1998, pp. 181-183).

Contrariwise, The Book of Job presents poverty as a great problem of injustice (Job 24, 2n). Yet another perspective is presented in the Book of Gospels, in which poverty and social injustice are actually innate to the earthly world (Gospels 5:7-8) (Nardoni, 2001, pp. 1707-1708).

From the above it follows that, for Jews, the source of justice is the Testament. Justice, however, does not mean absolution; which determines the difference between the Hebrew Bible and the teachings of Paul the Apostle on absolution. He who maintains the Testament is just, as he lives his life in accordance with God’s will; thus, he needs no absolution (pardons) (Iskrová, 2012, pp. 53-54).

## **2 Justice in the Christian (New Testament) tradition**

In the New Testament tradition, the teachings on justice are a theological continuation and, at the same time, an expansion of justice present in the Jewish tradition (Hays, 1992, p. 1130). It is a continuation of justice

as a concept of the relationship distinctively formed in the Old Testament and the Jewish tradition and became the keystone for the Greek notion of justice as a category without teaching on virtues. The New Testament highlights Divine salvation-giving justice, which liberates man from the power of this world, i.e. from sin and death and leads him to the Holy Kingdom. The Holy Kingdom that is present here on Earth in the person of Jesus Christ, which means that man, in his earthly life, participates in the Holy Kingdom but will only reach eternal salvation to the fullest in the eschatological Holy Kingdom. The authors of the New Testament emphasise the formation of a new community, which anticipates values of the eschatological world. Christians are those who follow God, His compassion and mercy over the needy, which is manifested in the duty of mutual service, active love towards the needy (Matthew 18:32-33). Following God revives their status, to which they were called in God's plan. The prompt to service results from the model of Christ himself (Matthew 25:40n).

Jesus Christ refuses formalistic justice; he warns his disciples against it and announces greater justice: “[...] *That except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven*” (Matthew 5:20). Greater justice of disciples means the fulfilment of God's will in the name of love. Equally to the late books of the Old Testament, as well as in Jesus's Judaism, justice is, in this text, understood in a religious-ethical sense, not as God's gift. It stands for actions in accordance with God's will expressed in the Testament. It refers to such actions in which God finds His liking, ethical-religious genuineness of man in the face of God. Constant adherence to God and His will is essential reality (cf. Matthew 6:1.33) (Kudasiewicz, 1996, pp. 209-211; Nardoni, 2001, pp. 1707-1708).

Paul's theology emphasises the idea of salvation-giving justice, which removes differences in class, race, gender, and nationality, which means that these differences do not decide on the affiliation to a community. Justice understood in this way, identified with love and moral perfection, is the product of God's mercy and the fruits of faith in Christ (Galatians 3:28). Removing all barriers is part of the order established by means of new creation, which is the work of Jesus Christ. However, the proof of God's justice does not only lie in the care of the needy, those who experience unfair oppression, but in the completion of God's intention, so that every man, through faith in Jesus Christ, has an equal part in the image of God. Since man who accepted christening is a new creation and starts a new existence in Christ (2 Corinthians 5:17; cf. Galatians 6:15). To be christened in Christ means to identify with him, as often pointed out by

Paul. Whatever concerned Jesus's life, concerns our own. He expresses it in the words "with him", "with Christ": *"Therefore we are buried with him by baptism into death [...] so we also should walk in newness of life. For if we have been planted together in the likeness of his death, we shall be also in the likeness of his resurrection. [...] our old man was crucified with him [...], now if we be dead with Christ, we believe that we shall also live with him"* (Romans 6:4-8; cf.: Galatians 2:19; Ephesians 2:5-6; 3:1.3-4; Colossians 2:12-13.20) (Gnilka, 2002, pp. 114-115).

Paul announces a new status of man, a new universal era in the history of mankind that starts with Jesus Christ. His mission is the pursuit of God's justice through which salvation is offered to the whole mankind. This, again, emerges from God's initiative and He renews a correct relationship between Himself and mankind. The Gospel, announcing Jesus's actions, suffering, death, resurrection and, especially, the effects of these events for man, is a manifestation of God's power *"unto salvation to every one that believeth"* (Romans 1:16). Therefore, all people can be liberated from sin and pardoned through mercy based on belief in Jesus Christ as a manifestation of God's justice (Schnelle, 2005, pp. 468-471). In his letters, Paul emphasises the idea of God's justice, which is of crucial importance for his theology.

Apart from this, one can also come across a different perception which recognises a pardon of the sinner and is part of Jesus's teachings (Luke 18:9-14). This can mostly be found in the writings of apocalyptic Judaism, such as in the Kumran. The order of unity considers it as a pardon by God. In God's hands lies the perfection of man's life and, through his justice, man's sins will be extinguished. It is from the source of God's justice that man is provided the right, even though he is a member of sinful mankind, a crowd of arrogant bodies. Even when man staggers, he will be helped by God's eternal mercy. Should he fall, his pardon lies in God's justice. His pardon comes through God's mercy. Paul keeps to this conception of God's justice and understands it as compassion for the apologetic sinner, as a manifestation of God's mercy (Porsch, 1993, 148). Benedict XVI explains the above fact as follows: *"It is mainly justice based on mercy where man is not he who redresses, heals himself or others. The fact that this "redress" is happening through Jesus's blood means that man is not free from the burden of sin thanks to human sacrifice but thanks to God's loving gesture, who will go to an extreme when experiencing a "curse" reserved for man instead of giving him "blessing" belonging to God (cf. Gal 3: 13-14)"* (Benedict XVI., 2010).

The most detailed elaboration of Paul's theology of absolution can be found in the letter to the Romans and Galatians. Paul first proves general

sinfulness and justifies of God's anger in order to make God's justice prominent: *"But now the righteousness of God has been manifested apart from the law, although the Law and the Prophets bear witness to it, the righteousness of God through faith in Jesus Christ for all who believe. For there is no distinction: for all have sinned and fall short of the glory of God, and are justified by his grace as a gift, through the redemption that is in Christ Jesus, whom God put forward as a propitiation by his blood, to be received by faith. This was to show God's righteousness, because in his divine forbearance he had passed over former sins. It was to show his righteousness at the present time, so that he might be just and the justifier of the one who has faith in Jesus"* (Romans 3:21-26).

From Paul's texts it is obvious that an apostle's perception of justice had little in common with man's distributive, punishing or rewarding justice. Paul uses it to designate God's salvation-giving actions, on which the overthrowing of the reign of sin and the beginning of salvation for sinners depends. This is how God expresses the plenitude of His love towards the sinner. It is love, which is the central fulfilment of God's justice and whose subject is the sinner, unable to rid his sin by himself. That is why justice is rather an act of God's undeserved mercy, bringing sinners worthy of eternal death to salvation. It is unconditional and embracing love, as Christ died for us when we were still sinners (Romans 5:6.8-11). Even when referring to prophets (Romans 3:21), one can see that justice proves God's loyalty to his irrevocable promises (Romans 11:29). God nurtures love towards man even when he surrenders to sin and confirms loyalty to his promises when he extinguishes the sin and saves the sinner (Boublík, 2001, pp. 125-126; Porsch, 1993, pp. 148-149).

Paul strongly emphasises general expansion of God's justice manifested in Christ. All have sinned but they were all freely absolved by Christ's blood. The crucified Christ is likened to a compassionate soul propitiated (Romans 3:25). He becomes a new place where God's mercy is manifested and where the sinner is ultimately reconciled with God. No animal blood is spilled, but the cathartic and reconciling blood of Christ. In Christ and his death, sins are forgiven and mankind starts to fulfil a new, eternal covenant with God. The apostle uses metaphorical terms to describe how God's mercy is manifested through Jesus Christ. These manifestations are: absolution, redemption, reconciliation, liberation, forgiveness of sins, new creation and mercy.

Absolution is the first manifestation of God's justice as a consequence of which the sinner is declared innocent; he acquires the status of innocence. Its meaning is the exact opposite to condemnation. To condemn means to declare someone guilty. Absolution is, thus, ridding one of guilt,

declaring him innocent – just. It, therefore, stands for achieving a true relationship with God. To be accepted by God, to live in his nearness, to be involved in his glory and, by effect, to achieve the goal of human life (Romans 3:23). God now offers mankind this unachievable status that man had been striving to achieve by means of maintaining the law through Jesus Christ. God relates justice to those sinners who believed in him. For Christ's merits, the sinner becomes just. By means of absolution, the quality of life changes considerably. Sin and injustice lose their unshakable power and are replaced by Christ's justice (Romans 3:21-22).

The notion of redemption expresses the same idea. Jesus Christ, in his life, death and resurrection, acted as a relative who, in the Old Testament, played the role of a liberator. Jesus liberated man from the slavery of sin and death and gave him the freedom of God's kinship. The image of reconciliation expresses the removal of sins. The manifestation of mercy – forgiving sins expresses pardoning debts caused by sinful actions (Gnilka, 2002, pp. 109-115).

It must be pointed out that, in the work of absolution, faith plays an irreplaceable role (Romans 3:22-28.30; 4:5; 5:2; Galatians 2:16; 3:26). In faith, God manifesting His justice meets man who needs absolution. The "place" of this meeting is Christ: God's justice is manifested in Christ's death. The subject of faith is Christ on the cross and, in him, faith meets God's justice. By faith, man unifies with Christ and his cross (Galatians 2:19) and by choosing the crucified Christ finds an absolving Father and he is pardoned. Absolution does not depend on faith but God who gives absolution through Christ; He, however, expects one's faith. By one's faith, one's becomes intimate with Christ and God's justice manifested in his death. Faith renounces justice in deeds; however, it requests one to sincere and humble confession of his insufficiency in the effort for salvation (Boublík, 2001, p. 126; Gnilka, 2001, pp. 336-340).

Just like absolution is necessarily linked with faith, so is the gift of Spirit (Galatians 3:2.14). Through faith in Christ, we were marked by the stamp of the Spirit as a payment of our legacy (2 Corinthians 1:21-22; 5:5; Ephesians 1:12-14). The stamp designates possession. Thus, the Spirit in believers proves Holy possession. Believers belong to God. The words "payment of our legacy" also have their great meaning. Payment means an instalment which, for a time, stands for a sum of an agreed amount and guarantees that the rest will be paid as well. Therefore, when man believes, he is presented with the Spirit as a part, a share, in his future life and, at the same time, assurance that he will get the rest in good time (Douglas, 1996, p. 1094).

In this way, one finds himself in an entirely new relationship with God. Thanks to a new covenant through Christ's blood (1 Corinthians 11:25), man becomes "like God". This new kinship with God, described by Paul as "blood kinship" is born through communion with Christ in one Spirit, as "*he that is joined unto the Lord is one spirit*" (1 Corinthians 6:17; cf. Romans 8:9). In this way, man is detached from the material and provisional world and takes part in the life of God Himself. A kinship with God means a new and fundamentally different existential level (Ratzinger, 2008, pp. 60-69; Gnilka, 2002, pp. 125-131).

### **3 The principle of justice in cultural-historical perspective**

In the oldest European thought conceptions from the generic viewpoint, justice was perceived as something determined in advance, something one must identify with. This was equally accepted in the earliest manifestations of the Greek way of thought, as well as in mythological stories where the idea of justice eventually prevailed (for instance, Hercules who, first, merely embodied physical power, then gradually changed to a rival of tyrants and a protector of just things). While other virtues, such as courage or skill find their typical personification in heroes of the Homeric poems, one would only in vain look for an analogical representation of the virtue that was later to be marked as major among all others, that which, according to Aristotle, included all ethical values. However, at the heights of Helenian philosophy, justice reaches its pedestal; it becomes the central element of moral life to such an extent that wisdom or religiousness, as objects of special appreciation, had started to be considered as secondary aspects or derivatives from this unique general virtue. St Tomas explains that justice includes all other virtues, or subordinates them to the common good.

The notion of justice as a general ethical and deontological value is given the highest emphasis in Plato's conception. He refuses such theories that assigned justice a specific role or a special sphere of application. Instead, he sees the essence of justice as a virtue in realisation of one's mission, i.e. in realising one's attitudes and activities which, in their nature, befit every ability or part of one's soul in order to create a harmonic personal whole. He believes that justice should be employed in task fulfilment by every town social body run by good laws. Justice understood in this way is, thus, a virtue which directs and synchronises activities of individuals as well as societies (Spiazzi, 1997, pp. 120-122).

Aristotle is a source of understanding justice and our civilisation; when reading his texts through the prism of a millennium of experience and thought, one can discover almost all that is currently known about

justice. Aristotle, similarly to Plato, predominantly considers justice in its generality, as a total or perfect virtue which is in entire opposition with injustice perceived as universal evil. Such evil embraces all forms of breaking norms and obligations, while justice, understood by and large, includes all virtues (Barány, 2007, pp. 85-86).

The awareness of ancient times as well as its most influential thinkers did not make a clear division between justice and its adherence to moral virtues. These areas gradually diverged. A difference was made between what was forbidden by law under the threat of punishment and what was forbidden morally. However, in the case of an action that broke such a moral prohibition, punishment follows. Legal theories or theories of justice exclusively relate to the legal dimension, the other area maintains reserved to morality (Chovancová, 2009, p. 12-20).

With the advent of Christianity, justice acquires a better sense of integral justice based on a proper relationship towards God, which results from the biblical conception of justice, realised in new man who, through belief in Jesus Christ, achieved absolution. In this way, justice acquires a higher metaphysical and theological character, as it makes the whole life superior to Divine law. It becomes the fulfilment of transcendental omnipotent will of God, in which justice combines with wisdom, kindness and infinite mercy of He who, according to the definition, is love, since He is the perfect being.

The tradition of Christian thought develops the integral value of justice revealed in the Gospel. According to St Augustine, justice lies in the love for the Highest good, God, for whom man acts and behaves according to the requirements of love.

St Ambrose refers to justice as a fertile birth-giver, as it is a virtue, a power, which affects man and leads him to that which is objectively just, to actions by the requirements of evolving reality; i.e. a constantly adapting ideal of perfection, be it in one's personal behaviour, legal regulations of society, or in social life. Even though this ideal in its transcendental perfection cannot be achieved, it is materialised in temporary syntheses, which express goals achieved on the human journey. This is the understanding and justification of the gradual development that happened in law and ethics of man's rights, including those that are better enrooted in the human spirit, such as the right to freedom and ownership. This development of law should not, however, deny its fundamental value, or destroy institutions in which, in the past, it found its social structure, nor should it destroy the forms or the main means by which order in relationships is guaranteed. At the same time, needs should be satisfied and mani-

fold, sometimes opposing, requirements of social coexistence synchronised.

This developmental dynamism is inevitable. Not only does justice not hinder it but it also provides the ethical-legal basis on which it can develop in the sense of true progress, while respecting the dignity of humans. Justice regulates its development in a safe scope, enhances positive solutions to problems brought about by the development, and prompts a search for such outcomes which would truly enrich man (Spiazzi, 1997, pp. 120-123).

#### **4 Principle of justice in the perspective of present society**

The concept of justice as a virtue cannot be separated from the issue of justice in external relationships, such as social framework, distribution of good, valid laws, or political regulations. Naturally, relationships and regulations cannot be just in the same way as persons: they cannot want to be just. They can, however, more or less (or not at all) correspond to one's idea of justice; and this analogy is also referred to as justice in the present day. Although this is an inaccurate term, it has come into use not only in political language but also in ethics and social sciences. This stands for objective, external justice in circumstances, in contrast to subjective justice as one's virtue.

In the area of justice, Piaget places in opposition two types of morality: morality of authority, which is a morality of obligation and obedience and justice is replaced by the content of existing law and punishment is respected. The other type is morality of mutual respect, a morality of good (as opposed to obligation) and autonomy (Bağ, 2008, pp. 108-119). From the viewpoint of justice, this morality leads to acknowledgements of equality, which is the content of the notion 'distributive justice and mutuality'. From solidarity among equals, stems a whole body of complementary and mutually related moral notions, which characterise a rational attitude (Fůrstová - Trinks, 1996, pp. 224-225).

Justice is typical of certain features due to which its requirements raise fundamental and essential demands for the existence and development of man as well as society.

The requirements of justice can be, in principle, enforced; they can be reported and imposed. Every community accepts measures and creates authorities so that the rights of its members can be enforced towards those who respect or break them. Breaking them must, naturally, be sufficiently grave, in order to, when enforcing the law, authorities could be involved (Peschke, 1999, p. 212).



In the modern period, people realised that social structures and institutions are not direct Holy law and are not part of some static order; they are available in order to be formed. Due to this fact, the notion of justice had to be considerably broadened. In a 19<sup>th</sup> century conflict about a social issue, “social justice” became an effective battle slogan of the exploited and their representatives. It was also appropriated from a religious social viewpoint in the encyclic *Rerum Novarum* (1891) and, in a more systematic way requiring social order, in the encyclic *Quadragesimo anno* (1931).

Social and political justice mutually condition, support and strengthen each other. The Church social standpoint did not first view it very clearly. At the beginning, it focused on social issues in a narrow sense and, also, tried to maintain Catholic social movement in “pre-political” space. It was, however, necessary to, in an increasing way, also deal with issues of political order and it has gone so far by the present day that the order of an independent legal state is considered a condition for fair social development (Pukała, 2012, pp. 382-388). The aggrieved have to be able to help themselves; otherwise, they will not rid themselves of their one-sided dependency.

This is also obvious from the conflict of interests and the common good. The interests of individuals and various social groups are limited by interests following from regulations (Bąk, 2009, pp. 71-85). A great number of conflicts of interests are also conflicts for valid regulations and the solution often lies in the change of rules and institutions rather than settling the matter. When distributing material goods, the conflict actually repeats regularly. That is why such institutions that are perceived as fair by all the parties (as they are based on mutuality) are so important. It is just because it is very difficult to say what the content of social justice is that formal political justice is necessary as a possibility for all to take part in searching for the common good (Sutor, 1999, p. 119). The world in which the Church lives and acts is full of dangerous contradictions. These result from divisive and contradictory powers in the contemporary world gaining superiority over those that are unifying and harmonising. The contemporary world is marked by a great amount of injustice (Vragaš, 1996, p. 57).

The modern phenomenon of creating great capital on the one hand and masses of proletariat on the other brought about and, in many cases, pointed out the problem of disproportion between wealth and poverty and its negative consequences in personal and social life (Pukała, 2010, pp. 233-247).

The antithesis of wealth and poverty is far from a new phenomenon; nevertheless, in other times and socio-cultural circumstances, this problem was less serious, as were the consequences of the concentration of wealth in the hands of a small group of people (Spiazzi, 1997, p. 126).

Poverty, hunger, unemployment, a greater and greater gap between the rich and the poor are what characterises contemporary society. To overcome injustice, cooperation is required from all agents of social life. This, for instance, concerns the issue of emigrants. Immigration is a typical phenomenon of the modern times. Immigrants, most often, stand in front of a closed door and do not get very far. Even if they are allowed to enter a country, they live in social insecurity and are not treated very humanely. The position of refugees is pitiful, as is the position of groups persecuted for their race, nationality or ethnicity. Such persecutions can easily change into genocide. In many places in the world, people are bullied and persecuted for their religion. Persecutions and torture of political opponents, dissidents, in various parts of the world are known of who are denied proper trial and who are ruthlessly terminated without their most essential human rights being respected. War prisoners are also treated inhumanely although the Geneva Convention ensures and defines humane treatment.

According to *Die iustitia in mundo*, the contemporary era is typical of a great number of unjust sins. The Church, thus, empathises with all those unjustly affected; however, at the same time, it realises its helplessness. In spite of all this, Christians must be sympathetic towards all those who suffer due to injustice; they have to stand up in defence and help them in the spirit of Christian love. Christian teachings claim that one's relationship to God depends on one's relationship to his neighbour. Man's response to God's love revealed in Christ finds its fulfilment in love and service to his neighbour. This synodal document emphasises mutual dependence of justice and love. Christian love and justice are inseparable. Love requires justice, which means respect for human dignity and man's rights. The Christian message of love can only find its echo in contemporary people if it is effective in the fight for justice in the world. A specific Christian contribution for achieving justice lies in the fact believers live Jesus Christ's Gospel. This is this only way they will become worthy in family, school, at work and in the entire community where they live at the moment (Vragaš, 1996, pp. 57-58).

The social teachings of Church and sociologic literature in the context of searching for ways of solving the contemporary crisis of essential social values points to the necessity of building stability and integration of society based on fundamental social principles such as: the principle of personality, solidarity, subsidiarity, common good, and social justice

(Bąk, 2010, pp. 157-178). The above principles are understood as moral-social norms on which social and political order should be based (Kondziela, 1992, pp. 149-157). This, to a great deal, also concerns the European Community which should not only be based on economic and material ground, but should also respect and realise social and ethical principles that are sensible and fundamental for a unified Europe (Pukała, 2012, pp. 127-141). They are universal and based on natural laws embedded in the heart of every man: Christian, Muslim, Buddhist, or atheist. They are binding for all human societies, for their norm is natural law. The social teachings of Church in this context emphasises their moral character. The social principle of society is a moral norm from which social rights and obligations of every man follow. Its realisation in social, political, or economic life also requires political-legal representation. It is necessary for these principles to not only be left at the level of an empty declaration or utopia (as it happens with other values such as life, marriage, or family; in spite of the fact that these values are generally acknowledged in international and national documents and declarations, in practice they are disclaimed by legalisation on abortions or euthanasia) (Strzeszewski, 1994, pp. 327-328; Kardis, 2007, pp. 90-92). It is generally accepted that social principles are not exclusively an empty hypothesis or theory regarding functioning of society but an inevitable principle and legal norm (Piwo-warski, 1993, pp. 130-131; Höffner, 1999, pp. 46-59; Strzeszewski, 1994, pp. 512-513; Herr, 1999, pp. 67-97).

Justice as an essential principle of society, according to Catholic Church Catechism (CCC) is a moral virtue which: “[...] *lies in constant and solid will to give God and one’s neighbour what they befit. Justice towards God is called the “virtue of religion” (virtus religionis). Justice towards people makes man able to respect the rights of every person and bring harmony to human relationships, which supports appropriate attitude (aequitas) towards people and the common good. A fair person, often mentioned in the Holy Scripture, is characterised by the constant directness of his thinking and rightness of his behaviour towards his neighbour. “Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honor the person of the mighty: but in righteousness shalt thou judge thy neighbour” (Leviticus 19:15). “Masters, give unto your servants that which is just and equal; knowing that ye also have a Master in heaven” (Colossians 4:1) (CCC, 1807).*

The social teachings of Church in this context point to the necessity of interconnecting social justice with love. Love should complete justice. Justice, in harmony with love, is the best precondition for the building of a socially just society. A change of social relationships or way of thinking

without respecting both principles is impossible. Social love in Christian social teachings goes hand in hand with social justice. Its groundwork is to virtuously serve the common good and confer every person their rights. Social love does not know class hate and does whatever possible to remove class hate. The highest Christian goal is a sympathetic, brotherly community of people, in both the economic and social area. This, however, cannot merely be enforced by laws; what is also needed is the power of social love. This is where the social teachings of the Church point to the message of the Gospel, which is actually the message of love, i.e. testimony of acts. These two entities – justice and love – are to cooperate and complete each other not only within small communities or countries, but also among nations and states. This requires worldwide common good and respect for human rights in the entire world. The contemporary world is marked by a great amount of injustice. Poverty, hunger, unemployment, a greater and greater gap between the rich and the poor, life insecurity and violence are what characterises contemporary society. Pope John Paul II claims that the first and foremost value that must be spread in the contemporary world is solidarity which, however, has to be connected with another value, justice, which requires one to give the poor not only what remained but, mainly, to help them participate in the process of economic and civilisation development (John Paul II, 2000, pp. 137-138; Strzeszewski, 1994, pp. 327-328; Kardis, 2007, pp. 92-93).

### **Summary**

The keystone of the biblical dimension of justice is the relationship between God and man as well as among men. As justice is a Divine attribute, it has been the main measure of values since the times of Moses and describes God's will as true actions which follow it. Justice as the main principle of human coexistence is based on giving everyone what they befit. It is the central ethical and religious value, a source of all other values. There are many concepts of justice and they are all based on the idea of equality that goes back to the essence of humanity. Every man is a person and this fact equates all with regard to their rights and duties. The human as the highest value which, in theological perspective, is the image of God the Creator befits the highest dignity. Dignity justifies man's rights and duties that follow; among them: the right to life, the right to freedom from defamation, to conscience and religion, free will, the right to assemble, freedom of practice, right to just reward, etc.

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## FORGIVENESS AND RECONCILIATION IN THE CONTEXT OF SERIOUS CRIMES

Slávka Karkošková

### Introduction

Restorative justice programmes create an environment to express offender's specific needs. Such needs include (among others) also the need to experience forgiveness and reconcile with victims, family and wider community (McCold, 2004, p. 164). According to Johnstone (2011) "it is crucial to the success of restorative conferencing that authentic apology, forgiveness and reconciliation take place. If they do not (...), the outcome of the restorative conference process is likely to be the stigmatisation and outcasting of offenders rather than their reintegration". The author further states "proponents of restorative justice, while not denying either the legitimacy or even the usefulness of the resentment which people often feel towards criminals, insist that there comes a point when resentment becomes counterproductive. At that point, a shift from resentment to forgiveness is required if the justice process is to have positive outcomes" (Johnstone, 2011, p. 109).

In this regard Amstutz (2004, p. 92) points out that there is a clear danger for practitioners to think of the restorative process "as a linear path leading to a specific destination, one that should include forgiveness". Umbreit and Armour (2011, p. 231) state that out of all restorative justice practices, victim-offender mediation (or victim-offender dialogue, VOD<sup>1</sup>) "is the most vulnerable to being seen and misinterpreted as a forgiveness intervention because of the personal nature of the violation and the belief on the part of some people that forgiveness is necessary for true healing and inner peace".

It has to be said that forgiveness "is significant at some level to many victims and offenders" (Umbreit & Armour, 2011, p. 231) and that restorative justice does foster the possibility for forgiveness (Gehm, 1992). But it should not be seen as a mandatory part of restorative justice agenda or

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<sup>1</sup> Which take place while the offender is incarcerated or under supervision in the community.

its goal. Facilitators should always “respect the standard that victims and offenders must be the ones to initiate the topic of forgiveness and must always define it for themselves.” Even so “it is also useful to the field of restorative justice (...) to explicate the current and implicit dimensions of forgiveness in restorative justice” (Umbreit & Armour, 2011, p. 232).

Admittedly, “forgiveness is not a simple or univocal concept. There are many different expressions and degrees of forgiveness, depending on individual circumstances and the nature of the harm suffered” (Augsburger, 1996, p.17-24).<sup>2</sup> But routinely it is “seen by victims as something abstract rather than concrete, and as a burden being placed upon them” (Amstutz, 2004, p. 92). According to Umbreit and Armour (2011, p. 230) “forgiveness is a flashpoint of controversy among victim groups and victim advocates in part because crime victims have been told by their clergy that they must forgive in accordance with the tenets of their religion. These prescriptions to forgive have created much guilt and consternation in victims who are not able to do so”. The authors add, “the ambivalence about forgiveness is heightened by the lack of agreement about just what it is” (p. 231).<sup>3</sup>

Indeed, forgiveness and reconciliation while being exalted as important values within Christianity (which is with about 1.5 billion followers the most widespread religion in the world), are at the same time frequently presented in vague manners. Referring to biblical texts (e.g. Mth 5:43–48; Lk 6:27–38), Christianity puts great emphasis on love towards all people, even towards enemies. Where sin appears and causes harm, damage or conflict, believers are encouraged to forgiveness and reconciliation. This challenge is often expressed within sermons, pastoral dialogues, articles in Christian magazines, lectures, prayers for inner healing, or within the religious language of the family. However, it usually stays on the level of general phrases, without clear explanation of what forgiveness and reconciliation mean, what they consist of, what the role or task is for the victim, for the offender and for the community. So it is not surprising that many believers create simplified opinions of forgiveness and reconciliation, which are very dangerous because they can (directly or indirectly but really) multiply suffering and encourage violence. Under the cover

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<sup>2</sup> As Marshall (2001, p. 264) explains “it is a very different matter, for example, to say “forgive me” when you belch at the dinner table than to say it to someone you have hurt in a very serious way. Forgiving a debt is different from forgiving a crime. Forgiving a child for being naughty is different from forgiving a nation for perpetrating genocide. Thus the force and implications of forgiveness vary significantly from situation to situation.”

<sup>3</sup> It is frequently defined by what it is not; for example: “It does not imply forgetting, condoning, or excusing offenses, nor does it necessarily imply reconciliation, trust or release from legal accountability” (Exline, Worthington, Hill & McCullough, 2003, p. 339.)



of Christian love there are often hidden such unchristian behaviour as denying of truth, laziness, cowardice, fear of stirring up a conflict, impatience, lack of love toward self, dependence on the offender, etc.

Once the forgiveness and reconciliation are presented as possible, or obligatory, or the best and most important things to do, without any reminder of disclosure, punishing and repentance of the offender, then it easily distracts attention from the core of the problem of crime and harm, and becomes part of the problem rather than its solution (Arms, 2002, pp. 108-110; Horsfield, 2002, pp 54-55).

In an atmosphere full of mistaken attitudes, the question of forgiveness and reconciliation becomes a rich source of a false sense of guilt and an unauthorized critique of victims. In contemporary Christian practice, the burden of forgiveness and reconciliation is nearly always put on the shoulders of victims, while the others stay in the comfort of doing nothing and in hypocrisy; the offenders deny their guilt, they are not held responsible and burdened by the demand for repentance. Such a non-complex attitude is surely not biblical. We refer to merciful love; but we forget that without the relation to justice and truth, love fails to serve life and healing (Arms, 2002, pp. 108-110; Allender & Longman, 2004, p. 17).

The aim of this chapter is to point out some mistaken concepts of forgiveness and reconciliation and offer a more sensitive and complex solution in the context of crime and trauma.

### **The core of forgiveness (or what it is that is forgiven)**

I think that this core could be found in the parable of the unmerciful servant (Mth 18: 23–35). Jesus tells the parable about the master who called his servant to show him his debt that was so high that he would not be able to pay it off before the end of his life. At the same time the master showed him how roughly he could deal with him because of his claim for payment of the debt. When the debtor heard this, he had to feel dismay and fear because he immediately started to beg for relief and promised to pay everything off. The master had mercy on him; he let him go and even forgave him his debt.

Let us note that the master forgives (**freely gives up to demand**) what the servant is not able to pay off by his own efforts under any circumstances. So I can state that what is forgiven is in fact **what could not be paid off. The part that still remains is** in fact a **challenge to repentance** – as when Jesus forgives sins and adds: *Go and not sin any more!*” (John 8: 11b). By this he challenges a sinner to change his present life and not create new debts; he asks the sinner to show a sincere effort to leave his old way of life. Even the most perfect repentance can never undo (repair) the

damage once done – but it does not mean that the repentance is useless – on the contrary repentance is a manifestation of remorse over the damage caused in the past and an expression of the will not to harm any more.

For this present moment the master also gives up the right to revenge. But when face to face with such mercy, the heart of the one who created such a huge debt will not learn to love in a better way (as happened to the servant in the parable), the disappointed and angry master will at the end insist that he pay off the whole debt.

In this context it is appropriate to mention that the Bible puts great emphasis on repentance in connection with forgiving sin: Jesus addressed a “woe” to unrepentant people – he said that without repentance they will not prevail in front of God’s judgment and will end in hell (see Mth 11: 20–24). The same message could be found in the Apostle’s letters (see Rom 2:4–7; 2 Pt 3: 9) and in the Revelation of Saint John (see Rev 2:21–23; 16:9–11; 3:1–3). At different places Jesus tells us that if we will not bring the fruits of repentance we will die (see Luke 13:1-9). The Apostles also speaks about forgiveness in relation to the necessity of conversion and doing repentance for the sins committed (see Acts 2:37–38; 8:22; 26:18.20; see also 1 John 1:9).

In analyzing the parable we can notice that the master shows mercy toward the debtor before any real change on the part of the debtor happened (the debtor’s promises of restitution were just empty words). So the master’s forgiveness is unconditional – at least in a sense that it is prepared before the servant is prepared to receive it honestly. Forgiveness is a **gift offered to someone who has not done anything to deserve it**; in fact one could do nothing to deserve it. Even through repentance we could not deserve forgiveness; in fact repentance itself cannot remove the harm and damage once done. Repentance does not create any right to forgiveness – that is a pure act of benevolence (Wolbert, 2002).

However there is some relation between giving and receiving forgiveness: **While giving forgiveness is not conditioned by repentance – only through repentance one can receive the forgiveness** which always was there. So God has forgiven us already; his forgiveness is always available, but only if we turn toward him with repentance; then we can start using this forgiveness. In connection to this, the Catechism of the Catholic Church (in article no. 1847) states: To receive God’s mercy, we have to admit / acknowledge our sins first.” In any case, it is not possible to receive forgiveness and stay in unrepentfulness. If man hopes to receive forgiveness without conversion and reach heaven without any personal effort – it is a manifestation of conceit or presumptuous calculating of God’s mercy (Catechism art. no. 2092; 982).

Repentance is really necessary for receiving forgiveness. If the sinner denies or does not regret his sin and the debt created by it, then he does not confess sincerely the need for forgiveness. So he cannot receive forgiveness if he behaves as if he does not need it, as if he is guiltless. In addition if he did not have a sincere interest in changing himself – forgiveness would be useless because at the end all his debts would be counted up anyway. In fact without repentance the sinner cannot receive the gift of forgiveness (in a valid and effective way) nor achieve real reconciliation.<sup>4</sup>

Through the parable about the unmerciful servant I also want to point out that the **term “unconditional forgiveness”** that is often used in Christian circles could be **easily misunderstood**. I have already explained that receiving forgiveness has its conditions. But the fact is that **giving forgiveness** is also conditioned – its conditions are **truth and justice**. Remember how the master allowed his servant to come to him and confronted him with the truth about his debt and the right to enforce paying of the debt. For both sides it surely was a painful and cruel truth. But only after the damage caused was stated and the desire for revenge expressed was the debtor released together with the undeserved gift (or offer) of forgiveness. We have to remember that God is both merciful and just – and even if we do not know the accurate relation between these two attributes, we cannot deny their mutual interconnection.

### **Basic conditions regarding forgiveness**

If we speak about conditions of giving forgiveness we should realize one more significant fact. While God forgives in the context of eternity, human forgiveness happens in the context of time and space. God’s forgiveness is always and constantly prepared because God is not liable to the laws/relations of time and space. God clearly recognizes sin and the damage it causes, experiences pain and anger, has mercy and offers forgiveness – all in one eternal moment. However in the human context forgiveness is a process.

Additionally, God as the perfect being forgives out of himself – but man needs God’s grace to be able to forgive; he is not able to do it out of

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<sup>4</sup> In this regard it is suitable to note that the **omission of reference to repentance (in relation to the offender) is a typical feature of definitions of forgiveness**. The emphasis is put on the attitude of the very victim. This can be seen for example in the following definition: “Forgiveness is what happens when the victim of some hurtful action freely chooses to release the perpetrator of that action from the bondage of guilt, gives up his or her own feelings of ill will, and surrenders any attempt to hurt or damage the perpetrator in return, thus cleansing the way for reconciliation and restoration of relationship” (Marshall, 2001, p. 264).

his own strength.<sup>5</sup> And God's grace usually builds on the natural laws of the process<sup>6</sup> of forgiveness (McManus, 2002, p. 195); it does not cancel this process, just accompanies man on it and reinforces him on the journey.

In usual discussions about forgiveness in Christian circles, people often forget the core and conditions of forgiveness and reduce the content of the parable to the scaring message: *As God has forgiven each and everyone of us a huge debt, we should also forgive our debtors. If we do not forgive, we will not be forgiven by God.* Usually no word about the context of truth and justice is mentioned. Such curtailed teaching about forgiveness, together with other myths about forgiveness and reconciliation triggers needless feelings of anxiety, fear, failure and guilt. I think that many people who have been deeply hurt by the sins of other people (especially victims of abuse and violence) need to clarify what forgiveness consists of.

My basic idea is that **forgiveness is a process that is realized in the context of justice** – while the essential component of justice is **truth**. Marshall (2001, p. 273) similarly suggests: “At its heart (...) forgiveness is a form of “speaking the truth in love” (Eph. 4:15), not of denying the truth for fear of the pain”. Thus as a prerequisite of forgiveness the author stresses the need of “acknowledging the situation needing forgiveness. To forgive requires, at the outset, an honest acknowledgement that one has suffered – and is still suffering – pain because of the actions of another. There is a need to name the specific incident or incidents that have created this pain, to identify the person or persons held responsible for it, and to acknowledge the emotional withdrawal that has occurred as a consequence of it” (Marshall, 2001, p. 275).

Therefore the first and necessary component of the forgiving process is **getting rid of the denial** of the truth. “One common strategy for dealing with profound emotional pain is to repress it, to deny that one is feeling it, to pretend that nothing serious has happened. Extended forms of denial or repression can lead to illnesses and character distortions of various kinds. But forgiveness is nor a matter of denying one's pain or of redefining the offense as a nonoffense” (Marshall, 2001, p. 272). As Zehr (1990, pp. 46-47) explains, “it does not mean saying, ‘It wasn't so bad, it

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<sup>5</sup> According to Marshall (2001, p. 270), forgiveness is not “instinctive or natural. It goes against the grain of human nature”. The author refers to revenge as a natural tendency; giving up revenge goes beyond human logic (thus appearing as something unnatural).

<sup>6</sup> Under the term “natural laws of the process” we mean certain indispensable conditions and elements without which forgiveness could barely happen. In the rest of the chapter we will further explain these conditions and elements of forgiveness.

doesn't matter.<sup>7</sup> It was bad, it does matter, and to deny that is to devalue both the experience of suffering and the very humanity of the person responsible.”

Various forms of denial serve as psychological defense mechanisms that can be useful for the victim for some period of time enabling him/her to survive, but from a long-term perspective they could prevent him/her from facing the truth that has to be worked through. Simply without acknowledgement of reality – without remembering, without recognition and naming evil and without admitting the damage caused – forgiveness is not possible. In this regard, it is useful to point out some common misconceptions concerning forgiveness.

### **Toward clarifying the process of forgiveness**

There is often a tendency to identify forgiveness with forgetting. Forgiveness however does not mean forgetting (Donghi, 2002, p. 85; Wolbert, 2002; Fortune, 1998; Keshgegian, 2000, p. 195). Our memory, our ability to remember, has indispensable meaning and function for our life as well as some laws. When somebody has been traumatized by someone else's deeds, the experience is stored in the memory in an especially strong and vivid way and can be triggered against the victim's will and desire not to remember any more (Van Der Kolk, 1994). To ask victims to forgive and forget is not only misleading but also insensitive because it creates false feelings of guilt from not forgiving. In addition, forgetting is the most incorrect request because the process of healing and forgiving demands **integration, not repression of memories** (Parkinson, 2001). The more the victim is conscious of what happened to her and how it influenced her and the more she is able to speak about it, the more freedom from the past she acquires. Trauma is part of one's personal history – trying to forget it through forgiveness is like trying to rub out a part of one's personal identity. From this perspective forgetting is not healthy but rather pathological (Bilich, Bonfiglio & Carlson, 2000, pp. 104-109; Fortune, 1991, pp. 137-151).<sup>7</sup>

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<sup>7</sup> In the same sense Marshall (2011, p. 273) warns: “forgiveness is not forgetfulness. The common advice given to squabbling children to ‘forgive and forget’ may be viable for minor irritations. But with serious injuries it is wrong to equate forgiveness with forgetfulness or to treat them as mutually dependent. On the one hand, it is quite possible to forget without forgiving, to repress the memory of an offense as a coping strategy but not to have dealt with it properly. Perpetrators can learn to forget the wrongs they have done; victims can teach themselves not to bring traumatic events to consciousness. But forgetfulness in these cases is not a sign of forgiveness (...). On the other hand, it is impossible to forgive while forgetting. It is precisely because an abuse is remembered, not forgotten, that forgiveness is possible. The very process of forgiveness is a kind of ‘memorial activity’, a

In addition, to forget and behave as if nothing bad happened is quite unwise, even unethical, in relation to the offenders. Memory plays an important role in preparation for confrontation and taking protective measures. Desmond Tutu writes in his book “There is no future without forgiveness” that in spite of forgiveness, it is important to remember not to allow crimes to happen again (Tutu, 2005, p. 278).

Forgetting is not biblical in the way some Christians think while quoting the verse from Jeremiah 31:34 (I will forgive their guilt and will not remember their sin any more). It is just a metaphor and we should not assume a literal understanding. The Bible teaches us that God remembers sins because one day each of us will stand before God. In a different regard the Bible also points out the importance of memory. Remembering significant traumatic events as well as God’s redemptive activity is an integral part of the Old and New Testament religion (e.g. remembering the Egyptian slavery and the rescue from it; or the memory of the death and resurrection of Jesus Christ) (Keshgegian, 2000).

Another wrong tendency is replacing forgiveness with remission. One can remit little things, everyday little mistakes or incidents which are morally indifferent (e.g. when somebody steps on my foot unintentionally). However to remit a crime would mean that nothing has happened, or nothing that bad. Such a remission would express that the immoral action was in fact not immoral, that violence or abuse was not in fact violence or abuse. Remission would lead to tolerating or accepting moral evil. Remission would not only ignore injustice but also trivialize the damage caused. But it would be self-deception to think that everything is OK. Real forgiveness clearly **recognizes and names evil** as well as the severity of the **hurt** and the extent of the **damage** caused (Tutu, 2005, p. 278; Fortune, 1998; Arms, 2002, pp. 113-114).

The tendency to interchange forgiveness and pardoning the offender is also connected to denial. But this form of the myth will be explained later. For the moment I would like to add that it is not easy to leave various forms of denial because they provide safe (although false) protection against cruel and painful truth. Moreover denial is often encouraged by unhealthy attitudes of the people around. Victims often get stuck in various forms of denial for many years while hoping that they have already

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conscious recalling of a past hurtful event, in all its concreteness, in order to deal with it”. The author further clarifies: “forgiveness enables a healing of memories, which is experienced as a type of forgetting. But even here, the memory of the offense does not vanish magically into oblivion but rather is integrated into one’s life experience. (...) It becomes part of one’s personal biography. (...) So it is remembering, not forgetting, that is intrinsic for forgiveness” (Marshall, 2001, p. 273-274).

coped with the past, already forgiven. But the victim has to clearly acknowledge that the evil was committed on her, **identify the person** who is **responsible** for it and admit the damage done – so she has to face reality; otherwise forgiveness is just an illusion.

As various forms of denial break down, various layers of suppressed emotions (especially grief and anger) start to emerge. To **give proper space to these emotions** is an important part of the forgiving process. Marshall (2001, p. 276) stresses the need of “giving voice to the pain and anger” within the forgiveness process. The author further explains: “Forgiveness may begin with our heads, but it cannot usually transpire entirely within our minds. Because the injury suffered is not just rational or moral or material but also emotional, forgiveness requires a healing of the emotions, a releasing of pent-up negative emotional energy. For this to occur, the injured party must recall, in some detail, what victims would rather forget – the experience of violation or betrayal or disappointment – and name the emotions felt. Deliberately choosing to relive traumatic events in this way requires considerable courage. It also often requires the companionship of someone willing to listen without expressing disapproval or judgement or quibbling over details. Perseverance is also necessary, for it can take many retellings of painful experiences before the victim reaches a point where he or she is able to discharge the feelings of victimization.”

**Grief** is understandable especially in regard to losses that are the results of experienced trauma. It is this very damage (the debt that cannot be paid off) that has to be mourned over. Trauma creates damage that cannot be compensated for; it is not possible to return to the previous state. Although many symptoms can be moderated or repaired, the recovery process will absorb a lot of energy, time and money that can be used in a totally different way. The process of grieving over losses is very painful and exhausting but it must not be repressed or skipped. The debt that is forgiven has to be acknowledged on the cognitive as well as on the emotional level – otherwise forgiveness would be an empty gesture.

According to Augsburg (1996, pp. 68-72) it may entail “multiple journeys into memory to tell and retell the past”, until the pain recedes, and we are ready to integrate the loss into our lives. In this regard, however, it is important to point out that forgiveness does not mean a state where pain has completely disappeared. Acute states of grieving – accompanied by many tears, sorrowful moaning and feeling as if there is nothing except the wound – can fade in time; given the proper conditions it is possible to reduce the pain to a great extent, but not remove it totally. It is just a myth that those who have forgiven should smile and overflow with joy as if nothing hurt any more. Deep wounds will not stop hurting;

although the pain will not be the center of the experience, it is quite probable that it will emerge from time to time. But the presence of pain is not proof of lack of forgiveness; it just manifests that the victim does not lose natural and healthy sensitivity toward injustice (Allender & Longman, 2004, pp. 155-158; Yantzi, 1998, pp. 125-128).

Apart from grief, **anger** also has its place in the forgiveness process. Many Christians regard anger as bad or sinful but the truth is that each emotion is good if we handle it properly. In addition anger is an especially important emotion because it helps us to identify injustice and mobilizes us to take action against it. When the victim of any form of violence feels anger, she expresses by it that what the offender did was in contradiction to her dignity, it was bad and destructive and he had no right to act in that way. Anger enables the victim to condemn evil and reject negative messages that the offender communicated to her through the way he behaved toward her. Anger helps the victim to get out of the position of victim and tear away from the offender (Wolbert, 2002; Grün, 2002, pp. 6-7, 11, 23, 36-37).

Marshall (2001, p. 273) stresses that the process of forgiveness requires “admitting the rage – even the hatred – one may feel toward the offender. In the short term, such feelings are not only understandable and excusable but reflect morally significant values about justice and accountability and one’s inherent dignity and right to respect”. According to Murphy and Hampton (1988, pp. 16-17) the passion of **resentment** defends the value of self-respect and a too ready tendency to forgive “may be a sign that one lacks respect for oneself”. They accept that forgiveness heals and restores and that without it “resentment would remain an obstacle to many human relationships we value”. They contend, however, that while “forgiveness may indeed restore relationships (...) to seek restoration at all cost – even at the cost of one’s very human dignity – can hardly be a virtue” (p.17). For them, forgiveness is virtuous only where it is consistent with self-respect and respect for others as moral agents (p.19).

Many Christians have problems dealing with their anger and expressing it because they regard this emotion as unbiblical – as if it were in contradiction to love. However anger is biblical. Jesus himself is the example that love toward an enemy does not exclude anger. In confrontation with the Pharisees, Jesus addressed them with harsh words: he called them hypocrites, snakes, sons of hell, fools and blind men, cups full of extortion and excess, whited sepulchers full of dead men’s bones (comp. Mth 23:13–33). Jesus did not pretend that everything was OK, he did not use nice words to protect their reputation. Biblical forgiveness is based on the commitment to speak the truth, clearly identifying the responsibility for



sin, expressing indignation at injustice and condemning evil. Such forgiveness is the opposite of false compassion and clemency that tempt many people to pardon the offender.<sup>8</sup>

It is necessary to realize that forgiveness **does not mean pardoning the offender**. We can pardon somebody who indirectly, without intention, caused some troubles (e.g. came late to a meeting because of unexpected and urgent duties or cancelled an appointment because he got ill) (Wolbert, 2002). However the majority of people who behave in a violent and abusive way are fully responsible for their deeds. No brain, hormonal or psychological disorders, nor bad cultural models, pathological family upbringing or childhood traumas can sufficiently explain and pardon delinquent behavior. People cannot achieve forgiveness through trying to understand the reasons of the offender's behavior and finding something that would pardon him or her. It would neither be therapeutic nor ethical; moral and legal norms could otherwise be easily relativized. In addition, pardoning the offender would imply the innocence of the offender and make forgiveness unfounded. If the victim believes that the poor offender is not responsible for his or her deeds, then there is nothing to forgive. On the contrary, true forgiveness clearly indicates that offender is guilty, that s/he has no excuse or mitigating circumstances, and in fact there is no reason to pardon him or her (Coyle, 2002, p. 96; International Forgiveness Institute, 2005; McManus, 2002, pp. 185-186; Wolbert, 2002).

According to Marshall (2001, p. 271) "forgiveness is not an excusing of wrong. To forgive wrongdoing is not the same thing as tolerating or minimizing evil, nor is it an evasion of moral responsibility or denial of justice." In this regard the author emphasises that forgiveness "demands ethical seriousness. It enthrones rather than dethrones justice; it exposes rather than excuses wrong; it challenges rather than condones the actions

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<sup>8</sup> Feelings of anger and hatred must not be denied. Taking a hint from the imprecatory psalms, Volf (1996, p. 124) suggests that articulating such feelings to God can help facilitate the emergence of forgiveness, for in doing so the victim confronts the depths of his or her own desire to injure and exclude: "This is no mere cathartic discharge of pent up aggression before the Almighty who ought to care. Much more significantly, by placing unattended rage before God we place both our unjust enemy and our own vengeful self face to face with a God who loves and does justice. Hidden in the dark chambers of our hearts and nourished by a system of darkness, hate grows and seeks to infest everything with its hellish will to exclusion. In the light of the justice and love of God, however hate recedes and the seed is planted for the miracle of forgiveness. Forgiveness flounders because I exclude the enemy from the community of humans even as I exclude myself from the community of sinners. But no one can be in a presence of the God of the crucified Messiah for long without overcoming this double exclusion – without transposing the enemy from the sphere of monstrous inhumanity into the sphere of shared humanity and herself from the sphere of proud innocence into the sphere of common sinfulness".

of the perpetrator; it transforms rather than tolerates evil (Rom. 12:21)". Marshall (2001, p. 270) also aptly notes: "forgiveness is not weakness. (...) It is not a refusal to stand up for ones legitimate rights, nor a passive acquiescence to abuse, nor a willingness to be walked all over for the sake of harmony. Forgiveness is not an act of cowardice."

In this place it is important to add that "forgiveness need not stand in opposition to formal justice. They are different but related – and sometimes complementary – processes. Legal justice – the promulgation of laws and the prosecution and punishment of law-breaking – operates largely at an impersonal level, as part of the social contract that binds society together. Forgiveness, on the other hand, operates at a personal – I-Thou level. It goes beyond matters of legal definition to address the relational and moral dimensions of offending. It is therefore possible for legal justice (entailing the vindication of law) and interpersonal forgiveness (entailing the remission of guilt and the healing of relationship) to work in parallel" (Marshall, 2001, p.271-272).<sup>9</sup>

People affected by crime might lack the recognition that forgiveness **does not exclude punishing the offender**. When preaching about forgiveness priests and pastors often mention examples of big-hearted people who could forgive even the most serious crimes. But preachers usually fail to mention an important fact – that such examples of forgiveness took place in the context of justice: the crimes were publicly disclosed (not kept in secret as is usual in cases of abuse) and the offenders were called to accept responsibility for their deeds, convicted and punished.

Where a crime is committed, private solutions to the situation are not only insufficient but also often impossible. For these reasons the task of confrontation, sentencing and punishing the offenders, as well as the task of protecting the victims have to be guaranteed by public authority.

Victims are uselessly confused by the request to forgive if they do not know that there is no contradiction between forgiveness and letting the offender bear responsibility for his deeds, this often entailing reporting him, a conviction, sentencing and imposing probation conditions.

Punishing the offender means public rejection of his false demands on the victim, and it contributes to the correction of negative messages that

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<sup>9</sup> Marshall (2001, p.271-272) further remarks: „There is much to be said for the legal system operating on an impersonal basis, not the least being its capacity to defend the innocent, control revenge, and prevent excessive punishment through carefully regulated judicial procedures. But from the perspective of restorative justice, the existing justice system can be faulted for giving too little attention to the relational dimensions of crime and its impact. Yet even the best system of restorative justice can never do the work of forgiveness. It can only seek to foster the conditions that are consistent and supportive of the goal of relational healing”.

he implanted within the victim. The punishment also expresses that violence and abuse cannot be tolerated. The punishment serves as a warning not to repeat the crime ever again; so it is a kind of challenge to repentance. From the spiritual point of view punishment is even a form of mercy – as it arises out of interest in the good of the offender’s soul and the wish to lead it away from hell (comp. Rev 3:19; 2 Cor 7:8-10 or James 5:19).

From what has been said already we can conclude that anger could and has to serve good – by restricting evil. **Anger** has an indispensable role in the process of forgiveness. It **becomes bad, harmful or sinful only when it is excessive or insufficient** (deficient) (Padovani, 1999, pp. 33-34).

If man does not control his anger, he can become furious and see the only solution to injustice in revenge. While the biblical request of forgiveness allows people to punish an offender, **revenge is forbidden**. Many people do not realize that there is an essential difference between punishment and revenge. The purpose of punishment is to protect and multiply good both on the side of victims as well as on the side of offenders. Punishment is an expression of anger that condemns evil and at the same time serves as an expression of love that urges change. Through punishment the offender is confronted with truth; the darkness of his sin is brought to light and he is ashamed. He can refuse the truth, stay in denial and continue in the direction of spiritual death – or turn to truth and accept the conditions of life. The punishment may be uncomfortable, humiliating or painful for the offender but it still serves a lot of good – it restores justice and order and contributes to purifying the offender’s soul (Wojtyła, 1981, p. 168). Punishment is not intended to destroy the offender – it still respects the dignity of a man as a being, which in spite of having committed a crime is still capable of moral reflection and actions. The punishment still gives the offender a chance to change. On the contrary revenge is merciless; it does not give him any chance to change – by which it also removes any chance for reconciliation. Revenge destroys an enemy, not the evil (sin). It is bad, absurd and useless – it commits just more violence that cannot remove or reduce past trauma anyway.

According to Duquoc (1986, p. 41) to forgive implies a decision “that one particular eye is never worth another particular eye and that the damage inflicted on another never compensates for the loss suffered by the first, that there will be only an accumulation of evils”. While we are naturally attracted to revenge, “to forgive is to transcend this instinct to hit back, to surrender one’s right to exact payment in kind from the offender. It is a preparedness to absorb the pain of victimization without seeking to

hurt in return as a way of getting even. (...) It breaks free from logic of equivalence” (Marshall, 2001, p. 266).

Whereas a person resorting to revenge is putting him/herself into a position of judgement (that does not belong to him/her), forgiving person renounces revenge – putting it into the hands of God (as the Bible recommends in Rom 12:19). God takes seriously the debt that has been caused to victims. If an offender does not repent soon and try to atone and make peace with the victim, God will finally demand him to pay off the whole debt until the last cent is paid (comp. Mth 5:25-26).

To clarify the issue of anger more, it has to be added that **repressing anger** is the opposite of its excess but it **is not less harmful** than revenge. If a victim does not feel anger about what the offender has done to her, it could mean that she denies the reality of injustice and hurt or that she blames herself. If anger is not properly directed and expressed, then it not only blocks the forgiving process but also inhibits a restoration of self-respect and could transform itself into self-aggression or various psychological, somatic, psychosomatic or spiritual problems.

Only if one acknowledges the justness of anger in relation to evil, can one understand what is being forgiven. It is important to deal with anger honestly, perceive it, try to understand it and finally express it in a proper way. But it is not enough just to speak about anger; it is useful to release it in a safe and therapeutic manner. Only if anger is honestly dealt with is the victim prepared to confront the offender and get free from him (Padovani, 1999, pp. 31-42; Wolbert, 2002).

Finally, in regard to the relation between anger and forgiveness, it has to be added that forgiveness does not mean the total disappearance of anger. Many Christians suppose that a person who openly speaks about abusive experiences and uses harsh words expressive of just and reasonable anger, is more full of hatred than of forgiveness. Even victims themselves think that anger is proof of their inability to forgive and love their enemy. The opposite is the truth however. Where even a little sign of anger is missing when forgiveness is declared, forgiveness is probably just a sweet illusion. That illusion is even bigger when there are no signs of repentance on the side of the offender. The Bible says: Awe before God is to hate evil. Toward pride, arrogance, bad way and mouth that wrest the truth, I feel hatred (Proverbs 8:13). Past or present evil will always activate a certain level of anger in a healthy man (Dratch, 2002, pp. 19-20; Bilich et al., 2000, pp. 104-109; Allender & Longman, 2004, pp. 155-158, 185, 195-198).

A difficult task concerning anger management is learning to distinguish between a person and a deed, or in other words to **perceive differ-**

**ent aspects of an offender's personality.** Forgiveness assumes recognising that crime committed does not define the offender in his wholeness. In this regard Marshall (2001, p. 276-277) comments: "When we are deeply hurt by another person, we tend to view that person in a way that is shaped, if not entirely controlled, by his or her action of injuring us. Little else enters into our picture of the person responsible. Consequently, it becomes easy to hate, despise, even demonize the offender. To be ready to forgive, we need to change the way we perceive the offender, to disengage the injurer from her behaviour, to change her identity from abuser to valuable human being, loved by God, despite the wrongs she has done, a fellow human being whom we resemble in more ways than we differ from. Two things can help this change to take place. One is humility, a recognition of our own fallibility and sinfulness, our own capacity to injure others, our own guilt for doing so many times, and our own constant need of forgiveness. This is not to excuse the offender by saying, "We all make mistakes"; it is to recognize that we are all offenders and we are all victims. We all belong to the same stream of broken humanity. We all do wrong, as Scripture reminds us: 'There is no one who is righteous, not even one' (Rom. 3:10). Acknowledgement of our own human frailty and sinfulness can help us to accept (not condone) the weakness and sin of the one who has injured us. The other thing that helps is sincere repentance by the injurer. When the wrongdoer expresses genuine remorse for her action, she asserts an identity that is distinct from the identity of the one who committed the deed. This makes it much easier for the victim to forgive her, because he sees before him a different person from the one who hurt him. By repenting, she has disavowed her previous behaviour and pledged to follow a different course. The gift of forgiveness affirms this new identity as one that no longer merits the victim's resentment or revenge."

What has been said up to now can be summarized into two rules: (1) **to face truth instead of its denial and (2) make use of emotions instead of their devaluation – are a necessary part of the forgiving process.** By accepting these rules we create basic conditions in which forgiveness can take place. But it is important to realize that one will not start living according to these rules in a moment – rather one has to learn them and get used to them, for a lot of courage and strength are required. That is why we should respect the reality that **forgiveness is a process.**

In literature as well as in common conversation one can often meet with statements that forgiveness is a choice, an act of will, a question of making a decision, a question of willingness to give up something or leave something (most often it refers to giving up revenge, hatred or anger

itself, or to leaving a painful past or self-pity) (McManus, 2002, pg. 181-183, 185-186, 188-189, 194; Benner, 1992, p. 111). I suppose that statements like these can be easily misunderstood. By that decision or act of will, people often imagine some isolated and simplified act – as if man decides to draw a fat dividing line in a notebook or turn over and continue on a new page. Many people really believe that this is what exemplary forgiveness should look like – if somebody does not manage to get rid of the past at once, then he suffers guilty feelings from not forgiving or such blaming is addressed to him from outside, from various people. Although this blaming seems to be substantial and stirs up much anxiety, it is not based on real guilt.

If we consider the fact that forgiveness is a process, then any linking of forgiveness with a decision or an act of will or with willingness is proper only in relation to that process.<sup>10</sup> In other words, a **forgiving person shows the will or willingness to set off on a journey of forgiveness** – so to learn to create in his inner and outside world conditions of justice and truth.<sup>11</sup> Each person walks this journey at their own tempo, according to their own individual possibilities and abilities. There are also other factors that may have impact on how much time forgiveness process will take, such as: “the magnitude of the injury, the character or the prior relationship between the parties, the level of the wrongdoer’s culpability, and whether the offense was an isolated act or a recurrent phenomenon” (Marshall, 2001, p. 274). In any case “forgiveness is best thought of as a process more than an event, a process through which people move at their own pace and in their own way. It is therefore not possible to prescribe a single “how to” procedure that everyone should follow” (Marshall, 2001, p. 274).

**Nobody has a right to accuse somebody of not forgiving.** It can be said that wherever on the journey of forgiveness one is, one has, in fact, already forgiven; but at the same time such forgiveness does not yet need to be perfect. We can long for perfection, struggle for it, get closer to it – but we can hardly reach it fully on the earthly journey. It seems that forgiveness is similar to the Kingdom of God, which on the earth “already is” (to a certain extent) but at the same time “is not yet” (completely) here.

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<sup>10</sup> Similarly Marshall (2001, p. 275-276) uses the phrase “deciding to enter the forgiveness cycle. The authors further remarks: “Forgiveness initially is an act of the will; it does not happen unless we intend it to happen. (...) Both head and heart must ultimately be involved, but head precedes heart.”

<sup>11</sup> It is useful to remark here that “in practice people often circle back and forth between different components of the process” (Marshall, 2001, p. 275).

If every process has its beginning, middle and end, then something similar can be distinguished in regard to forgiveness. It seems that awakening from denial is somewhere at the beginning of the forgiveness process. The middle of the process could be characterized by emotional and cognitive flotation with a wound and a debtor. Clear distinguishing of truth and lies and relative freedom from the offender, and probably also from the consequences of the wound, should dominate the end stage of the process.

This scheme is very simplified but it outlines an interesting fact – that **the forgiveness process is parallel to the process of healing**. I do not agree with those who preach that forgiveness is a condition of healing. Many victims who suffered some long-term consequences of trauma were told that they were not healed because they had not forgiven. Such a statement is not only absurd but also totally insensitive. We would never dare to say something like this to somebody who suffers permanent physical consequences as a result of physical harm. But contrary to physical wounds, psychological wounds are often simplified and minimized – making victims responsible for the trauma consequences.

In some Christian circles forgiveness is presented almost as some magical instrument for inner healing, as a miraculous medicine to every wound and trouble. Victims then think that it is enough just to say a couple of magic words such as “I forgive you” or perform some forgiveness ritual (ceremony) and from that moment everything will be changed, traumatic symptoms disappear, broken relationships be repaired, everyone will be happy and God will be satisfied. If this does not work victims feel disappointed and ashamed. They start blaming themselves or think they have made some mistake while saying the magic words or performing the ritual – perhaps they were not concentrating enough or perhaps their love for their enemies or trust in God is not sincere or strong enough. Lasting consequences are then often interpreted as a sign of not being sufficiently forgiving (a sign that a particular person has not forgiven yet) (Fortune, 1998, pp. 49-50; Horsfield, 2002, pp. 55-56; Yantzi, 1998, pp. 125-128; Coleman, 1998, pp. 42-52).

I do not say that words and rituals of forgiveness are totally useless or bad. Such words can be said and rituals can be done many times during the forgiving process. But they are harmless only if it is clear that they bring with them no expectation that they will carry a person to the very end of the forgiveness process, to a state of freedom from the wound as well as from the offender. To reach such a state requires not only a lot of time and effort but also the proper therapeutic environment. So **forgiveness is not a condition or an instrument of healing**; rather we can say that gradual moving forward in the process of healing naturally facili-

tates the process of forgiveness. But although one reaches a final stage of forgiveness, it does not mean that one will at the same time encounter perfect health. Health and the possibilities of its restoration on this earth are relative: **some consequences can be permanent** and this has nothing to do with not being forgiving (with whether the person forgave or not).

### **Senseless pressures regarding forgiveness**

There is one more dangerous tendency with regard to forgiveness: this is a **tendency to push victims to forgive**. Many Christians do not respect the fact that forgiveness is a process and that it has some conditions. When victims share their experiences, the first thing they are advised or asked to do is to forgive. If the topic of forgiveness is not raised at the first meeting, it is usually brought into conversation during the next few sessions. It is a common reaction of priests, relatives or friends.

Critical examination would disclose that hidden motives for such pushing are probably unwillingness to face uncomfortable truths and to stand actively on the side of justice. In practice it is usually manifested by an unwillingness to listen to the troubling questions of victims and the emotions they feel. This unfortunately equates to an unwillingness to help our neighbor carry a burden that is too heavy for them; and our indifference may even result in making this burden even heavier. Pushing victims to quick forgiveness is for many also a way to silence victims effectively, to hush up a crime and possibly avoid the uncomfortable task of confronting an important person; this may prevent a conflict, scandal or trial and preserve an air of normality. People with such motives expect forgiveness to resolve everything and once and for all close an uncomfortable topic. They do not want to be bothered by such problems anymore and have to devote their precious time and energy to them. They do not want to burden themselves and at the same time do not sufficiently care about the burden of the victim. By pushing victims into forgiveness they want to get rid of their portion of responsibility in building a just and safe world. In better cases their behaviour merely reflects the unawareness of somebody who would like to help but does not know how; forgiveness seems to them to be a good idea (Horsfield, 2002, pp. 54, 57-59; O'Grady, 2001, p. 33; Duffy, 1999, pp. 68-70, 72).

The outside pressure on victims (to forgive) is often internalized. Victims identify with this pressure – they themselves wish to forgive quickly – while other motives emerge. They want to meet outside expectations – fearing that otherwise they would not be good Christians and would risk condemnation. Or they are afraid to be seen as “unhealed” or even “obsessed by the spirit of not forgiving” in the eyes of some Christians. In



addition through quick forgiveness they may unconsciously avoid having to go through demanding therapeutic work – hoping forgiveness is a shortcut to healing (Horsfield, 2002, pp. 57-59; Heitritter & Vought, 1989, pp. 205-206, 208).

Forgiveness cannot be prescribed, forced or rushed into existence (Marshall, 2001, p. 274; Amstutz, 2004, p. 92). **Neither outside nor internal pressure can speed up the process of forgiveness.** Forgiveness is a process that has no shortcuts. At the same time forgiveness is a gift of God, a grace with which one can cooperate but not manipulate. As God gives his gifts in a proper time – each stage of forgiveness has its time. The last stage is characterized by the “fulfilment of time” for which the Bible as well as theology use the Greek term “kairos”. Kairos cannot be enforced nor can it be planned or calculated – it does not have a chronological character. We do not know when this time will come; we only know that we should always prepare for it. Preparation consists of everything that contributes to justice, healing and maturing. When the wounds are deep (especially when they have been inflicted by crime) the process of forgiveness can be very slow and long lasting; it can take years or even decades and we even have to admit the possibility that it may take a whole lifetime. It is necessary to respect this reality and approach victims with great patience. Instead of insisting on forgiveness we should patiently await the fulfilment of time and carefully accompany victims on the process of preparation for it (Duffy, 1999, pp. 68-70, 72; Fortune & Marshall, 2002, pp. 2-3; Bilich et al, 2000, pp. 104-109).

During a **process of preparation** various layers of denial break down; truth comes to the surface with various emotions that have been suppressed for a long time. It is a time when it becomes clearer that the offender’s degrading messages are false and the victim’s self-respect is gradually restoring itself. It is a time when boundaries against evil are established, justice is renewed, and the victim gains inner strength. Only a stronger person can forgive. It has nothing to do with strength of character but with the structure of power. If the relationship between a victim and an offender is similar to a relationship between a slave and master, it is unhealthy, unethical and unbiblical to expect the victim to forgive. However, when the victim possesses more power, she can take a proactive stance toward the offender and freely offer forgiveness (Duffy, 1999, pp. 68-70, 72; Wolbert, 2002; Heim & Rye, 2002, p. 46; Farley, 1998, p. 17; Keene, 1996, pp. 121-134). In this regard it is useful to mention that the topic of forgiveness should not enter into the dialogue on the helper’s initiative and never during the initial stages of therapy. Its proper place is in

advanced or final stages of therapy, when conditions for it are sufficiently prepared.

When the phrase “Forgive!” or “I forgive” is used outside of the conditions of truth and justice, then it is just a form of insolent hypocrisy or naive illusion. It is important to realize that if somebody forgives under pressure, s/he is doing nothing other than an act resulting from false ideas about forgiveness. Such an act can create a short-lived sense of release within victims, offenders and other interested persons, but from a long-term perspective it can bring nothing good. **Forced and premature forgiveness is not a way of healing, peace and salvation for anybody.**

**In victims** such “forgiveness” will probably cause a short circuit in the process of healing. It can block up access to emotions of grief and just anger and at the same time deepen the guilt feeling, depression and a risk of auto-aggression. In addition any pressure on the victim to forgive may remind her of the offender’s approach and serve as another kind of abuse to the victim’s soul. Through all this the cycle of violence (with all its negative ramifications affecting the victim) gets stronger instead of weaker. So it is not surprising that forced forgiveness often influences various relations (therapeutic, pastoral, family or friend) in a bad way. It can also lead to a premature ending of therapy or even to a break-up in a friendship (Keshgegian, 2000, p. 195; Heim & Rye, 2002, p. 46; Bilich et al, 2000, pp. 104-109).

**Regarding the offenders**, premature forgiveness may lessen their motivation to do the solid work that repentance demands. Christians should not offer forgiveness as a cheap grace (without requesting repentance) because it will not help offenders to change themselves. People sometimes offer quick forgiveness in the false hope that such “great love” will change the offender. Sometimes victims are told that if they do not forgive they will hinder the offender’s healing or even his salvation. Such thinking is misleading: with “unconditional forgiveness” we can almost certainly predict that an offender will resist change (Horsfield, 2002, p. 56; Arms, 2002, p. 121).

The question is what should the victim do in a situation when the offender is explicitly asking her for forgiveness? To find a response we have to remind ourselves of the parable that we analyzed at the beginning of this chapter – especially the finding that true forgiveness takes place in the context of justice and truth - and that it is important to make a distinction between giving and receiving forgiveness.

### **Confrontation and reconciliation: how do they relate to forgiveness?**

It can be said that the process of forgiveness is for a victim a time of preparing for giving forgiveness. But the moment the victim demonstrates forgiveness to the offender is, I suggest, a moment of clear confrontation where the challenge to repent has its place. As forgiveness has nature of an undeserved gift, Marshall (2001, p.265-266) concludes: “if the wrongdoer is to benefit from this gift, he or she must know that it is being offered. Some audible word or visible action must come from the victim to ‘perform’ the act of release”.<sup>12</sup>

**Confrontation** can be understood as a moment of truth revealing. The very forgiveness is “rooted in the truth of the victim” (Duquoc, 1986, p. 42-43). That is why being confronted by the victim can be a deeply disturbing experience and the one that perpetrators rather avoid (Marshall, 2001, p. 264). Confrontation brings to light the depth of the evil that the offender has committed, uncovers his manipulative lies and unauthorized interests, and unveils the hurt and damage that his behavior has caused to the victim.

Confrontation within the context of victim-offender mediation (or victim-offender dialogue) is undoubtedly a demanding situation for both sides. It requires willingness to experience “the fellowship of sufferings”, described by Marshall (2001, p. 277-278) as follows: “When one person intentionally injures another, both victim and perpetrator are unavoidably bound together by their common experience. Both are chained to the same transgression and its aftermath. One is bound by guilt and shame, the other by bitterness and pain. (...) The offender needs the victim to trigger or sharpen his contrition, to hear his confession, remit his guilt, and to affirm his ability to start fresh. The victim needs the offender to hear her pain, answer her questions, absorb her resentment, and affirm her dignity. Each holds the key to the other’s liberation. For this ‘mutual unbinding’ to happen, both parties must return together to the original act to talk about what happened and to face squarely all the destructive and shameful implications that ensued. This is an immensely threatening and painful experience for both parties. (...) But it is out of this shared pain that the miracle of forgiveness is born. As the perpetrator confesses the guilt of his deed to the face of the party who suffered it, he experiences

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<sup>12</sup> Here I need to point out that there are situations when direct (face to face) confrontation of the offender is not possible: the offender may already be dead, live far away or in an unknown place, be anonymous or may have refused a meeting. Even in such circumstances, however, confrontation is still appropriate and can be carried out indirectly, e.g. in the form of a confrontational speech spoken in front of a witness (whether an understanding and compassionate human being, God or both).

shame and humiliation. He is stripped of his defences and appears naked before her. The victim witnesses this pain at the same time that she is brought back to the origin of her own pain and experiences once again the abasement or betrayal suffered at his hands. Witnessing her pain in turn deepens the perpetrator's shame and sorrow. Forgiveness occurs as a compassionate exchange of pain (Müller-Fahrenholz, 1997, p. 26). Each party enters into the pain of the other, and a miraculous liberation occurs. The dignity of both is restored."<sup>13</sup>

Confrontation shames the offender and activates a reaction, intensifying either the evil or repentance. It is quite possible that the offender will deny his responsibility, try to discredit the victim, make threats or even physically attack. The victim has to be prepared for it and not let herself get confused or scared away. Confrontation not only clearly distinguishes and rejects evil, it also sets boundaries to it. If the perpetrator will not respect boundaries and will continue to live a life full of lies, deception, abuse or denial, that way creating a new "debt", then it is not possible to fully accomplish forgiveness. Through confrontation the offender is given a challenge to repent as well as a warning about the consequences of an absence of repentance. The victim can say: "I forgive you but I want to let you know that you will use the grace of this gift only if you are prepared to receive it."

Granting forgiveness is neither necessary nor automatic – even if the offender asks for it repeatedly. Some authors suggest that it is also possible to "**withhold forgiveness**" (Fortune, 1996, pp. 201-206; Horsfield, 2002, pp. 59-62; Dratch, 2002, pp. 13, 16-17). According to Johnstone (2011, p. 111) "there are circumstances when, despite offers of apology and reparation, it is morally right to withhold forgiveness". This does not mean that the victim is not prepared to grant forgiveness – rather it means that the offender is not prepared (disposed) to receive it. It can be a useful way to help the offender to see the reality, to emphasize the necessity of repentance and to protect the word forgiveness from the abuse or degradation of its proper meaning. Such withholding of forgiveness is intended for the good of the offender.

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<sup>13</sup> Umbreit and Armour (2011, p. 233) perceive the issue in a similar way. They conclude: "Forgiveness, in the context of restorative justice dialogue, is a derivative of a bilateral process that requires victim and offender to be emotionally available to each other. Change may be created in both victim and offender as a result of their impact on each other. The victim's pain, for example, may reduce the offender's denial and elicit the remorse necessary for offender self-accountability and victim healing. Similarly, the offender's remorse may reduce the victim's anger and vengeance and foster empathy. If appropriate and desired, the mutuality in this kind of interpersonal influence may advance the conditions for victim forgiveness."

Even if the victim has expressed forgiveness in front of the offender, it does not mean that she will thereby reconcile with him. Although **forgiveness and reconciliation** are connected terms, they are **not identical**. The difference between them is similar to the difference between granting and receiving forgiveness. Forgiveness is an activity that the victim carries out as an inner process, the fruit of which can eventually be expressed outwardly but which does not depend on the repentance of the offender (only to the extent that it may make it easier or more difficult). Reconciliation, on the other hand, requires the active involvement of both sides – but primarily the side of the offender because reconciliation essentially depends on his repentance. Without sincere repentance the offender cannot receive the gift of forgiveness in a valid and effective way, nor can he achieve reconciliation in his relationship with the victim or with God. This principle is clearly shown in the biblical parable about the prodigal son (comp. Luke 15:18-20).

Confrontation is a situation in which **conditions of reconciliation** can be settled. The offender should confess his sins and accept his responsibility for wrongdoing without trying to excuse himself or blame the victim. He should also express regret over the hurt and damage he has caused, seek therapeutic and spiritual help and make restitution by which he would actively support the process of the victim's recovery from the traumatic consequences she has suffered (especially by paying the expenses related to it). Of course he should also relinquish any form of manipulation in relation to the victim and respect the other conditions set by the victim in order to protect her dignity, health and safety (Allender, 1993, p. 242; Fortune, 1996, pp. 204-205; Tutu, 2005, p. 280).

**Apology and restitution** are perhaps the most discussed topics concerning the conditions of reconciliation. Petrucci (2002) suggests that since apology is a relational act, to be effective and genuine it has to be given in a face-to-face discussion between the victim and the offender, it has to include communication of emotion (such as sadness or shame), and it should happen at the right time. Apology is an indispensable element of restorative justice. Through apologising, offenders acknowledge they have done wrong, accept responsibility for the harm they have created, express remorse and show they want forgiveness<sup>14</sup> (Tavuchis, 1991, p. vii; Roberts, 1995). By apologising, the offender demonstrates “that he

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<sup>14</sup> However, it has to be kept in mind that “the benefits of an apology might be counterbalanced if receiving an apology in itself creates an expectation to forgive” (Gal, 2011, p. 78). Yet non-manipulative apologies are considered as profoundly valuable, especially “in child-adult situations because they represent an articulation of respect for a young victim – an attitude that is particularly cherished by the less powerful” (Gal, 2011, p. 78).

takes (roughly) the same position of moral disapproval of the offense as the offended one takes” (Roberts, 1995, p. 193). The meaning of restitution is immense as well: “At one level, it serves as a tangible expression of the genuineness of the offender’s repentance, an external symbol that an internal change has occurred. (...) At another level, restitution affirms the victim’s significance as a person of worth and value. In place of having used the victim for his or her own ends, the offender now honors the victim as an independent subject with whom he shares his resources and power. In doing so, the offender also empowers and equips the victim for a better future. Restitution, then, is not about repaying the past or purchasing pardon in the present but about affirming the victim’s significance and helping provide for her future. Yet, at the same time, this enables the victim to be reconciled with the negative realities of the past so that they no longer control the present and the future” (Marshall, 2001, p. 279).

Although **reconciliation** might be seen as the culmination of the forgiveness process, it has to be admitted that **sometimes** (full) reconciliation **will not be possible**. The absence of repentance on the side of the offender is considered to be a principal barrier for reconciliation.<sup>15</sup> Forgiveness may be an invitation to reconciliation but never its blind and cheap guarantee. Forgiveness does not mean that the victim will automatically trust the offender. Love towards one’s neighbor should not be naïve; it has to be careful and vigilant – it has to make sure the repentance of the offender is sincere. Lost trust can be regained only through honest repentance. If the offender does not respect boundaries and repeatedly trespasses conditions, reconciliation would not only be unhealthy but also dangerous (Freedman, 1998, p. 200; Coyle, 2002, pp. 97-98). Withholding reconciliation in such circumstances is an expression of love for truth and life.

The victim even has the right even to **interrupt any contact with the offender** (a hint at such a step can be found in the Bible – comp. Matthew 18:15-18 or Mark 6:7-12). Nobody knows for sure when it is appropriate to take such a step; but it is possible that the time will come when this is the only proper way to protect oneself or others (perhaps one’s own children) from an unrepentant offender. But the victim should be prepared for the possibility that other relatives and friends will stay in contact with the

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<sup>15</sup> “Another instance is that in which the offender is dead or cannot be located. For example, one may unilaterally forgive an abusive parent after he or she has died, but full reconciliation with the person is not possible in this life” (Marshall, 2001, p.268-269). Considering the severity of the injury, it also has to be remembered that because of some permanent consequences that the trauma leaves (e.g. flashbacks during any contact with the offender) full restoration of the relationship can sometimes be impossible. Nobody has the right to rebuke the victim for this, however.

offender, showing an attitude of false forgiveness towards him while condemning the victim's approach.

Even if reconciliation occurs, it is important not to idealise it. In this regard Marshall (2001, p. 269) clarifies that "reconciliation never means going back to exactly the same relationship that existed before the offense, as though nothing has happened. The relationship between victim and offender is inevitably changed by what has transpired between them. Both parties have become different people through the experience of injury, guilt, shame, repentance, and forgiveness. Their relationship is not so much restored as renewed or renegotiated. It is not returned to its *original* condition but brought to a *healthier* condition. Sometimes the relationship will be stronger, closer, more fulfilling than before. New levels of intimacy and friendship may emerge. Often, however, the intimacy and trust of earlier times will not be recovered; the relationship will assume a more distant or formal character. But it will still be a healthier relationship than before because the bitterness and distrust or the imbalance of power that crippled the former relationship will have been dealt with and a more appropriate relationship between the parties established."

The last **dangerous tendency** is **to consider forgiveness and reconciliation a private matter**. Many Christians perceive forgiveness as a one-sided task for victims. There are even some psycho-spiritual recipes for forgiveness (e.g. five steps toward forgiveness; twelve steps toward forgiveness; the pyramid model of forgiveness; the four phases model of forgiveness etc). Aside from the fact that they are rather simplistic and in some points even deceptive, their common feature is that they ignore the ethical and community dimension of the crime and put the responsibility for solving the crime's consequences exclusively on the shoulders of the victim. Such forgiveness programmes are victim oriented – the victim has to understand why the abuse happened and what kind of consequences it brought, and she then has to come to terms with them on a psycho-spiritual basis. Forgiveness is reduced to a psycho-spiritual act which will bring resolution of the crime through a sense of inner freedom.

There is no doubt that the theory and practice of forgiveness is to a large extent separate from its ethical and social frame. People have to realize that such a frame is essential, however, if forgiveness is to be meaningful and bring an effective solution. In the context of the crime, the privatization of forgiveness and reconciliation is absolutely inappropriate. The crime not only harms its primary victims<sup>16</sup> but also represents a viola-

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<sup>16</sup> It is indisputable, that "forgiveness is the response of victims. Only victims have the right to confer forgiveness on their abusers. I cannot forgive you for what you did to another person; only the person you hurt has that right." At the same time it has to be admitted that

tion of basic ethical norms protected by the laws of the state. In its ethical context a crime is understood as a problem of the community – as a situation in which one member of the community has treated another member badly – and so **the response to the crime should also be a response of the community**. The Bible says that all Christians create “one body of Christ” and when one member suffers, all the members suffer with him (comp. 1 Cor 12:12-27). Faith is something inward and private, but it has to be witnessed outwardly by respecting and protecting ethical norms. Here we touch on the **need for justice, prevention and solidarity**. In this regard Augsburg (1996, p. 97-98) aptly notes: “We cannot heal ourselves; healing is either actualized, mediated, or surrogated within community. We are healed by the other; we heal each other”.

The Church as well as the secular community has to take a clear stance (attitude) toward the crime and look for the right way to forgive and reconcile with the offender (from its own position but also with regard to the victims). It also plays an important role in the process of forgiveness and reconciliation that both the victim and the offender have to go through (Horsfield, 2002, pp. 51-64, 68; Arms, 2002, pp. 109, 112; Fortune, 1998, pp. 49-57; Coleman, 1998, pp. 42-52; Tutu, 2005, pp. 280-281). There are many ways members of the community can complicate this process and many ways they can facilitate it. These latter are the same ways as those in which the community participates in achieving justice.

## **Conclusion**

As it has been described in detail, forgiveness is a multi-layered phenomenon (within which reconciliation may or may not occur). Commitment to the truth (despite the fact that it is so painful and demanding for

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“there are different degrees of victimization. The most direct experience of forgiveness takes place in the interaction between the offender and the *primary victim*, the person who has actually suffered the injury directly. But those close to the victim, her friends and loved ones, also suffer hurt. They have their own feelings of betrayal, resentment, anger, hatred, and revenge. Insofar as these painful feelings have been forced on them by the offender, they too are victims. As secondary victims, they also have issues of forgiveness to confront. In addition, the suffering caused by an offense – especially an unresolved offense – can sometimes have an enduring intergenerational impact. The immediate victim and/or the actual offender may be long dead, but the injustice or bitterness created by the offense might still be felt by later generations. They are subsequent victims of the offender, who may also need to find a place of release from their pain through forgiving the absent offender (perhaps represented by his or her contemporary offspring). This has particular relevance to dealing with the legacy of military or political or ethnic grievances from the past.” (Marshall, 2001, p. 164-265).



all stakeholders) is essential if justice is to be restored and healing is to be facilitated.

There is no doubt that **premature forgiveness** is potentially very **dangerous** and can create more damage than benefit both on the side of victims as well as offenders. Plus it can also have a negative impact on the wider community – on the family or friends of offenders and victims, or on other people who are somehow affected by the crime. Members of the community also need to deal with the crime and trauma. Premature forgiveness will not help them to negotiate the problem but rather make them accomplices of the crime.

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## VALUES IN MEDIATION

Lenka Holá

### Introduction

Large amount of works is currently focusing on lists of values, their classification, typologies, value orientations, and on what values are approved by an individual. Therefore the authors try in various ways to name specific human values, to summarize them, to classify them, and it leads to a definite framework of the term “value”. However, there is not enough works dealing with a process of their origins, with dynamics of their formation and interference.

We believe that this topic is essential also in mediation. This contribution’s objective is to analyze mediation in relation to values and to point out significant influence of values on evaluation and decision-making of mediation participants. The contribution shall increase interest in deeper research of values in mediation and it shall provide basic theoretical orientation.

If we speak about the mediation philosophy, as an approach to conflict resolution based on cooperation, mutuality and reconciliation, then we may consider it as a certain moral ideal or value. Another argument for clarification of the processes and relations in mediation through values is given by their mutual relation. Social behaviour is closely related to (moral) values and (moral) norms derived from them. Mediation also follows certain norms. From this fact, we may deduce that it has its values. Moreover, mediation itself is an instrument of intermediation of values. We should add that we regard mediation values as an approach and a method, values of mediation participants (clients and a mediator), values of mediation output (values of all observable results) as “values in mediation,” therefore not only individuals’ values in the psychological sense.

A generally accepted definition of values is impossible to create. *“A value concept ... represents a basic term which, strictly said, cannot be defined by a nominal definition. However, it is possible to describe what it means and to identify relations forming its meaning.”* (Scholl-Schaaf,

1975, p. 60). Essentially, we are not able to say once and for all what values are.

Values as a metaphor were introduced into philosophy by German scholar Rudolf Herman Lotze in mid-19<sup>th</sup> century to express what directs and orientates our evaluation. Older terms of good and evil or virtue and vice are absolute (either – or, yes – no). Unlike them, Lotze anticipates that our evaluation is usually graduated (more – less, better – worse).

In everyday life, one must constantly evaluate and choose. Even though one does not know exactly what is absolutely good (e.g. of high-quality, reliable, economical, healthy, ethical), one is usually able to understand what is better and what is worse. One prefers certain thing to another and is able to justify it.

Values are a term transcending borders of several fields of study. Values have long been in the spotlight not only of philosophy, psychology, and sociology, but also pedagogy, political science, economy, mathematics, anthropology, or theology. We will deal with analysis of values in mediation from the philosophical, sociological, cultural, and psychological point of view. These fields are most strongly related to mediation and they also significantly influence value conception. We will focus mainly on psychology and its benefits.

To be specific in the case of mediation e.g. what values influence a choice of constructive approach to conflict resolution by the participants? How they are reflected in evaluation and a choice of specific intervention (mediation)? What values influence transformation of rivalry into cooperation, and even before it – what values influence motivation to transform rivalry into cooperation? What values influence expectations from mediation, in other words what result is considered by the participants as desirable so they would be satisfied with it? And what values are reflected in a mediator's personality, a choice of one's mediation concept, an approach to it and a choice of specific mediation techniques? Therefore the choice of a course of actions between a mediator and clients. This is only a part of the topics related to values in mediation which could be, and in our opinion should be, further researched.

### **Values from the philosophical perspective**

One cannot live only as an indifferent observer but one must choose, decide, and thus evaluate. One asks not only what is true and what untrue, but mainly what is good and what bad, better and worse. And not only a human but every living creature, to the extent it is able to influence its fate, must search for food or water or to avoid danger.

Ancient cults adhered to personification of good and evil. Their age-old fight ended with the last judgement and the victory of good. Fear of and anxiety over such fate mobilized people to constant moral effort. But a contemporary person does not need myths. One has real knowledge about the character of own existence. It forces a person to anticipate polymorphous evil as a constant guide on a life's journey (Kučerová, 1994). Thus one transcends into a social sphere where one may realize individual opportunities.

Questions on a "good life" have belonged to philosophy since the very beginning. Even in ancient history, philosophers considered values in certain way. But the ancient philosophy dealt with them mostly as a search for good or virtues. It did not inquire into own procedures of evaluation much. It was primarily theoretical economists (e.g. Adam Smith, Jean-Baptiste Say) who developed interest in evaluation as a comparison and appreciation. They studied the way how one chooses, what and when one prefers, what one is willing to swap, and what values one attributes to certain things.

Philosophers often sought specific values leading to the "good life". They explored their essence and formation. However, the term "value" seems to be very problematic. It leads to conception that they are just things which are easy to find and then to follow. Should we define values more specifically, we would have to use evaluation and a circular definition: "Values are what we follow in our evaluation". With conception of value we try to subsequently answer the question why we prefer something over something another. Therefore current, more demanding philosophical research stems rather from acts of evaluation than from predetermined values.

The term evaluation, as fundamentally different from cognition, is found in the works of Liessmann and Schopenhauer. But it gains the essential meaning thanks to two different thinkers – F. Nietzsche and H. Lotze.<sup>1</sup> Nietzsche believed that the source of evaluation is will, more specifically the will to power. Therefore he called for "re-evaluation of val-

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<sup>1</sup> Rudolf Hermann Lotze (1817 – 1881), a German philosopher, a doctor, and one of the founders of practical psychology. He tried to merge natural scientific and philosophical exploration of reality. He was speaking about three regions – a region of facts, a region of laws, and a region of standard of value – in order to general understanding of a human. However, these regions are separate only in our thoughts, not in reality. His lectures ranged over a wide field of logic, philosophy, ethics, and psychology; in his works he endeavoured to interconnect them. The task of philosophy is to specify several insights into reality, which are provided by separate sciences, and to harmonize and unite them. Lotze was the first who tried to deal with it. He introduced the terms "validity" and "value" into philosophy. Recently, his thoughts have become a centre of renewed interest.

ues” and he expected a creative human to create “own values”. Exactly these creative humans create and push specific groups of values which consequently characterize and also distinguish human cultures. Herman Lotze focused on a process of evaluation and he named this study as axiology. Axiology (derived from the Greek *axios*, equal, worthy), also called value theory, is a modern philosophical discipline, part of practical philosophy, and it deals with evaluation and values. J. Patočka (2003) considers values as secondary and as “sediments of evaluation” unlike evaluation, which may be securely stated.

The topic of values is then reflected in writings of numerous thinkers. Nevertheless, there is no space to deal with them and it is not even the concept of this work. They explore relativism (conditionality and dependence) and universalism (similar conception) of values. They research values in relation to the mankind, they deal with the question if value is objective or subjective. How values give a purpose to life and if searching for the purpose is a universal human motive. In the history of philosophy, axiologic research focused on validity of cognition and evaluation. A human is situated in conflicts between nature and civilization, reality and ideal, and between what one is, what one has and what one would like to be. One desires to overcome isolation but also to be oneself, one wants to be open to the world but also to be closed inward, to integrate own world.

### **Values from the sociological perspective**

Key for sociological approaches is that they emphasize values within a group, culture, society or institutions, because people would not be able to *cooperate* in any social group without values. They examine an impact of existence of certain values on society and its development. The same but on smaller scale applies to different institutions, movements etc. Values are not defined through their meaning for an individual.

According to sociologists, values are cornerstones of a social structure (e.g. Inglehart, 2009). They form a framework or an orientation of individuals’ behaviour and primarily they form regulations of individuals’ behaviour, all of which is then reflected in regulations of a group or society. Values express what is desirable, appropriate or good for an individual or a group, and what guides their route. We might consider values as ideals influencing rules and norms. Current sociologists share similar ideas. For example Schaefer (1989) defines values as collective understanding of what is considered to be good, desirable and appropriate, or bad, undesirable and inappropriate in a given culture.

A very interesting research on values took place in the Czech Republic between 1991 and 2008 (Rabušic, Hamanová, 2009). It was part of the

longitudinal research European Values Study, which was characterized by foreign researchers as one of the most important researches of current social sciences. The research deals with value orientation and value preferences of citizens in 45 countries. The outcomes are unique, since they are based on series of repeated research on a representative selected group (around 2000 respondents in the Czech Republic). The outcomes allow us to examine a development of certain value preferences and attitudes of those citizens. For example in 1991, 59 % of Czech citizens considered their work as very important in their life. In 1999 it was 53 % and in 2007 only 44 % of citizens. Importance of work in people's life decreased by 16 %. The research deals with large amount of values, which may be divided, in accordance with the authors, into seven categories: 1. Values of and attitudes to basic life problems; 2. Work; 3. Reason and purpose of life; 4. Family and marriage; 5. Politics; 6. National identity; 7. Social justice, solidarity and environment. There is no space for further details, but in general we may say that in the Czech Republic in 1991-2008 the order of basic values is as follows (in descending order): 1. Family; 2. Work; 3. Friends and acquaintances; 4. Free time; 5. Politics; 6. Religion.

If in mediation we aim to participants' satisfaction with a process and outcomes of conflict resolution, it is interesting to investigate the relation between age of respondents and their feeling of happiness. In 1991, there were no differences in the feeling of happiness among the age categories. In 2008, this relation was clearly linear. The older the respondents, the less intense the feeling of happiness. There was an increase of happy people mostly among young respondents. In the 45-year-of-age category and older the feeling of happiness was constant, but not that high (Rabušic, Hamanová, 2009).

### **Values from the cultural perspective**

In a sociological research of values, the relation between values and culture constitutes an independent category. According to Rickert (In Major, 1991, p. 108), culture is directly bonded with values. In this context he speaks about two types of objects – cultural (thus dependent on values) and natural (independent on values). Rickert is convinced that it is not possible to observe cultural reality without considering its value relevance, because that would be a naturalistic perspective. Durkheim (1982) has similar approach towards cultural values. According to him, values are one of the basic elements necessary for the existence of society. Culture is formed by values that are recognized by its society members.

A sociologic-cultural line is to some extent peculiar also to Freud – he also deals with the cultural psychology and formation of cultural values



on the basis of individual values. In the book *Totem and Taboo* (Freud, 1997) he clarifies psychology of nations through psychoanalysis and besides, he compares individual norms with group rules. These individual norms are created on the basis of values and if they are incompatible with demands of a group (society), an individual is frustrated.

Value as an outcome of (someone's) evaluation is always value for someone. Therefore it is subjective. Nevertheless, evaluations of diverse people are often very similar or even identical, especially if these people belong to the same society, culture or have common experience. Education and culture, in which people grow up and live, have substantial influence on their evaluation and on the other hand, a system of values is a characteristic of a specific culture.

The outcome of this is that values approved by individual members of society become somehow norms. A society is built on the norms recognized by its members. Based on these values we may, to some extent, predict in which direction the society will develop.

There is also interesting reflection from the other side – what is the importance of values in mediation for culture and society? And what impact they have through society on an individual? Implementation of mediation as a regular method of conflict resolution in a given society and its support of a state – is it reflecting values which this society recognises or more accurately – prefers?

### **Values from the psychological perspective**

Philosophy from the perspective of psychology of values cannot be omitted, since some authors combine “philosophical” inquiring about purpose of the world and a place of a human in the world with psychological interest in understanding an individual, one's inner processes. Psychological definitions deal more with values from the perspective of their purpose in life of a human (one's behaviour, feelings and thinking) than philosophy or sociology. Psychology studies value in relation with personal variables, what place within the framework of one's personality value has, and what its difference from other personal characteristics is.

Rickert<sup>2</sup> posits values as independent on being, not having physical nor psychical essence, but as “valid” and creating its own realm of validi-

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<sup>2</sup> Heinrich Rickert (1863 – 1936) was a German neo-Kantian philosopher. He studied history, philosophy, and physiology. He dealt mainly with philosophy of values. Rickert differentiates six values spheres: 1. logic; 2. aesthetics; 3. mysticism; 4. ethics, including social matters; 5. eroticism; and 6. religion. Rickert deeply influenced Max Weber, who adopted his term “ideal type”. Main works: *Der Gegenstand der Erkenntnis* (Subject of Knowledge, 1892), *Kulturwissenschaft und Naturwissenschaft* (Cultural and Natural science, 1899), *Die Philosophie des Lebens* (Philosophy of Life, 1920).

ty. They are transcendent and do not exist in reality. They represent validities which are completely independent, objectively similar, and invariable (Rickert, 1910).

This idea was also shared by Durkheim (1982, p. 59). According to him, values are “a non-materialistic social fact” which is external and exists outside a human. He also distinguishes psychology from sociology by stating that the purpose of psychology is research of values “from within”, whereas sociology studies values “outside”. Lotze has similar opinion – he says that value exists in a special world of values that exists besides and above the realm of nature (Storig 1993).

Freud was among the first ones to look for a position of values within one’s personality (Cakirpalogu, 2009). After him, most of the psychologists assume that values are part of an individual, one’s personality. Berlin (2006) considers values to be a human creation. They are not “outside” as a part of the universe, they are not derived from nature. They are a human creation. Fromm (2007) believes that a human is influenced by society, but also that values exist “within a human”.

It is not easy to define values. The ambiguity is given by characteristics from the perspective of many science disciplines. Values are once called stable characteristics (Schwartz in Bardi et al., 2009), another time dynamic structures of personality (Sagiv and Schwartz, 2000), sometimes they are even called a “non-influenceable fact” (Durkheim, in Giddens, 1995). The clash whether values exist outside a human as part of the outside world or are part of one’s personality, may be likely solved only by a philosophical debate.

To study values and attitudes is important not only for analytical and interpretational reasons but also for prognostic reasons – on the basis of known value preferences, one may presume future behaviour of a human, a group or society. According to the American psychologist Gordon Allport, we may best predict the future by paying attention to values people stand for and also by noticing changes which occur there. For example, should someone’s value be belief in God, the attitude towards abortion would likely be negative. Likewise, the attitude towards homosexuality or adultery will also be negative. Mediation that would not include this value and its influence on participants’ attitudes in its scope might be compared to showing the way through a desert to a person who is dying of thirst. Values indicate preferences of outcomes which people desire in their lives and also preferences of certain types of behaviour. Hechter (1994, p. 321) speaks about values as a ground for negotiation.

A question for mediation arises from all abovementioned – in what relation values are towards an individual? Are there values outside humans

or dependent on them? Is it possible for individuals to influence their values, change them, and if so, to what extent? And how these changes influence thinking, behaviour and living of the participants of mediation? We cannot get answers for these questions until we admit that values are variable during a human life.

### **Determination of values**

Since philosophical theories are not supported by empirically verified facts, they do not say anything about determination of values, their substance. Therefore, we will explore fields of psychology and sociology.

According to Durkheim (1982), an individual cannot influence values much. Value as an opposite of an idea, as a given “thing”, is not influenceable by an individual. Only small autonomy is granted to a human by theories viewing an individual only from the “biological” perspective. These theories consider maturing of humans or a species as the basis for change in values (Trivers 1971, in Sachdevová, 2009). Depending on the level of development of a given organism, there are also changes in needs to which values serve. If influence of other factors would cease to exist, it is probable that people in the same age categories would have approximately same values.

The authors, who emphasise interconnection between the concept of values and fulfilling values, do not give a human any ability to actively influence values by their will. Theories by pro-evolution authors (Andreoni 1990, Cialdini et al., 1980, Darwin 1970, in Plháčková, 2006) may serve as an example. They describe value of altruism as something that exists thanks to personal benefit of altruism for an altruistic individual. Some of them admit that an individual does not have to be altruistic for a particular reason, but just because it satisfies him internally. Therefore, one is essentially always selfish. Adler (1999) believes that an individual possesses a lot of positive values and is programmed to be satisfied by socially beneficial behaviour. But eventually, one always does beneficial values for self, because e.g. one tries to overrule low self-esteem. Values are therefore determined by their benefit and function. They can be also measured according to their usefulness. Value therefore serves the need or is directly the need.

Warmer attitude towards human nature, morality, and values is presented by e.g. Brooks (2009), who emphasizes that a human aims at good and may use own will to overcome own programming to do only those things that would be beneficial.

A counterpart of values serving certain needs is values that are called as “inner” (intrinsic, inherent). Fromm (2007) believes that a human is

able to actively think about values and to change them. He underlines their spiritual dimension. Values give our life direction and purpose. According to him, values emphasize free will of a human being. This concept of values is also close to Frankl (2006), who describes creative, experiential and attitudinal values. They allow a human to rise above reality. Frankl speaks about values when one experiences something valuable (like relationships) and also in cases when one holds certain attitudes and beliefs. The second case, “values of attitudes”, is common in situations when one cannot experience or create anything meaningful. These values belong to the highest (Frankl, 2006). Frankl says that a human is not reduced by biological mechanisms and therefore even human values may be independent on fulfilling bio-social needs. As well as for Frankl, also for a number of existential philosophers is crucial the theme of searching for purpose. The work by American psychotherapist Irvin Yalom is also based on existentialism. In his casuistry, individuals speak about their values. He is convinced that one may change own life by changing own values. Opinions of those humanistic-oriented psychologists are absolutely crucial for understanding values and their significance in mediation.

Let's summarize all abovementioned. On one hand there is supposed biosocial conditionality of values (i. e. instincts, CNS maturing, learning) which does not allow an individual to have a free choice of changes. In the concept of values as a drive to fulfilling needs, there is also only little space for free will. Opposite to these, there are existential and humanistic trends that consider values to be constructs giving purpose to life, whether it suits a human or not. It is probably an unsolvable dispute, where two “camps” of scientists stand against each other. And it is very probable that even mediation would not be able to solve it. We incline to the view that an individual actively forms own values and exerts influence on them. Therefore, there is a reason to examine values in dependence on their carriers and situation.

### **Stability and dynamics of values**

If mediation presumes transformation of competing relationship into cooperation, transformation of thinking, behaviour and experience of its participants, then the idea occurs – these crucial changes in their inner lives are also related with changes of values. We will therefore explore if this dynamics of values is possible and under what circumstances. First, we should elaborate the terms “stability” and “dynamics” of values.

Schwartz (2009) does not consider stability of values as an expression of permanency, but as an expression of transformation according to certain rules. He himself studies dynamics of values (see Schwartz, 2006),

even though he focuses rather on mutual effect of different values than on dynamic development of particular values. Inglehart et al. (1998) says that based on a socioeconomic developmental level of certain culture, one may always observe similar values in similarly developed societies. Psychologists also agree with this statement. For example Schwartz (2006) says that each individual has values which represent the need of group functioning. These values may be certainly considered stable.

However, if we consider values in the context of a human life, not a group, it is evident that specific values are not completely stable. As we will elaborate further, most of the authors admit their development and variability. This may be considered as another basic postulate for the mediation concept as an opportunity not only for conflict resolution, but also for (more permanent) changes in value orientation of clients.

Dynamics thus describes development and transformation of values; how values affect each other, if specific values are “attracted” to each other or eliminate each other, what influences their change etc. There is no generally recognized theory to clarify the dynamics. Therefore we will focus on opinions of significant psychologists, who dealt with dynamics of values. Thus we may illustrate development of thinking about values and also what the role of an individual is – an “actor” that influences values or a “receiver”. We think about dynamics of values in terms of their development, not in terms of mutual effect.

Freud saw interconnection between values and development of super-ego, and as one of the first people tried to structurally place values inside personality (Cakirpaloglu, 2009). In his study on values, he emphasised only unconscious factors during forming of values. He also said that the important part of moral development ends during childhood. This would mean that also values are dynamically formed more or less during childhood. During adolescence and later periods, individuals are not able to influence their values. Contrary to humanistic-oriented psychologists, Freud rules out the possibility of free will, a human is physiologically determined in his theory. Development of values is independent on a human.

Jung (1995) finds values both in the unconscious and a conscious mind. His theory is not clear on the matter when the most sensitive period for development of values is. However, it is evident that Jung recognizes influence of an individual. According to him, a human is changing for a longer time than Freud says, and some wisdom or maturity could not be achieved before the middle age.

Hartmann's (1962) work is based on psychoanalysis, but he is grouped among “reformers” of psychoanalytic teachings. Firstly, he stated that the place of values is not only in superego, but also in ego (con-

scious self). Self is capable of judging itself, of testing own and cultural values. According to Hartmann, the place of value potential is both personality and culture. Differences of values among people may be explained by an experience factor. Unlike Freud's psychoanalysis, he accepts a possibility of conscious and lifelong influence on values.

Adler's "individual psychology" was partially influenced by psychoanalysis, but it emphasises more individuality of a human whose objective, though, is to fit in society. Value is a part of Adler's definition, where personality is defined as a coherent system of traits, interests and values (Adler, 1999). According to the author, a human suffers from low self-esteem, which one wants to get rid of. That is the human basic life objective. From this we may derive specific values of a human. In Adler's theory values can develop whenever but it depends on fulfilling the objective. It is not inner free choice.

Horney (2000) explored the idea of healthy life growth and self-fulfilment as inherent processes. In her concept a carrier of values is the real self, which is also a source of spontaneity, responsibility, intensity and emotions. For healthy growth of an individual, interaction between an individual and the outside world, which must react in a certain way to one's needs, is required. Hence, development or change of values is subject to proper social contact. Horney does not speak about biological determinism of a human, she stresses social determinism. She assumes active formation of values, but it depends on an individual and how one will deal with challenges.

Fromm (2007) integrates psychoanalytical psychology with sociology and philosophy. Thus he forms a broad-ranged theory of personality that includes a compact study of values. He examines them in relation with morality of both an individual and society. He believes that a human is influenced by society and a social system but that values also exist "within an individual" as well. A human is able to actively think about them and to change them. Adopting specific values by an individual depends on personal responsibility and decision to accept "life's challenges". Thus change and development of values are even more distinctly matter of an individual in Fromm's interpretation.

Erikson's interest in values is clearly apparent in two mutually connected areas. The first one deals with development of identity, during which an individual has to achieve certain values. If this does not happen, then one's personality cannot develop any further. The second area deals with development of moral characteristics (Cakirpaloglu, 2009). Values achieved by humans predicate their moral beliefs. Premises for achieving some values are both evolutionary and socially affected, but an individual

is also an actor. Humans acquire values during their whole life through “achieving developmental stages”. As they get older, this process is more and more conscious.

Maslow proposed a theory of hierarchy of needs. He was a humanist, a predecessor of Frankl, Rogers and others. He stressed significance of an individual and one’s healthy growth. Maslow (1970) presumed individual’s activity in formation of values. An individual acquires a disposition for “higher values” since birth, but sometimes one is diverted from healthy development by life events.

Last author, on whom we will focus as we discover possibilities of dynamic changes of values in a human life, is Victor E. Frankl. His theory is based on the principle that a human is a being searching for purpose. “Higher values” that represent certain purpose are above all. They are independent on satisfying lower values. One is actively fighting for own values; one just has to decide to fulfil them. Therefore, one may acquire creative, experiential and attitudinal values already during childhood (Frankl, 2006).

When trying to generalize all abovementioned facts, we may say that opinions are shifting, in accordance with development of psychology – from those that take into account only instinctive conditionality of values, through opinions considering social conditionality, to those that accent autonomy of humans and their free choice.

Basic value structures are being formed in the formative period of a human life, i.e. between 10 and 25 years of age and as such they are relatively resistant to change (Becker, 1995). Their later transformation is, as experience shows, possible. Usually it is a gradual process. To find out what values people adhere to and what changes occur there is not a simple research task for at least two reasons:

1. we must be able to register and measure human values,
2. we must have a timeline of value development.

Of course, diversity of opinions also exists, but the current trend of views on value dynamics is such that value development is, at least partially, under individual’s control. Hence, it is necessary to examine the meaning of particular values for mediation and its participants, the differences in activity during formation or change of values, and the impact of particular factors on positive change of values that may be achieved through mediation.

### **Function of values in mediation**

So far we have mentioned reflections on values on a wider scale. Now we will focus on particular meaning of this construct. We will focus on

each function of values, which are as follows: - motivational; - emotional; - moral; - cognitive; - social. We will relate them to mediation, which we here consider, methodologically and de facto, to be value.

### *Motivational function*

Weber (2009) contributed to understanding of values by his concept of their motivational function. Interests stimulate clients to certain behaviour. Value and value orientation are also related to needs. They determine what comes first, which values are to be satisfied sooner and which later. According to Grác (1979, p. 30) “...a certain object's value corresponds with its necessity.” Values are part of a motivational sphere of personality and they are a source of attitudes towards the outer world. They are considered to be a typical social phenomenon (Nakonečný, 1995).

We consider also norms to be a source of values. They work as generally binding obligations exhibiting certain social good. Another source may be represented by behaviour which satisfies us. In this sense, good values for many people are e.g. delicious food, comfort, entertainment, support and trust of others. Values are the important dynamic part of human activity. They are a basic component of attitudes and they create our attitudes (Grác, 1979).

### *Emotional function*

Weber considers emotions to be one of the important principles in life which determines motivational function of values (Oakes, 2003). Thus values have also emotional function. Most of theories of emotions assign a central position to objectives, hence values pursued by an individual. Mediation is influenced by participants' emotional experience, and vice versa it influences the participants' emotional experience. There is a feedback relation between values and emotions. Motivations and emotions influence value. But as a feedback, value influences emotions and motivations. Acknowledgement of certain values is important for satisfaction, for feeling of happiness (Tyrlík, 2004). Value is what we experience as valuable. Sarnoff (1962, p. 79) also attribute emotional function to values. He considers them as an emotionally tinted concept of good and evil. Mediation influences attitudes, behaviour, motivation and an emotional experience of clients.

### *Moral function*

Naturally, morality is closely related with values – values influence behaviour in terms of content (objectives, means) and motivation. Values are a factor influencing moral reasoning and resolution of moral situations



(Tyrlik, 2004). So mediation influences moral reasoning and resolution of moral situations which occur in mediation. This applies for both clients and a mediator. Another interpretation is that values always have a limited range of effect – they influence behaviour of mediation participants only in a limited time frame. Generalized values in form of ideas or world pictures are always relevant for higher number of situations (Habermas 1984, p. 172). In this way we may consider mediation, expressed by ethical values of cooperation, mutuality, and by respect of dignity, modesty, justice etc., as a relevant approach to resolution of higher number of conflict situations.

### *Cognitive function*

With this we are going back to Weber, who emphasises cognitive function of values through description of interpretation schemes. Values are sort of a filter which determines what a human observes, perceives, remembers etc. (Murray, in Hall and Gardenr, 1997, p. 260). Therefore, a mediation participant has an opportunity to judge importance, significance, and advantages of mediation, as well as own needs and tendencies, and to decide accordingly, to elaborate cognitively own motive. We examine meaning of mediation within cognitive processes – for thinking, perception and memory.

Interconnection between value development and cognitive development is typical for Piaget's theories (Piaget, 1966). He names each stage of thinking according to their maturity and derives how morally an individual manages to behave in a given stage. According to the author and his followers there is linear causality – morality is dependent on intellect, not vice versa. Discussing this topic would be certainly interesting, especially while looking into newspapers. Nevertheless, we believe that thanks to values which people with lower intellect accept, these people are often capable of morally superior behaviour compared to people with more mature intellect.

### *Social function*

Social function of values has special significance for mediation. One has to deal with values of others during socialization (which happens through the whole life, from birth to death). One learns from the environment and usually does everything possible to feel well among other people. One has to somehow abide by social values e.g. in a form of norms or laws. One consciously or unconsciously internalizes some values and refuses others. Individuals (e.g. father, mother, siblings, friends, teachers, a mediator, a psychotherapist) and institutions (e.g. family,

school, church, political party, state) are intermediaries of values. Values are naturally influenced by social environment (relations and process of mediation) and as feedback, mediation participants influence the social environment. Sharing meaning of values facilitates communication.

Some authors (e.g. Havighurst, 1972; Erikson, 1999) claim that people experience certain key events at the same age during their lives. Consequently, there is a precondition for similar formation of their values. Roccas and Schwartz (2003) investigated what significance people attribute to specific values in dependence on their identification with a group. The result was that specific values influence how an individual identifies itself with a certain group. Thus, what values are presented by mediation, on what principles it works, what values it intermediates – all of this influence how clients adapt to conflict resolution by mediation, how they accept it as suitable and what effort will they put into cooperation.

### **Mediation and participants' values**

Mediation as a communication method has, besides its correlation and content components, also its dynamic (procedural) component. Effect of mediation on participants' values emerges from being based on values recognized by participants. As the mediation participants we consider clients, a mediator, indirectly also an organization providing mediation services, a professional group of mediators etc. In return, participants influence values of mediation, because they are part of it. It is therefore difficult to separate effect of mediation on participants and vice versa.

Mediation means influence by values to values. It allows clients to discover values, to experience them and to create new value. It means that despite all "intentionality" of mediation, it is an unrepeatable, creative act. Mission of mediation is then more significant in clients' lives than it would occur at first. It interferes, or more specifically may interfere, with essence of a human existence. After all, it does not matter what people believe in, what they focus their strength and energy on. Mediation participants ask questions on human essence and nature, one's needs, capabilities, perspectives and ideals.

Decision-making about oneself is associated with possible difficulties and obstacles. A human takes actions at own risk and danger and with constant possibility of individual failure. Each choice means engaging in a human community, in a world of multilateral polarization of personal tendencies and social norms. It is reasonable to assume that this is also true in mediation. If one is successful in fulfilling own life, one is happy. If one is limited to minimum there, if is unable to realize it to the desirable and satisfactory extent, then one feels unfulfilled, failure and unfortu-

nate. One may overcome this vicious circle with creative activity. We speak about transcendence – surpassing or exceeding human subjectivity. Through it, one is something more than in reality. One exceeds oneself by being creative. According to Antoine de Saint-Exupéry, a human is someone who possesses inward a superior being. With creative attitude towards conflict resolution, one discovers new meaning of things and values around oneself. Almost anything may be a source of happiness, feeling of self-significance, wealth, fascination or threat and deprivation. During mediation one discovers own opportunities and abilities, develops own inner wealth. “*All human activity is nothing else than formation of values, their protection, effort to their preservation, multiplication and development.*” (Kučerová, 1994, p. 30).

Mediation would be pointless without evaluation. Without realizing what is better, what worse, what is necessary and what is not, what is improving progress of my situation and what is failure. Mediation participants want, desire, struggle, disagree, fight or agree and cooperate. We cannot avoid axiological issues in mediation. Nevertheless, it is fair to say that opinions on it are ambiguous. Phenomenon plurality undoubtedly requires also plurality of possible examination methods, as we outlined in the first part of this chapter.

A client may choose mediation as an approach to conflict resolution, agreeing in fact with cooperative resolution. However during mediation, one should accept values (or at least comply with them), that are not one’s own. One has to be conformable to some extent, to adapt norms (rules) of mediation. And if one does not comply with them, it has personal or even social consequences. Paradoxically, the client’s conflict situation may be enhanced by recognition that one does not fit in the cooperation frame.

Research of values within culture, or more specifically within defined cultural societies, reflects values of an individual. Research of values which create social norms is considered by many authors as crucial for understanding of individual human behaviour (see Cialidin, Reno and Kallgren, 1990; Fishbein and Ajzen, 1975). The same may be assumed on a lower scale –e.g. a certain institution, such as a professional association of mediators, will probably reflect values of an individual belonging to the institution. That is because mediation values, as well as values of a mediator’s profession, may reflect values of individual mediators.

E.g. Ingelhart (1995) claims that values of each member of society are transformed on basis of society transformation. Hence, transformation of rivalry into cooperation, effort into mutual understanding, and searching for mutually acceptable resolution are specific changes that may influence values of each participant. Following Sagiv (2010) and focusing on e.g.

facilitative mediation, which deals with behavioural structure, participants' roles being clearly defined and a mediation objective being frequently verified, then we may observe that "mediation groups" behave similarly (very generally speaking) in certain stages of negotiation. And even values may be transforming analogously. One group of researchers would cover a social climate of mediation and its development in dependence on case resolution. They would deal with what influence each stage of mediation has on changes of participants' values. Another group of authors would examine specific social events which participants experienced in mediation and which had some effect on them. According to them, these events influence the value change.

### *Possibility of understanding other's values*

It is interesting to meditate on how values are understood by various people and if it is possible to understand the value system of others. Berlin (2006) created a concept of "value relativism and pluralism". It is the basic doctrine in his value theory. He refuses a relativistic concept of values by "if I like a cup of milk before bed and you a glass of wine, you cannot ever understand how I might like milk in the evening, as well as I do not understand you". He applies ethics on this example and says that, taken to extreme, it may be like this: "I like hurting people and you do not, our habits and traditions are different; there is nothing we can do about it." There is no place for communication and consensus in this approach to values.

On the other hand, pluralism according to Berlin (2006) enables communication and understanding of moral attitudes among people. The basic principle of value pluralism is opinion that value is binding for a human by preferring own objectives in own terms, not in terms which define objectives of someone else. Berlin says that values are rooted in a human character. A human is however able to understand values which define objectives of others. Value pluralism in mediation means that one side has preconditions to understand other side's values.

Schwartz (2001) also speculates if there is any universal value structure common to all people, and if values have the same meaning for everyone. He explores it both generally and in specific groups (e.g. churches, political parties, nations). Thanks to it, he came to ten universal values which are similarly understood by people around the world. Those are self-direction, stimulation, hedonism, achievement, power, security, conformity, tradition, benevolence, and universalism (Schwartz 2009). It is possible that this is the source of capability to understand needs, interests and values of a mediation partner and capability to understand each other

by the fact that certain values, communicated during mediation, are understood comparably among the participants.

### **Mediation values**

The basis for mediation is related to many fields of study and disciplines, especially philosophy, psychology, sociology, social work, consulting, law, management theory, and mathematics. It is therefore difficult to find universal principles of mediation. Values are also a term transcending borders of several fields of study. Values have long been in the spotlight of philosophy, psychology, and sociology, but also pedagogy, political science, economy, mathematics, anthropology, or theology. As we know, philosophy, psychology, and sociology are fields deeply related to mediation and values.

If values are basic orientation stones for what is good and desirable for a human or a group, then we may consider mediation principles to be basic “value stones” of mediation. Philosophical vocabulary *Universum* (2009, p. 270) describes a principle (derived from Latin *principium*, beginning) as a basic and generally recognised intellectual foundation, a rule that does not need to be proved, but from which other consequences for behaviour or knowledge may be derived. We will work further with this construct, even though we realise that it deserves a more thorough explanation.

We have decided to elaborate on this topic because mediation itself in the Czech Republic seeks its “basic intellectual foundation”, its identity. Is it an approach, philosophy of conflict resolution, a method, or a technique? Is it “only” an instrument for resolving substance of a conflict or does it also feature deeper aspects, mission? And if so, then which ones? Based on which values? Establishment of mediation in the Czech Republic, connected with the Law No. 202/2012 Coll. on Mediation, could suffer from uncertainty about what mediation is and how it works, and from doubts what will become of it. For these reasons, we deal in the last part of the chapter with mediation values. We do not hide the other reason – to support a wider view on mediation and its potential.

To interconnect the concept of values and the principles of mediation, we used the hierarchy of values by Milton Rokeach. Based on his investigation of literature and observation of respondents, Rokeach (in Svoboda, 1999) stated these values. He lists these terminal values:

- A comfortable life (a prosperous life)
- An exciting life (an active life)
- Sense of accomplishment (a lasting contribution)
- A world at Peace (free of war, conflict and animosity)

- A world of beauty (beauty of nature and the arts)
- Equality (equal opportunity for all)
- Family Security
- Freedom (personal independence)
- Happiness (contentedness)
- Inner harmony, unity
- Mature love (sexual and spiritual intimacy)
- National security (general satisfaction of economic, social and cultural needs)
- Pleasure (an enjoyable leisurely life)
- Salvation (being saved)
- Self-respect
- Social recognition (respect)
- True friendship (close companionship)
- Wisdom (a mature understanding of life)

For each principle we selected from the list of values such values which, in our opinion, define the given principle in its substance or are related to it.

### *Voluntariness*

Clients wish to solve and resolve their conflict through mediation. Agreement on conflict mediation is usually their first agreement. It is positive experience with cooperation which influences their mutual trust and willingness to continue with this cooperation. Clients' voluntariness represents their free choice of mediation, persistence in mediation or its termination. Voluntariness needs to be verified in case when any of them is forced to mediation by a situation or considers (consciously or unconsciously) prolongation of conflict to be more useful than any agreement at all.

Law also deals with the term "voluntariness", relating it to subject's actions. It means that a person makes decisions of own free will.

The principle of voluntariness is expressed by value "freedom" (personal independence).

### *Confidentiality*

Confidentiality is a characteristic of a process. It is an important factor facilitating communication between clients. Information revealed during mediation remains confidential and it is not possible, if not agreed otherwise, to publicize them. The purpose is to establish feeling of personal safety, inner harmony and unity among participants. Confidentiality is one of the fundamental principles of mediation (Van Gramberg, 2006). It is a strong motivational element in choosing mediation instead of a court

hearing. In mediation, the principle of confidentiality has its limits, defined by laws than by standards of the method. According to Charlton and Dewdney (2004), confidentiality is one of the key features of support, expressed by all parties in negotiation to resolve their dispute.

The principle of confidentiality is related with values of “inner harmony, unity” and “salvation”.

### *Trust*

Trust is a characteristic of a relationship. It is one of merits of mediation; it influences efficiency of a process and outcome. Establishment of trust and cooperation is also one of the toughest tasks for participants. M. Deutsch (1960) elaborated some aspects of trust among members of a small group: 1. A cooperatively-oriented person views a conflict as a common problem, sees common interest and recognizes own and partner's legitimate concern; 2. the person views the conflict situation from both sides; 3. the person is capable of feeling certain amount of compassion with a partner's situation. We would add to Deutsch's aspects of trust also values of honesty and justice. Justice as an ethic category is very hard to cover in ordinary life and it is even harder in a conflict situation and its resolution. Mediation may be realized if some sort of agreement on safety and justice exists among the participants.

Some mediation approaches strongly incline to defining economic compensations and guarantees. They consider it quicker and more efficient. But weight of an agreement lies mainly in its spiritual power, in honest reconciliation between involved parties whose reflection is a fair agreement.

The principle of trust is related to values of “salvation”, “freedom” and “true friendship” (close companionship).

### *Impartialness, neutrality*

The principle of mediator's impartialness is crucial for mediation. Neutrality is a test of mediator's capabilities to help partners with finding their own resolution, without imposing own opinions on desirability of conflict resolution. By neutrality we mean mediator's specifics practical impact on the clients, own external behaviour; not own inner reasoning. The clients may repeatedly experience a mediator in coalition with the partner, when inquiring about partner's opinions. This process is always shifting.

Hoffman and Penn (1987, p. 406) redefined neutrality as “curiosity”. Curiosity allows a mediator to remain alert to plurality of possible explanations. Instead of looking for true and final description of client's prob-

lems, a curious mediator is able to continue with questions. Mediator's neutrality means involvement and sympathy for each participant. He views a conflict relationship between two or more people as a phenomenon which was developing under certain unrepeatable circumstances and thus inevitably matured into current state. Mediator's task is not to revise history. He is curious about what happened earlier and how things developed. An impartial mediator supports all clients and is equally interested in their benefit. After a good mediation session, the clients shall have enough to say about mediator's personality, but they should be uncertain about a mediator's opinion on each participant.

The principle of impartialness and neutrality is related with values of "equality" (equal opportunity for all), "national security" (general satisfaction of needs of all people) and "social recognition" (respect).

#### *Transformation of rivalry into cooperation*

Transformation of rivalry into cooperation is outcome of a mediation process. At the same time it is also its premise. There would be no mediation, had the clients not agreed on it willingly.

According to M. Deutsch (1968), people's dependence on common objectives is one of the motivational sources of cooperation. Advancement of any participant towards the objective increases the possibility of any other participant to reach own objective as well. Deutsch's results of many researches of cooperation and competition prove that during cooperation (unlike competition), there is more effective communication, more friendliness, higher coordination of effort, agreement and trust in own results and others' results. Deutsch states that there is more mutual communicational understanding in cooperation.

It is characteristic for cooperation that the total amount of values increases. Everyone gets something, all participants are richer than in the beginning. Cooperation profits from expectations, there is hope in the background. An attractive objective of cooperation is equal distribution of values (gains).

The principle of transformation of rivalry into cooperation is related to values of "a world at Peace" (free of war, conflict and animosity), "equality" (equal opportunity for all), "freedom", "true friendship" and "wisdom" (a mature understanding of life).

#### *Orientation on the future*

Past life events are important in mediation only in relation to the present and the future. Function of the past is to learn from what did not work. Mediation is focused on the future. Even though repeated descrip-



tion of past events (e.g. to justify oneself, to win a mediator on own side, to deal with own qualms and thus relieving inner tension) may sometimes reveal new information and enable client's temporal relief, it often leads to increased tension and escalation of quarrels. Reflection on client's feelings and situation is an integral part of perceptive mediation. Nevertheless, repeating of past conflict schemes, of what did not work, so that the clients sought help of mediation, will hardly lead to change and improvement. The approach, which does not consider an initial cause necessary for understanding present situation, enables orientation on the future.

The principle of orientation on the future is related to values of "sense of accomplishment (a lasting contribution), "happiness" (contentedness), "inner harmony, unity" (freedom from inner conflict) and "wisdom" (a mature understanding of life).

### *Understanding the differences*

Conflict participants are focused on their own positions, opinions, attitudes, interests and needs. They consider them to be the only correct and true ones, the only possibility to perceive reality. Another basic principle of mediation and premise for formation of trust and cooperation is the participants' ability to understand the right of a partner for different conception of reality. How we explain the reality and how we explore and use the reality is reflected on both individual and society-wide level. A part of perception of the reality is mutual perception of individuals engaged in relationship (communication) and mutual understanding based on such perception. Understanding a relationship between two people is based on the manner in which these two people mutually interpret each other.

If a client does not understand own partner in mediation, one cannot see a situation from the opposite view. Then one will hardly allow partner's own perception of things. It is a mutual process. During mediation, a mediator emphasizes the reality of diverse opinions and helps the clients to understand mutual differences through various techniques depending on own experience, orientation, qualification and creativity. Mutual understanding is expressed by a final agreement that reflects and satisfies needs and interests of all mediation participants.

The principle of understanding the differences is related to values of "equality", "freedom", "self-respect", "harmony, unity" and "wisdom".

### *Alternatives – seeking new possibilities*

This principle may be analysed from two perspectives. From a wider perspective, conflict resolution through mediation itself is seeking new

possibilities. A client tried to resolve the situation by means which were under her/his control and which proved themselves in the past. However, the result was not as expected, in general – satisfaction. So he sought other possibilities how to resolve the situation, how to reach harmony and mutual satisfaction. Choice of mediation is outcome of a process of seeking new possibilities to resolve conflict situations. From a narrower perspective, the whole process of mediation is accompanied by seeking new possibilities – whether it is viewing own or partner’s situation, discovering own interests, needs and motives, seeking own sources of problem resolution, or also seeking new possible solutions to unfavourable personal situation.

Seeking possible solutions is at the same time one stage of mediation. Seeking a possible agreement and cooperation is related to abandonment of former adversary positions and clients’ orientation on cooperation.

This principle is, in our opinion, related to all values mentioned by Rokeach, mainly because this principle is based on opening possibilities into the future. Hence, a space where one expects all human values to be applied; a place where each value is significant for a satisfying human life.

#### *Independence of decision-making*

Independence of decision-making is closely related to the principle of assumption of responsibility. Clients are offered opportunity to consider all proposed solutions and to choose some of them according to their needs and interests. This independence of decision-making is connected with a factual side of conflict resolution, with the subject of conflict. However, a mediator is not able to fully guarantee that both parties made informed and free decision. Having any doubts about the informed consent to conflict resolution (i.e. enough information to make a good decision), a mediator will advise the client to counsel with other experts.

Independence of decision-making is also related to the principle of voluntariness. Each participant – a mediator included – may whenever withdraw from mediation. Independence here is applied on a process of mediation – persistence and a degree of participants’ involvement. The situation of conflict resolution is unique and so it may follow general rules only to the extent accepted by the mediation participants.

The principle of independence of decision-making is related to values of “freedom” (personal independence), “happiness” (contentedness) and “wisdom” (a mature understanding of life).

### *Assumption of responsibility*

Roles of mediation participants are determined or at least generally specified. Clients may focus on factual side of negotiation and only reflect on the process. They reflect on how a mediator manages mediation in relation to their own satisfaction. So the clients are responsible for the factual side of conflict resolution (the manner of resolution). Hence in the beginning of mediation, it is vital to verify their competences to negotiate for the conflict and its resolution.

An expert on the process – a mediator – deals with the process, while he may monitor the factual side from a certain distance. That allows a mediator to impartially judge if specific resolution is realizable (if it is not against law or does not harm the third side) and balanced in relation to the clients. So she/he does not evaluate the factual side of conflict and possible resolution in relation to the client (if it is or is not desirable for the client), but in relation to preservation of idea and the basic principles of mediation and to possible continuation of a process. This is the mediator's responsibility. Thus a mediator is exposed to great pressure, but is also very vulnerable. Therefore she/he has to establish certain conditions (e.g. obtaining required qualification) in advance, so she/he would be able to assume this high degree of responsibility.

It is not easy to relate values to the principle of assumption of responsibility. Especially because assuming responsibility is a sign of maturity of personality. Nevertheless, if we accept that even this may be achieved under certain – value – premises, then values of “freedom”, “salvation” and “wisdom” would contribute to it.

### **Conclusion**

It is not possible to state more specifically what values are, every field of science views them from a different perspective. But based on researches, we may almost certainly claim that they have fundamental influence on e.g. experience and thinking of an individual, choice of actions, evaluation of behaviour of others, one's interests, needs, formation and application of social norms or choice of specific approaches towards conflict resolution. Reconciliation and agreement may be achieved through mediation if civil values are applied. They manifest themselves in the manner how individuals, clients and even a mediator balance their needs with collective needs. If we would like to create such mutuality through mediation, which determines cooperative relations, there would have to be shared values defining appropriate behaviour.

The purpose of this contribution was to analyse mediation in its relation to values and to stress fundamental influence of values on evaluation

and decision-making of clients, a mediator, organizations providing mediation, and of society as a whole. This contribution should inspire deeper research of values in mediation and add basic theoretical orientation.

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## HIDDEN POWER IMBALANCE IN THE MEDIATION PROCESS

Grethe Nordhelle

### **Creating a false reality:** *"All that glitters is not gold"*

The presentation is not always reality. It is therefore not wise to believe everything you hear in the mediation room. To get the mediator as a supporter and ally in a conflict with the other party, many different strategies are being used. As a mediator, one is in danger of contributing to the conclusion that the agreements in the mediation process ends up with the other party being unfairly treated if you do not reveal the false stories.

There are many forms of power imbalance that can be performed between the parties within and off the mediation room. Power itself is a neutral term, but it is the way power is being used that indicates whether it is positive or negative. The positive way to use power is to inspire or help other people. The negative way is the one that concerns me in the mediation process. It is the selfish way, to complete own needs at the expense of others. I define negative exercise of power as the following: The conscious ability to control or force other people to act against their own will, in a direction the powerful person want.

An obvious negative power imbalance, where one party completely dominates at the expense of the other in the mediation room, any mediator will detect. Worse, a subtle power game where one party misrepresents by presenting himself as very sympathetic, and in appropriate dosages conveys the other's incompetence in one or more areas. When the presentation is false, and he has a hidden purpose: to get the mediator to support their own case against the other, then this is manipulation. Manipulation is the weak party's power and is in fact a compensation for the lack of real power. If you have real power there is no need to use manipulation for achieving what you want. With manipulation, I mean a conscious and strategically way to abuse others for your own purpose by use of a hidden agenda by means of a false or biased presentation. Manipulation can be applied to both the mediator and the other party. When the mediator does not detect this power game, she is easily part of the game and responsible

for entering into agreements in a mediation process that hurts the other party and any other innocent third parties.

Disclosure of manipulative behavior is perhaps the biggest challenge facing the mediator regarding power imbalance, provided that the manipulator is skilled in this game. It can be a stressful conflict in which much is at stake that triggers the manipulative behavior of some. I assume that anyone of us have used manipulation in a more or less innocent way. The most challenging manipulative behavior to reveal is when a resourceful person has, as part of its personality character to manipulate others. Being manipulative in itself is not a personality disorder in diagnosis system, with a specific set of behaviors. However, some manipulative personalities can also be diagnosed with a personality disorder. As many are aware, several personality disorders have manipulation as one of the diagnostic criteria. Manipulative personalities will use the mediation arena to try to manipulate to their own advantage to satisfy their own selfish needs. They are used to using manipulation in different situations, for different people. This means that they are well trained in performing this type of hidden power. Have you trained long for something, and also have excellent resources, you become a skilled practitioner. As a mediator one should therefore not underestimate how devious some people can be. The most important thing is that the mediator does not get their impartiality disturbed by the manipulative, but analyze and understand what is going on.

A father, who is a musician, offered nursery staff to play for kids in the kindergarten where his son went. The staff was thrilled. They had no idea that his intentions were not necessarily noble. Sympathy gives an emotional "anesthesia" which means that one forgets to analyze in order to understand whether there is a hidden agenda with such an offer. We are by nature often trusting and usually do not question people's good intention. We cannot have such a naive attitude when we work as a professional mediator. *We must train ourselves in rapidly forming two hypotheses to the parties' narratives: Is it reality or manipulation presented?* During the mediation process, the hypotheses will be weakened or strengthened.

We return to the father. His strategic behavior was to make a positive impression on the staff, so that they in turn could give a positive testimony about his qualities as a person, and as a father, in a court dispute about the child, as a court case was coming up. Most of us would not imagine that someone can have long-term, strategically planned behavior to create the illusion of a personality character that you really do not have. This father was most concerned with winning the case, to frame the child's mot-



her. Some conflicts are of such a nature that the needs of others, even third parties, becomes a balancing item in a selfish project.

In mediation process between father and mother in this case, the father in a natural way includes into his presentation of himself, his musical performances to children in kindergarten. He speaks in a relaxed and easy manner, smiling, friendly, and presents himself very cooperative and polite to both the mediator and mother. The presentation is still not so excessive that it arouses suspicion that something is not right. The audiovisual effects on the mediator, both when telling what he does to the children in the kindergarten and how he talks about himself as a father, makes mediator sympathetic to him. It's when sympathy gets the emotions to exceed that the mediator should have a built-in alarm that warns danger. An inner hypothesis should be established: Is it a real or manipulated version of reality presented? Such a hypothesis formation that gradually progresses through the process, is my essential message. To deny or confirm a hypothesis too fast should not happen. When we meet others in a limited period of time it can be a daunting task to understand who they really are. For a manipulative party it can be a simple task to be tougher on not being disclosed and to cover his true personality behind a false façade within the time limit that is available for mediation. The longer we observe someone in their natural surroundings, the easier it is to discover other sides. It depends upon the mediator's alertness whether she can successfully reveal the reality behind the façade in the mediation process. Humility is an important trait of mediator. It involves not to understand too quickly, meaning not to confirm a hypothesis she has at her disposal, but generate several alternative ways of understanding of what goes on in the mediation room.

The real challenge arises when one parts story agrees with the behaviour mediator observe or get confirmed that happens elsewhere. Even in such a situation mediator must not forget to form alternative hypothesis for understanding. In our case the mother has learned that the father has been playing music for the kids in the kindergarten. This is nothing he invents. But why he plays is a hidden agenda. The father tells in a poignant and appropriate manner, that he is so fond of playing for children, and has great pleasure to be in the nursery with them. Mediator spontaneously gets sympathy for him. It does not occur to her to form an *alternative* hypothesis: *Could it be that this is done and told to accomplish anything, and that there is not a genuine interest in the children in the nursery?* A manipulative person intends precisely to awaken an emotion in those he communicates with, allowing the manipulated to forget to analyse. What is being communicated and how, are deliberately chosen by the manipula-

tive to influence their "victim" emotionally. What will affect mediator emotionally? Yes, a narrator form and content that is likely to arouse sympathy.

The father also uses another weapon: Since the child most of the time is with his mother, he tells a sad story about how much he misses his son. The story is not overly told and wakes spontaneously mediator's compassion. To ask the hypothesis: Is it real or is it manipulation, is sitting very deep. Most parents miss their children when they do not see them, and it does not fall into mediator's mind to consider an alternative hypothesis for understanding the father. That there should be a possibility that the father primarily requires care for his son to continue to dominate the mother, is hard to imagine, without knowing the past history between the parties. A skilled manipulator has a good ability to put herself into the other's perspective and imagine what will touch. In parallel with the rise in mediator's emotions, it reduces her cognitive capacity. Pleasurable emotions tend to make one forget to analyse.

Mediator's hypothesis affirmative understanding is not helped when the father also is skilled at communicating, verbally and nonverbally, his despair and worry over the mother's parenting skills. He conveys his concern about her emotional instability. Also this story is told in a way that does not seem exaggerated, but credible in its form and content. The story is confirmed by the mediator experiencing an emotional mother. The better manipulator knows the other party, the easier it is for him to press the right buttons to get the other off balance. We all have weaknesses and manipulators are good at detecting these and making use of them in terms of different varieties of provocations. The situation is not helped when the manipulator also behind the scenes is terrorizing the other party. If you are constantly criticized and disturbed and creating obstacles to one's activities, most people get psychologically charged. Such power play behind the scenes the mediator do not know about, and she is forming her understanding of the parties and their cause through what is observed in the mediation room.

The mediator sees a mother who alternates between being angry and crying. She is not able to convey their story coherent and have enough to defend herself against the father's attack on her. In the theory of manipulation this is called diversion. This means that the father deliberately is focusing on her weaknesses. He enlarges them completely out of proportion, in order to get her to respond. The purpose of this is twofold: both to get her to be emotional but at the same time he does this to avoid focus on his own weaknesses. He succeeded in getting her to appear incoherent and emotional and the issues mainly concern her weaknesses. She's not

able to convey her concern for him as a father, as is disarmed and has more than enough to defend herself against his critics. It is this picture father wants mediator to form, while he can play on her emotionality as a concern for her ability to provide care to the child.

The father on the other hand has full control, calm and objective, and it is easy to understand what he means. It is not surprising that early on the mediator gets sympathy for the man and his story, both about himself and the woman. Mediator begins to see the conflict through the father's presentation, exactly as he has planned. A hypothesis that the man creates emotional instability in the woman in his interaction with her, is absent from the mediators consciousness. Mediator must be watchful that the behavior a person displays in a given situation does not need to be a personality characteristic. It is easy to underestimate the parties' histories effect on how, in a given situation, one may react to a seemingly innocent stimuli that are planted deliberately to provoke a reaction. The situation develops to become alarming for the mediator's impartiality, a **kingpin** in all mediation.

We have, in this mediation process, seen a sophisticated manipulator reinforce his own positive qualities through a false presentation, told in an elegant and seemingly credible manner. The skillful manipulator tells a lie story literally without blinking. When Bill Clinton was president of the United States, he looked straight into the camera and said the famous words: "I did not have sexual relations with that woman." When a lie is presented in a most natural way, it is easy for us to believe it. In addition to being an accomplished liar, a clever manipulator also is clever about creating situations in the environment where others may be impressed by him. Parallel to elevate their own status, he works (or she!) to reduce the other party's importance, both outside and in the mediation room. In many subtle ways manipulator will create an impression of the other as a person with weaknesses. He knows what strings to pull to provoke the other party to even appear weak. For mediator's the danger is that she is being abused, without being aware of it in this game towards the other person, and will favor the manipulative party on false premises. In other words, two forms of manipulation that goes on in mediation room: one is that it creates a weak counterparty that fails to protect his own interests in a positive way in the negotiations. The second is that one is able to control the mediator in a subtle way so that the mediator is not aware of, so impartiality is impaired. Mediator can therefore in other words be double manipulated by that she does not see that the game is being played both to the other party and to themselves. What you do not know about, you cannot

defend yourself against. Therefore, the key is that the mediator must be alert, these games can be unfolded in the mediation room.

### **Managing hidden power imbalance**

Identification of different forms of power imbalance brings mediator to the next challenge: Managing power imbalance. This implies that if one is not able to balance a power imbalance that exists between the parties, it can be so severe that the conflict is actually not suitable to be handled in mediation. How demanding issues of power imbalance mediator can handle depends on how skilled she is in balancing the power imbalance. It is challenging both to support the party that feel weak, while one at the same time has to curb the power of the dominant without losing his confidence. This can be a very difficult balancing act. Such a form of art, any mediator with respect to themselves develop.

How to neutralize the power imbalance in such a way that it becomes two real and equal negotiating partners in mediation room? When the power imbalance is caused by a manipulative party, an additional challenge appears: Should mediator confront the manipulative with his discovery?

To balance the power imbalance involves *temporarily* to go out of the neutral position to give strength to the one who lack it and reduce it for the one with too much power compared to the other. This must be done in such a way not to lose any of the parties' confidence. Then the mediator must resume her impartial role. It is therefore a challenging task. My experience is that separate meetings with the parties is useful, because it is a completely different task related to each party. When one has strengthened the power of mediation of the weakest part in the relationship, and this is done in a separate meeting, one need not consider the other party while doing this. The strengthening can involve giving support and understanding to his subjective perception of their situation. At the same time it is important to identify how this party believes the mediator can help her case being presented correctly in the joint meetings. To find that the mediator understands, gives a greater confidence in the joint conversations. Part of the mediator's responsibility in the process is to ensure that both parties are equal. In practice this often means the need to *prepare* the parties for negotiations.

In our case, the mediator decided, after the first public meeting to have a separate conversation with each party. The woman had eased a little on her emotional pressure in her separate meeting, which made her a little clearer. The conversation was also a reflection of the interaction between mother and father in the mediation session. The purpose was to increase

the mother's awareness of why the other party got her out of balance. The analysis helps her to move out of an emotional state to an analysis and an understanding of the father's behaviour. It is the first step in changing her response from spontaneous emotional to a consciously decision. Questions like: What might he say to her next time? How does she want to respond to his initiative? Some of the answers she had already, but nuances and deepening of the understanding was lacking. In addition, she had difficulty practicing the knowledge. She knew she should not be easily provoked, but it slipped when she was in the situation. The better the understanding, the greater the opportunity to curb the emotions. Because of the mediator's help in the separate conversations, she was better able to think more clearly in the meetings. She also experienced mediator's empathy and understanding, and got the assurance that the mediator would take responsibility for helping her to convey their message in the next joint conversation. She was calmer, and dreaded not so much the next conversation. She said she needed the mediator to stop him when he criticized her, because this would get her out of balance. Just sitting in the same room as him, meant that she could be completely empty headed, so that she would not know what to say. She therefore told her story uninterrupted by him in a separate conversation, so that the mediator was aware of her version of the conflict. In that way the mediator helped her to get on track in the following joint conversations, as the mediator knew what she meant.

It is the mediator's responsibility to assist the parties to present their views of the conflict when they have difficulties. A preliminary conversation can help, and also mediator's indications of how she can help each party to promote their views in public conversation. Also with this party mediator must form a hypothesis if she can take the role of victim and manipulate the mediator to be on her side. The sympathy the woman awakens in the mediator must also be subject to an alternative hypothesis formation for understanding.

Also the party that the mediator has developed a hypothesis that is manipulative, the mediator will have a separate conversation with. If the mediator decides to use a separate conversation, it is important that both parties get it. In this session it is important that the mediator shows understanding of the presented reality. The mediator will empathically listen to what he has to tell and identify with his story. She may show that she partly, but not completely, agrees with what he says and give recognition to some of what is said. The most important thing at this stage is for the mediator to win the party's confidence. When one talks with one that is strategic, oneself must also be strategic, but not naive. A manipulative person is wary if one is being believed or not. Critical issues will make a

manipulator extremely careful to show who they are. The mediator must identify the manipulative behaviour, but not express it. If the mediator begins to raise doubts about what the party mediates, the party's confidence in the mediator quickly disappears. Conscious, naive and detailed questions, which specifies as much as possible, brings many details into the story. It's a daunting task to fabricate many details quick at hand, and one can become both shaky and less consistent in what they convey. Such elaboration will therefore make it easier for the mediator to assess credibility.

Another observation mediator does in such a conversation, is how much the party talks about the conflict, and how much time is used to put the other party in a bad way. In our case, the man spoke surprisingly little about the child, as was the main subject of the case, and how much time he used to supply a negative image of the other party. Such presentation reinforces the hypothesis that he has another project than the best interests for the child in focus, namely to hurt her. If the mediator confronts them with their thoughts, they will be denied. A manipulative party is aware of what he does and has no need for awareness. The consequences of a confrontation will be a sharpened use of advanced manipulative behaviour in order not to be discovered. The danger is also that he reacts negatively and do not want more contact with the mediator. The manipulator is keen to make a good impression on the mediator, and the façade is an important ally. Mediator will therefore in any case relate to the presented reality, whether it is false or true. She's just wary of being used in a game. As a professional she behaves both sympathetic and understanding anyway. To ally with the party's presentation, and make use of whatever can be used to move the parties closer together, is important. The father said, among other things "I have no problems with cooperation and it is important that we are flexible." Mediator makes use of what the father present, regardless of whether it is his reality: "You who are keen on cooperation and flexibility, and it is an important feature, you may perhaps accept ....?". If the mediator takes up themes in a way the manipulative person responds to, it is important that the mediator does not defend herself, but humbly apologize.

It is possible to negotiate with manipulative people. Since it is important for manipulator not to be revealed, he may be willing to stretch pretty far to keep the sympathetic façade he has presented. If the mediator reveal her doubts about this, she has also lost the ability to create an alliance based on the presented.

Mediator said nothing about her hypothesis testing, or suspicion about the party. She avoids the difficult and choose to treat a manipulative party

as a noble person and appeals to his presentation, as Mahatma Gandhi recommends:

"If you want to convert your opponent  
you must present two heavens  
his better and nobler side.  
Work on, round, upon that side.  
Do not dangle his faults before him ".

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## **PART TWO**

### OVERVIEW OF ADR IN SELECTED EUROPEAN COUNTRIES



## ADR IN THE CZECH REPUBLIC

Lenka Pavlová, Eva Vaňková and Robin Brzobohatý

### Introduction

The concept of Alternative Dispute Resolution (ADR), meaning an extra-judicial/alternative resolution of disputes is used as a collective term for several diverse approaches to resolving disputes which, just as in other countries of the world including the European Union, have in common a liberal range of contractually agreed-upon intentions of the parties to resolve their dispute out of court, that is, to avoid litigation. In the Czech Republic all the three general forms of ADR – Conciliation, Mediation and Arbitration are recognised and used. Neutral Consultancy or Med/Arb are used rarely.

In the Czech Republic, like in other countries, the main characteristic of ADR is that the process is voluntary and fully under control of the individual parties. The choice for initiating a proceeding, as well as the choice of the persons involved in the procedure, time, costs and procedure itself are determined by the parties' own decision. The basic common characteristic of all forms of ADR is the consent of the parties, usually executed in the form of a bilateral or multilateral contract.

All forms of ADR, including conciliation proceedings before a court decision or another authority such as an arbiter or state administration authority, are subject to the principle of autonomous contracting and contractual freedom of parties. In the Czech Republic nobody may be forced to choose or use a certain form of ADR, as such a decision is solely at the discretion of the parties.

The legislation in the Czech Republic recognises three basic forms of ADR. Conciliation, Mediation, and Arbitration. Other forms, such as Minitrial or Arb-Med or Independent Expert are also being used, but there is no direct legal framework set up for them. The legal system, however, allows their application in practice. For instance, the institute of judicial conciliation that precedes court proceedings is very close to what is known in the Anglo-American legal culture and the legal systems in the subordinate countries, specifically, in individual states of the USA and the

legal systems of Great Britain and the Commonwealth, as a “minitrial”. Similarly, “Arb-Med” is a process which resembles proceedings conducted in accordance with the Rules of Arbitration Proceedings of the Arbitration Court of the Czech Chamber of Commerce and Agrarian Chamber by arbiters who try to bring disputing parties to a settlement before initiating arbitration proceedings. However, there is one substantial difference, as what they practice is basically a combination of conciliation and arbitration proceedings. The option of combining mediation, as the commencement of dispute resolution to be concluded by an arbitration award, is complex, integrative practice of certain specific institutions specializing in ADR services, such as the European Institute for Reconciliation, Mediation and Arbitration (Evropský institut pro smír, mediaci a rozhodčí řízení, o.p.s.), abbreviated as ESI, [www.esi-cz.eu](http://www.esi-cz.eu). The need to combine arbitration and mediation proceedings stems from the requirement of the disputing parties, mostly commercial and entrepreneurial entities, that mediation agreement be instantly enforceable. The fact that mediation agreements are not instantly legally enforceable in the CR, not even under the latest legislative update, unless further legal steps are taken, makes it less effective. Parties facing a dispute are interested in reaching an agreement that guarantees them enforceability in the event of non-compliance, as a legal instrument that they can rely on and use as a form of recourse. At present, Czech legislation provides for this possibility in the form of: (a) approval of their agreement by a court, in special court proceedings or (b) arbitration proceedings. Arbitration proceedings, like court proceedings, are concluded by the issue of an arbitration award or approval thereof by a court.

In the legal order of the Czech republic the ADR – being a collective term for out-of-court resolutions of disputes – is not specifically defined. Its definition can only be found in legal texts and related literature, and it is being used in practice. The only legal definition provided by Czech law is the definition of mediation, be it mediation in criminal matters, general mediation, or family mediation. As for other types of ADR, Czech law contains provisions regulating certain features, for example conditions, enforcement and effects of proceedings, but does not provide a definition of conciliation or arbitration like it does in the case of mediation. Despite this, the legal framework of conciliation proceedings before a court and arbitration proceedings can be found in legal rules.

The practice of amicable settlement and conciliation exists on an informal level in many different forms, especially in the form of business and/or common negotiations, where issues are resolved in an amicable

manner out of court. In practice, it applies in particular to the important institute of consumer rights protection.

Under the current regulation of family law, in effect in its amended form until 31<sup>st</sup> December 2013 as the Family Act, i.e., Act No. 94/1964 Coll., as amended, in accordance with the relevant provisions of the Civil Code, the court approval of an agreement between parents concerning a child's custody and maintenance is required. From 1<sup>st</sup> January 2014, the above-cited Family Act will be repealed and fully replaced by the New Civil Code. Nevertheless, the parents' procedural obligation to have their agreement concerning their minor children approved by a court will prevail.

Thus, from a legal perspective, space for the usage of all the methods, approaches, and forms of ADR in the Czech Republic has been created. The Czech Republic has, historically and also politically and socially, a great deal of experience with the individual forms of ADR to draw from and rely upon. On the other hand, the practical application and general awareness of the options and opportunities of ADR are not particularly common, even among the professional public, such as attorneys. While the individual forms are being applied in practice, it cannot be said that it has become common or regular practice. Oddly enough, the benefits of the individual forms of ADR are being acknowledged with hesitation and strong apprehension on the part of the users, that is, parties in dispute and other participants, as well as the providers and bearers of these forms themselves. Arbitration proceedings, which existed and were known even during the era of Socialist law, took nearly twenty years to become a widely accepted and more frequently used institution. It is a sad reality of the contemporary, "post-modern" society, that the benefits of arbitration proceedings came to be exploited first by powers and persons whose intentions were neither particularly honest, nor morally sound. Consequently, their purpose-driven mass use of arbitration proceedings spread out into the sphere of consumer contracts, thus bringing to this legal institution shame, rather than respect, in the eyes of the lay and the professional public.

Consolidated statistical data for ADR are not available. It is not an easy task to get even approximate figures, not only because of the rule of confidentiality, but also because of the fact that, so far, there has been no need to collect and process such data. Wherever statistical and summary data exist, they were collected in order to serve the internal purposes of the individual providers of ADR services.

However, there exist data in the specific area of consumer disputes. On 1<sup>st</sup> April 2008, a pilot project was launched, entitled "Out-of-Court

Settlement of Consumer Disputes in the Czech Republic”. The Ministry of Industry and Trade, in cooperation with the Czech Chamber of Commerce, Czech Association of Mediators, Arbitration Court of the Czech Chamber of Commerce and Agrarian Chamber, jointly with the Ministry of Finance, the Ministry of Justice, and representatives of consumer groups, prepared a project with the aim of offering consumers and entrepreneurs alternative approaches to resolving their disputes. The European Consumer Centre for the Czech Republic was established ([www.mpocr.eu/ecc](http://www.mpocr.eu/ecc) in English, or [www.mpo.cz/EUc](http://www.mpo.cz/EUc) in Czech). The European Consumer Centre accepts requests for settling consumer disputes involving foreign participants. Statistics and data on the number of requests and data on the rate of success are kept by the Czech Ministry of Industry and Trade.

As of 2012, the agenda of State supervision over mediations performed by registered mediators has been assigned to the Czech Ministry of Justice: [www.justice.cz](http://www.justice.cz). The Ministry of Justice maintains a list of mediators, family mediators, and arbiters for consumer disputes. Therefore it may be expected in the future that the Ministry of Justice will begin to collect, sort, and record these data and statistics, at least in terms of the number and the activities of registered mediators. The relevant lists of registered mediators are currently being created. The first applicants completed the prescribed exams in the spring of 2013. The area of education and disciplinary responsibility of registered mediators—attorneys is in the competence of the Czech Bar Association, [www.cak.cz](http://www.cak.cz), which will presumably keep a record of these statistics and data. Beforehand, prior to the enactment of the Mediation Act, the Czech Bar Association established a Commission for ADR.

### **Arbitration proceedings**

The Arbitration proceedings have been regulated for longest in the Czech Republic. Although the arbitration proceedings in clear form were limited to international disputes only, the Arbitration was acknowledged and provided. The legal regulation of Arbitration was contained in rules of private international law, specifically in the International Commercial Code, which is not in force any more, and in a number of international treaties. The Arbitration was considered and preserved as an important legal institute of international commercial law even during the era of Socialist law and a centrally controlled economy. An important reason for the functionality and practice of arbitration proceedings was the circumstance that enforceability of arbitration awards in private international law

was easier and much broader than the enforceability of foreign judicial or administrative decisions.

The arbitration proceedings were used not only as a mode of resolving international disputes, i.e., disputes with international aspects, but also as a special form of the “ economic arbitration “ in domestic disputes, i.e. a mode of resolving conflicts between economic entities of the socialistic economy market. This sort of special “arbitration“ (hospodářská arbitráž) was closer in nature to the conciliation. Arbitration proceedings were modified to accommodate the principles of Socialist economic laws applied to domestic disputes between economic (they could hardly be called commercial or entrepreneurial) entities, which incorporated elements of conciliation and arbitration proceedings in the conditions of Socialist economy in terms of content. Following the changes in the political and economic system in the 1990s, arbitration proceedings became possible even for the purposes of domestic disputes.

Nowadays, the scope of disputes that may be resolved by arbitration proceedings is stipulated by the law on arbitration proceedings (Act No. 216/1994 Coll., as amended). According to this law, arbitration may only be used for property disputes that do not involve insolvency. This is the only limitation applicable to the parties opting for arbitration and their legitimate right to entrust their cause to the decision-making of an independent person of their choice, i.e., an arbiter who need not be a professional lawyer, with similar results as judicial or administrative proceedings.

Act No. 216/1994 Coll., on arbitration proceedings and enforcement of arbitration awards, as amended, specifies who may be an arbiter. These provisions were subsequently complemented by specific internal rules issued by arbitration courts and organisations.

“An arbiter may be any citizen of the Czech Republic who is of legal age and competence, unless special regulations<sup>2)</sup> stipulate otherwise. A foreigner may be an arbiter as well, provided that he/she is legally competent under the laws of his/her country; however, it is sufficient to be legally competent under the provisions of the Czech Republic. Arbiters appointed by means of an arbitration clause to resolve disputes arising from consumer contracts must be registered in the list of arbiters administered by the Ministry of Justice.” (see Section 4, Act on Conflict Resolution).

### **Conciliation proceedings**

One of the known, albeit not too common, institutions is that of judicial conciliation, used in preliminary proceedings or proceedings already in progress, and regulated in the Civil Procedure Code (see Section 67

and 99 of Act No. 93/1963 Coll. – Civil Procedure Code). The concept of conciliation proceedings is defined in legal theory which differentiates between a so-called “ Praetorian peace ”, which is approval of an agreement between disputing parties by court in a preliminary conciliation hearing, i.e., before initiating a formal judicial proceeding, and a judicial settlement, which both parties may enter into by conciliation during proceedings before the court. The judicial settlement substitutes for a court decision on merits, i.e. traditional court judgement. Both of these types of reconciliation are equal in nature and are equally and directly enforceable. Conciliation proceedings are specific proceedings before a court, the sole purpose of which is to reach an amicable settlement, i.e., agreement between the participants, with the court’s subsequent approval. The court will try to seek reconciliation upon the proposal of one of the parties to the dispute. The cooperation or presence of the participants may not be enforced under any circumstances until one of the parties files a motion to initiate court proceedings. Conciliation proceedings – both preliminary and judicial – have three phases, namely: filing a motion with the court to make an attempt at conciliation, where the fee for this motion is different from the fee for the initiation of proceedings; approval of both parties of the text of the agreement and conclusion thereof; and finally, acceptance by the parties of the court-approved settlement agreement. The court approves the settlement agreement only if the nature of the matter so allows, i.e., if the matter is in the competence of civil courts, and if the rights and obligations of the participants comply with provisions of substantive law.

The update to the Civil Procedure Code, introduced by the Mediation Act, brought a provision that stipulates a 30-day period for the approval of a mediation agreement under the Mediation Law. There is no time limit for decision-making on other agreements however, including mediation agreements concluded before other than a registered mediator.

The competence for approving “ Praetorian peace ” and judicial settlements lies on the part of the judge, whereby the proceedings may be conducted before any district court. The conditions for executing the duties and responsibilities of a judge are set forth in legal regulations. The further education of a judge is provided by the Justice Academy but is not compulsory in the Czech Republic. Judges themselves may only be subjected to disciplinary measures – they do not bear material responsibility or liability for their decisions at all.

Conciliation proceedings with similar effects are also possible as part of arbitration proceedings, whereby provisions of a procedural nature are, as in judicial proceedings, contained in the rules of arbitration proceed-

ings, such as the Rules of the Arbitration Court governing Domestic Disputes .

## **Mediation**

Mediation in the Czech Republic started in the early nineties mostly as private initiatives, partly as trainings and education of the state's administration in a large scale of education programmes and trainings. Since the beginning of the 21th century the first mediation services have been developed for both commercial and family matters. Business and civil mediation has been handled since the 1990s in the form of paid commercial services or as a free of charge social assistance. The special project on the consumer mediation and small claims mediation has been run under the Ministry of Industry and Trade in recent years.

Mediation helps to overcome the traditional mentality focused exclusively on litigation and administrative style of resolving disputes. Recently various forms and styles of mediation, facilitation, negotiation, collaborative law, teamwork, coaching, and other forms of professional assistance and consultancy have been used in the Czech Republic. Since 2010 a multidisciplinary approach called " Integrative Practice " has been developed by ESI – European Institute for Reconciliation, Mediation and Arbitration. The Integrative Practice is based on the use of mediation techniques and skills and focused on resolving disputes using the integrative, multiprofessional approach.

## **An Overview of Mediation in the Czech Republic**

This part contains a basic overview of the mediation regulation and the provision of mediation services in the Czech Republic. Judicial mediation recognised in other countries, for example in the United Kingdom or in Slovenia, is not established and practised in civil matters in the Czech Republic. The judicial (state) voluntary (not mandatory) mediation is provided in criminal matters.

Mediation has been legally regulated in the Czech Republic since the beginning of this century, specifically since 2001. Czech legislators gave primarily preference to regulating mediation in penal matters. Business and civil mediation has been handled since the 1990s in the form of either paid commercial services or a free-of-charge social assistance. The regulation of the civil mediation was somewhat enforced by European law through obligatory implementation of a European Directive. In the Czech Republic, as in many other European countries, the process of said implementation resulted in the new mediation regulation also for domestic cases. Since September 2012 a new Mediation Act has been in force in

the Czech Republic. The new Mediation Act applies to all sorts of civil or business mediation including the family mediation, and mediation in labour disputes. The new Mediation Act regulates exclusively the mediation performed by so called registered mediators. No obstacles or limits are put in the way of mediation provided by “unregistered” mediators. The Mediation Act does not only regulate mediation and organization of mediation activity but also updates others legal acts including the Civil Code, the Commercial Code and the Civil Procedure Code.

The provision of health care and psychological services is quite understandably associated with a certain degree of professional education, including obligatory attestations. Mediation in the area of health care and medicine has and will certainly have its specifics in the future, too, including special requirements for professional qualifications of mediators.

Specialists in other fields and vocations are merely subject to their moral conscience, in addition to being subject to the general obligation, like any other citizen, in the sense of liability for damages and responsibility for any unlawful conduct in terms of a specific danger to society or negligence. Common civil and criminal liability is linked to the institute of fault, unless the law specifies otherwise.

In practice, mediation is similar to services provided in connection with social work, psychological services, therapeutic work, personality development, and last but not least, managerial training and management of meetings or any other skills required of moderators, facilitators, crisis managers, coaches, therapists, and relational and family consultants, whose activities overlap with the skills and practices of mediators. Moreover, many attorneys have the opportunity to provide mediation services, especially if trained in the techniques or rules of collaborative law or collaborative practice.

No professional training is required for obtaining a trade license, i.e., for the provision of entrepreneurial activities. It is in the interest of every specialist to upgrade his/her knowledge and skills regularly, which is somewhat disproportionate to the investment put into specialised, professional education and the returns on that investment.

### **Penal / Criminal Mediation**

The principal legal act regulating the criminal or penal mediation in the Czech Republic is the Act No. 257/2000 Coll., on Probation and Mediation Service, as amended. It regulates the provision of penal mediation based on the principal of so called restorative justice in the Czech Republic. The Act on Probation and Mediation Services was adopted on 14<sup>th</sup> July 2000, and came into effect on 1<sup>st</sup> January 2001.



The criminal mediation in the Czech Republic is executed exclusively by officers and assistants of the Probation and Mediation Service or PMS (Probační a mediační služba), established by the above mentioned legal act. The Probation and Mediation Service of the Czech Republic, in accordance with article 1(2) of the above mentioned law is a unique competent provider of the mediation services in criminal matters. The PMS's employees are state officers working for the Ministry of Justice. The responsibility of the PMS officers is governed by the Labour Code and by internal regulations of PMS. The Act on State Services is being prepared in the Czech Republic, but has not yet been adopted. The qualification and requirements for mediators and officers of the Probation and Mediation Service (PMS) are set forth by law, including internal regulations of PMS.

The criminal mediation is defined in the above mentioned law in the article 2(2), as follows: “ *For the purposes of this law, mediation is understood to be extra-judicial resolution of a dispute between the accused and the injured parties, and activities conducted as part of criminal proceedings with the objective of settling a state of conflict. Mediation may only be performed with the explicit consent of the accused and the injured parties.*”

The criminal mediation services are provided in connection with the criminal investigation and proceedings. Recovery of damages and social rehabilitation are main goals and principles of the criminal mediation, also called “ restorative justice “.

Motions to commence mediation come to the Officers of the Probation and Mediation Service (Probační a mediační služba České republiky, [www.pmscr.cz](http://www.pmscr.cz)) from courts, prosecutors or directly from the private persons who have an interest in the mediation, e.g., the perpetrator himself or his relatives, or the injured party or even the victim of a crime may apply for the mediation. The mediation in criminal matters, likewise the restorative approach, is performed exclusively through the Probation and Mediation Services officers. The criminal mediation focuses on the integration of perpetrators and the participation of the victim in the restorative process. It is focused on the victim's interest in results of the penal proceeding and, last but not least, also on the social protection in general.

The perpetrator's confession and the agreement to remedy the caused damage are the very objectives of the criminal mediation and constitute the basic condition of the so-called deflection of punishment. It means the imposition of an alternative or lesser punishment. This constitutes the grounds for the perpetrator's voluntary participation and his/her interest in taking part in the mediation.

## **Civil Mediation**

For more than ten years the Ministry of Justice had been preparing a new law on mediation as an alternative way of resolving conflicts. Different bills, proposals and ideas had been discussed. In September 2012 the new regulation was adopted. In connection with the adoption and the force of binding European laws, specifically the European Parliament and Council Directive 2008/52/EU of 21<sup>st</sup> May 2008, on certain aspects of mediation in civil and commercial proceedings, the Czech Republic mediation legal framework has changed. The principal legal regulation on civil mediation is ruled by the Act No. 202/2012 Coll., on mediation and amendments to certain laws (Mediation Act), which was adopted on 2<sup>nd</sup> May 2012 and came into effect the first day of the third calendar month following the day of its publication, i.e., 1<sup>st</sup> September 2012. Legal provisions regulating mediation handled by registered mediators are complemented by the Ministry of Justice Decree No. 277/2012 Coll., on attestation and remuneration of mediators.

The Mediation Act does not apply to all mediation proceedings, as it is limited to mediation performed by so-called registered mediators. Various types of common or general mediation are allowed and practised in the Czech Republic. The mediation law cited above does not preclude the possibility of applying mediation procedures. The mediation or mediation procedures lead to a constructive communication between the parties and facilitate the break-through of communication blocks. The mediation techniques and skills help to overcome misunderstandings and misapprehension arising from conceptual and ideological differences of parties in a conflict. Mediation in general is performed by practitioners of different professions – lawyers, psychologists, social workers, personal development trainers and coaches. Mediation services and support of the mediation approach are provided as commercial services paid by clients or as social services partly financed by the state, mostly in the form of social assistance to families with children.

Participation in mediation or arbitration proceedings requires the consent of the parties. Obligatory, that is, mandatory or compulsory mediation is not used in the Czech Republic, either in criminal or civil proceedings. The only exception, newly implemented, is the institute of an ordered first meeting with a registered mediator, which a judge may order the participants in a dispute to attend. This obligation does not apply to mediation proceedings per se (see Section 100/3 of the Civil Procedure Code, included in Section 30(3) of Act No. 202/2012 Coll., on mediation (henceforth the Mediation Act) which also amends the aforementioned Rules. Similar powers are reserved for the authority that protects chil-

dren's rights, as amended by Act No. 359/1999 Coll., on the social and legal protection of children (Section 13/1/d).

### **Civil Mediation under the Mediation Law**

The Section 2 of the Mediation Act contains the basic definitions of the terms used in the act and it particularly defines the civil mediation as follows: “ *For the purposes of this law, mediation is understood as the course of procedure followed in resolving a conflict with the assistance of one or more mediators, who facilitate communication between disputing (henceforth “disputing parties”), in order to assist them in reaching an amicable solution to their conflict by entering into a mediation agreement.* ” (see section 2/a). The Mediation Act also defines the term of the family mediation: “ *Mediation which aims to resolve conflicts arising from family relations.* ” (see section 2/b).

The Mediation Act defines the mediation provided by “registered mediators“, governs the process and performance of mediation and states legal impacts of mediation.

In Chapter II of the Mediation Act the organisation of mediation is regulated. The Mediation Act contains provisions concerning the Register of Mediators, especially states the data of the persons registered therein (Section 15(2)), conditions of registration (Section 16), the particulars of the relevant application (Section 17), including compulsory enclosures, as well as the conditions for amending the registered data (Section 18). These provisions contain the substantive and procedural standards concerning suspension and withdrawal of mediators' registrations. These provisions are contained in Sections 21 and 22 of the Mediation Act.

In the next parts of the Mediation Act alterations and amendments of various legal acts, for example the Civil Procedure Code, Civil Code, Commercial Code and others, can be found.

Under the Mediation Act there are different classes of “registered mediators“ or registered family mediators:

- Registered mediators – who are not attorneys
- Mediators-Attorneys - Mediators who are members of the Czech Bar Association and fulfilled all legal requirements for registration
- So called Visiting mediators, i.e., foreign mediators providing services in compliance with Czech legislation (section 19)
- Persons performing common mediation and other forms of professional mediation assistance, e.g., workers and employees of NGOs, authorities acting in the area of social and legal protection of children, social aid centres, etc.

Supervision over the activities of registered mediators, i.e., their compliance with their obligations, excepting attorneys of the Czech Bar Association (Česká advokátní komora, [www.cak.cz](http://www.cak.cz)), is in the competence of the Ministry of Justice. Education, training, mediators' exams and disciplinary supervision over the activities of registered mediators–attorneys is performed by the Czech Bar Association.

Section 49b of the Mediation Act updates Act No. 85/1996 Coll. on advocacy and regulates disciplinary responsibility of mediators-attorneys, who are – according to these provisions – strictly subject to the provisions of the Czech Bar Association, whereby disciplinary proceedings are subject to regulations applicable to each attorney's disciplinary responsibility. The regulation cited (Sec. 2 et seq.) defines disciplinary misconduct or offence committed during the process of mediation and specifies what sanctions may be imposed on the attorney at fault. Attorneys bear exclusive disciplinary responsibility vis-à-vis the superior/supervisory statutory authority. The law therefore also contains provisions under which the Czech Bar Association is obliged to inform the Ministry of Justice, without undue delay, of the imposition of a disciplinary sanction, as the Ministry is in general in charge of the supervision on the mediation and the activity of mediators.

The Mediation Act expressly stipulates, in Section 3(3), that responsibility for the content of the mediation agreement lies solely on the part of the parties in conflict, i.e., not on the mediator or mediators. The mediators' responsibility for the content of the mediation agreements is limited to assurance of compliance with the relevant legislation on mediation (Mediation Act) or Legal Profession Act, not merely contractually but also legally. In addition to professional and administrative responsibility, mediators may bear typical civil liability, particularly for damages.

Attorneys bear full material responsibility for their services, as well as disciplinary responsibility, which is supervised by the Czech Bar Association. In accordance with the Czech Bar Association's internal regulations, every attorney is obliged to be insured under CBA's group insurance policy covering its members' professional liability, with an optional individual increase of the amount of indemnity.

### **Regulation of Mediation Providers**

The Mediation Law cited above regulates the conditions for performing mediation, including the compulsory qualifications of mediators and their responsibilities merely to the extent applicable to registered mediators. However, the legislation of the Czech Republic permits so-called

common mediation and other forms of professional assistance that are not subject to the Mediation Act or other relevant subordinate legislation.

### **Qualification of mediators**

The compulsory professional qualification of registered mediators is specified in section 16(1c) and 16(1d), which stipulates that the Ministry will register a physical person who has a university degree of a graduate (master's) or post-graduate level or has completed a similar academic programme in the Czech Republic or abroad, provided that the foreign programme is recognised as adequate (see under [c]). Another requirement for registration in the Register of Mediators is passing a mediator's examination or recognition of qualifications under another legal regulation, whereby the law refers to Act No. 18/2004 Coll., on recognition of professional qualifications and other competences of foreign nationals from EU countries, citizens of other countries, and amendments to certain legislation (Act on Recognition of Professional Qualifications), as amended.

The contents of Section 16 indicate clearly that Czech legislation requires that registered mediators meet both professional and moral qualifications. An inseparable and mandatory prerequisite of registration is, according to Section 16(1b), also proof of personal integrity, as defined in Section 16(2), whereby Sections 16(3) – 16(5) set forth the procedures to be followed (to meet the registration requirement of personal integrity).

### **Mediator's exam**

The mediators' examination, being another registration requirement, is specified in Section 23 of the Mediation Law, and detailed in the relevant ministerial regulation, which regulates the examining conditions as well as the rules for mediators' remuneration. The legal provisions on the examination and remuneration of registered mediators are contained in Decree No. 277/2012 Coll., on Mediators' Examination and Remuneration, issued by the Ministry of Justice on 13<sup>th</sup> August 2012, and in force as of the same day as the MA, i.e., 1<sup>st</sup> September 2012. The mediators' oral exam is public and takes up to 2 hours. It consists of a practical demonstration of mediation skills, primarily in the area of personal interaction, mode of conduct, facilitation of expression, conflict analysis, negotiation management, ethical conduct, communication, demonstration of empathy, active listening, and strategic intervention. Furthermore, the oral exam includes a presentation of mediation skills in the form of a simulated mediation proceeding. Aspirants must achieve a total evaluation of at least 75% to be successful. The examining committee consists of three examiners

who will decide on the outcome in a non-public meeting immediately following the oral exam.

Applicants pay an administrative fee of 5,000 CZK for the exam. The same fee is payable for examination in family mediation. The Ministry will give the applicant a chance to take the exam within 6 months of submitting his/her application. The application is filed on a form that will be published and available for downloading on the Ministry of Justice website.

The fundamental requirement for registration in the Register of mediators is to pass a mediator's exam or the recognition of qualifications under another legal regulation, whereby the law refers to Act No. 18/2004 Coll., on recognition of professional qualifications and other competences of foreign nationals from EU countries, citizens of other countries, and amendments to certain legislation (Act on Recognition of Professional Qualifications), as amended.

Education in mediation for attorneys, as well as exams in mediation for attorneys, in accordance with the law, are handled by the Czech Bar Association, [www.cak.cz](http://www.cak.cz). Exams in mediation or family mediation may also be taken at the CBA, after paying a fee of 5.000 CZK or 10.000 CZK. The exams may also be taken as part of bar exams, certification exams, or recognition exams.

### **Registered mediators – attorneys**

Mediation performed by attorneys is closer to procedures and approaches of Collaborative Law or Collaborative Practice. Lenka Holá (2011, p. 71) said that “there should not be a substantial difference between collaboration and mediation conducted by two mediators with orientation on evaluating all the optional combinations from the perspective of the mediation's objectives and progress, and the conduct of its participants. The situation is probably different in the area of the participating specialists' professional identification.” In this context, one has to realise that the attorney and the client enter into a mandatory contract collaboration, which empowers the attorney to represent the client during negotiations with their counterpart. During the initial four-party negotiations, the parties conclude a contract of collaboration with their counterpart, also represented by an attorney. In the course of the ensuing legal proceedings, the attorneys retain their role as legal representatives and counsels. However, this is in stark contrast to the explicit provisions of the Mediation Act, where the attorney who is a mediator must not provide services as a legal counsel. The Mediation Act stipulates expressly that “*mediators must not provide legal services in cases where they act as mediators or*

*assist in preparing a mediation*”. Legal services are not understood to be a situation where an attorney, who is a mediator, offers his legal opinion on the parties’ conflict or any aspect thereof” (see section 8/2).

Since the Czech rules of procedure do not cover collaborative law procedures, parties and attorneys wishing to negotiate in accordance therewith follow the recommendations of the IACP (International Academy of Collaborative Professionals) or Global Law Collaborative Council, i.e., the two largest professional organisations of associated collaboration specialists. The methods of collaborative law are based on the philosophy of the so-called collaborative approach that derives from the principles of post-modern trends in psychology, see e.g., Harleen Anderson: Conversation, Language, and Application Options.

The provision of mediation services provided in connection with legal services is subject to specific statutory and professional rules applicable to advocacy. Legal consultancy and rendition of legal services to clients in the context of alternative methods is subject to basic provisions on advocacy and is more or less influenced by the personality, experience, and special professional qualifications of a given attorney. As far as the methods and standards of collaborative law of the above-mentioned professional organisations are concerned, it is assumed that collaborative law proceedings may only be handled by specialists who have completed basic training in collaborative law methods and a certain number of hours of training in mediation techniques and other similar communication skills. The number of hours required varies, depending on the standards applicable to the given group of trainees.

### **Mediator – Arbitrator**

A comparison of both legal rules indicates clearly that the powers and qualifications of registered mediators and arbiters are not identical. According to the current Czech legislation, arbiters need not meet any special professional or other requirements, as long as the parties appoint the given person as their arbiter by means of an arbitration agreement or arbitration clause. Provided that the particulars set forth in the given Act on Conflict Resolution have been met, their decision is final and reconsideration or cancellation of their arbitration award by a court is only possible in strictly defined cases, primarily in connection with procedural issues related to the arbiter’s appointment, not the merit of the given dispute itself. Arbitration awards are usually not only final, but also directly enforceable. Mediators on the contrary, have no decision-making powers, but they need to satisfy much higher requirements for education and professional qualifications.

## **Administrative offences**

In connection with the legislative update on the one hand, and the option to perform mediation on the other (not as a registered mediator), even beyond the framework of the relevant legislation, it is necessary to mention administrative offences newly specified in the Mediation Act (Act No. 202/2012 Coll., on Mediation). These apply to offences in the form of misuse of the designation “registered mediator”, which is intended to guarantee a certain degree of qualification and professional proficiency. Section 14 of the Mediation Act stipulates clearly that mediation services may only be provided by persons registered in the relevant registry, unless their authorisation has been suspended or the Mediation Law stipulates otherwise. The Registry of Mediators is defined in Section 15 as a public administration information system, administered by the Ministry of Justice, and is accessible on the Ministry’s website, in accordance with Section 15(3). [www.justice.cz](http://www.justice.cz)

Such administrative offences, punishable by a penalty of up to 50,000 CZK or 100,000 CZK depending on the offence, may be committed by an individual, a legal entity, or an entrepreneur who uses this designation although he/she is not registered in the list as being authorised for conducting mediation activities. An individual taking part in the preparation and process of mediation may also commit an administrative offence violating the rule of confidentiality under section 9(4), or by failing to inform the parties in conflict of his deletion from the list of registered mediators under section 3(2) of the Mediation Act (see section 25(1) of the Mediation Act). The range of offences that may be committed by mediators is considerably broader, see Section 26(2) of the Mediation Act. The importance of adhering to the principles of proper mediation by observing the rule of confidentiality is furthermore indicated by the amount of the penalty that may be imposed on an individual or mediator at fault, with respect to the rule of confidentiality, which is up to 100,000 CZK.

## **Consumer Mediation**

We have mentioned a project for out-of-court resolution of disputes in the area of consumer mediation, entitled Platform. The pilot project was conducted with the support of the European Commission and European Funds in the Ministry of Industry and Trade under the title Platform for Out-of-Court Resolution of Consumer Disputes. The Platform was launched under Minister of Industry and Trade Measure No. 58/2007 of 19<sup>th</sup> December 2007, and was active in several contact points all over the Czech Republic. The Ministry of Industry and Trade endeavoured to revive the project using national resources, but – for various reasons – its



efforts have failed. The original project ended several years ago with the total depletion of the funds invested in the project. It was discontinued due to insufficient funding. At present, the continuation of the project on a national level, in a form corresponding to the original project, is being reconsidered.

On the personal initiative of Ms. Marcela Reichelová, who became acquainted with the benefits of out-of-court resolution of consumer disputes, a variation of the idea took root in northern Moravia. Ms. Marcela Reichelová was a member of the national Consumer Protection Association at the time, one of the consumer organisations engaged in the project. After both the national consumer organisation and the pilot project failed, she began to explore opportunities for the further pursuit of this methodology. She initiated the founding of the Association for Consumers in the Moravian-Silesian Region, a new and regionally oriented organisation, which aimed to tie into the activities that had been conducted by the former national organisation. This endeavour focused on the promotion and protection of consumer rights, primarily by providing general services and legal counselling. She intended to make use of the successful and positive experience acquired during the running of the project and to continue in the same direction. She contacted the Evropský institut pro smír, mediaci a rozhodčí řízení, o.p.s., (European Institute for Conciliation, Mediation and Arbitration, abbreviated as “ESI”) and upon signing a Collaboration Agreement in September 2010, she established the Centrum Ostrava při SOS MS kraje (Ostrava Centre of the Association for Consumer Protection in the Moravian-Silesian District). The “Centrum Ostrava”, in cooperation with the other non-profit organisations mentioned above, provides services for professional and legal consultancy focused on ADR in the area of consumer disputes. Centrum Ostrava provides the premises for the consulting organisation’s activities and handles its organisational and administrative facilities. ESI recruits experienced ADR specialists for the Centre’s consultancy activities, especially in consumer disputes. There is a specific and steadily growing demand for mediation services by consumers as well as business operators. The latest data on the number of clients testifies to the success and viability of the idea – Centrum Ostrava has been providing services since the end of 2010. The importance of ADR is furthermore corroborated by the fact that the public has responded positively, as well as the fact that people have begun to contact Centrum Ostrava with issues and disputes far exceeding the normal scope of everyday consumer issues. In addition to typical consumer disputes, Centrum Ostrava has negotiated and taken part in resolving various family and commercial disputes. In one recent case, it has, in co-

operation with a local government administration authority, mediated a dispute between neighbours. Only in one single case (a dispute between the inheritor of a vehicle, who intended to sell the vehicle, and a sales broker, concerning the option of withdrawal from a contract for the purchase of the vehicle), was the mediation proceeding unsuccessful. Requests for ADR extended by consumers to business operators are also often unsuccessful – they usually involve a complaint of defective goods. In many cases, business operators do not respond to a consumer's request for mediation, but they often try to negotiate a settlement themselves. They do so on their own, independently, by offering a settlement directly to the dissatisfied consumer or through Centrum Ostrava, thereby engaging the centre in the ADR process between the consumer and the business operator. With the exception of the failed mediation mentioned above, most cases, in which consumers and business operators agreed on negotiations with the assistance of an independent, unbiased arbitrator, have been concluded successfully and satisfactorily for both parties. Another benefit of joint mediation meetings, compared to long-distance negotiation, is the likelihood of a better understanding of the causes of the dispute and the possible consequences of failed mediation.

### **Mediation of Family Disputes**

At present, family mediation comprises the largest segment of the mediations provided in the Czech Republic. The use of mediation as an option had been developing intensively even before the Mediation Act came into effect, thanks primarily to specific circumstances that go together with family disputes – especially disputes concerning minor children. In the event of a conflict between the parents, an authority for the social and legal protection of children or a court, may order that the parents use the services of a professional counsellor. This institution is frequently used by courts as well as government authorities for the social and legal protection of children, as a form of assistance to parents who are not motivated, for whatever reason, to seek assistance themselves. For this purpose, courts generally engage the services of organisations which have many years of experience with working in the area of the social and legal protection of children (these organisations are authorised and certified for providing such services under Act No. 359/1999 Coll., on the social and legal protection of children).

Development of family mediation in the Czech Republic stems primarily from the initiative of the non-governmental organisation called “Fond ohrožených dětí” (Endangered Children's Fund in Czech only FOD), one of the three largest NGOs specialising in the protection of

children's rights in the Czech Republic. The social workers at FOD regularly deal with parents who are in dispute regarding a divorce or separation and need to work out issues related to the children's custody, regulation of visitation rights, or the amount of child support.

After about 2001, FOD workers began to use mediation techniques in their work with parents and children. In 2005, the first independent mediation centre was opened, specialising in family disputes at the FOD branch in Ostrava. Since then, more mediation centres have opened in Olomouc, Opava, Bruntál, Krnov, and Pilsen. Family mediation is also provided by FOD branches in Brno, Prostějov, and Zábřeh. Some FOD mediation centres have expanded their activities and transformed themselves into what they call "Assistance, Mediation, and Therapeutic Centres" (AMT Centres). The mission of the AMT Centres is to provide a comprehensive programme for parents undergoing a divorce or separation. AMT Centres provide both mediation and family therapy or assisted meetings. These involve supervised and assisted meetings of one parent with a child (such as in situations where a parent has become estranged from their child as a result of a divorce, and it is necessary to help rebuild their relationship). The family may utilise only one service, all of them one at a time, or all three of them concurrently.

FOD Mediation Centres conduct hundreds of mediations per year – the Mediation Centre Olomouc for example, handles 8-10 mediation meetings weekly on average. Thanks to their expertise and the opportunity to make use (in the past) of funds from the European Social Fund, the ECF mediation centres are havens of good practices and innovation in the sphere of mediation in this country. In addition to family mediation with subsequent or complementary services (therapy or assisted meetings), there are also new trends in mediation – such as transformative mediation.

### **Outlook to the future**

Just as in other European countries, the rate and extent of conflicts in personal, business, and social relations may be expected to grow, in connection with a long-term inundation of law courts of all levels, unreasonably protracting court proceedings and motivating both the lay and professional public to seek ever more often alternative ways of resolving disputes by using various forms of ADR and applying complementary, interdisciplinary approaches which appear to be less time-consuming and more cost effective. The complementary approach is more effective than the classical approach, which had reached its positive potential in the course of the 20<sup>th</sup> century, but eventually and gradually began to show – due to certain social and cultural transformations of modern society – its

negative aspects. In the area of family disputes, the unfavourable ratio of the advantages and disadvantages tends to have a destructive impact on individuals as well the family as a whole, with the consequences affecting not only the lives of individuals but a whole series of generations as well.

The Czech Republic, like other European countries, is now presented with the opportunity to use ADR and Complementary Practice in the broadest spectrum of social relations, particularly in the area of education, environmental protection, the construction industry, tourism, and of course also in the area of resolving family issues and relations with children.

A unique opportunity for the widespread use of ADR in practice in the Czech Republic may be expected after January 2014, when the new Civil Code comes into effect that will fundamentally change the provisions of civil and family law, in the absence of the necessary legal practice and case law concerning the new concepts and legal institutes. The possibility of a more common application of ADR is indicated especially in Section 647 of the New Civil Code (NCC), which stipulates that “in the event that a creditor and a debtor enter into an agreement on out-of-court negotiations on the rights and obligations arising from the agreement, the limitation period shall begin to run when the creditor or the debtor expressly refuses to continue the negotiations; if such period has begun to run earlier, it shall be stayed during the negotiations.” The principle of autonomous will is the main unwritten principle that pervades the whole text of the NCC. Section 1725 stipulates clearly that “the law retains the right of the parties to enter into the agreement on their own free will and to determine its contents”. According to Section 3, “private law protects people’s dignity and liberty, as well as their natural right to pursue personal happiness and happiness for their family or their next of kin in a manner that shall not unduly cause harm to others.” The law cites examples of the basic principles of private law, including the fact that “promises shall be binding and contracts shall be fulfilled”. Furthermore, the law stipulates the manner of assessing cases where a decision cannot be made on the basis of the unambiguous provision: “assessment shall be made in accordance with provisions on the contents and purpose of a legal case closest to the case under assessment. In the absence of such a provision, the legal case shall be considered in accordance with the principles of justice and the principles that constitute the basis of the law, taking private practices and the status of jurisprudence, as well as the established decision-making practices into account, so that the just arrangement of rights and obligations is arrived at.” The NCC entrusts to the court the competence of making decisions in cases where parties in dispute do not reach an agreement leading to a “proper system of rights and obligations”, whereby the

court is not bound by the law to act upon the proposals of the parties, as to whether they will or will not entrust a third party with making a judgement – be it a judge or arbiter, or whether they use a form of ADR and make their own decision on their case. The legal framework and an adequate number of specialists trained in mediation techniques are prepared for this development of affairs.

## References

- Act No. 257/2000 Coll., on probation and mediation services (abbreviated as PMS)
- Act No. 202/2012 Coll., on mediation and amendments to certain other laws (the Mediation Act)
- European Parliament and Council Directive 2008/52/EU of 21<sup>st</sup> May 2008, on certain aspects of mediation in civil and commercial matters
- Act No. 359/1999 Coll., on the social and legal protection of children
- Act No. 93/1963 Coll., Civil Procedure Code
- Act No. 216/1994 Coll., on arbitration proceedings and enforcement of arbitration awards
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## ADR IN THE SLOVAK REPUBLIC: LEGISLATIVE AND SOCIOCULTURAL ASPECTS

Renáta Dolanská and Slávka Karkošková

### Legislative aspects of ADR in the Slovak Republic

There is no one strict definition of ADR (alternative dispute resolution) in the Slovak legal code. There are various laws, however, which cover out-of-court resolution of disputes either through mediation or arbitration<sup>1</sup>.

In response to the excessive strain placed on courts and the growing need to introduce new methods which, in comparison to the traditional ones, would be better able and more effective in resolving disputes in a correct, complex and satisfactory manner, the Slovak legislature has gradually codified the practice of mediation as well as the status of professionals practising mediation at various levels. On the one hand, this approach encourages the wide-reaching use and application of mediation in various social relations. On the other hand, however, it places increased demands on legal practices, especially in the area of distinguishing which aspect of mediation and its legal operations is relevant in a specific case, as well as the status and competences of persons practising mediation. That is why it is always important when using the terms *mediation* and *mediator* to properly determine whether, in the given case, they refer to:

- mediation carried out according to Act no. 420/2004 Coll. about Me-

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<sup>1</sup> Arbitration proceedings in the Slovak Republic are regulated by Act no. 244/2002 Coll. about Arbitration. This law states that either one arbitrator or several may decide an issue if both sides in the dispute have reached agreement through a so-called arbitration agreement. According to the law, arbitral proceedings are permitted in cases dealing with property disputes arising both in Slovak and international business and civil relations if the place of arbitration is in the Slovak Republic. Only disputes which participants can end with a consent decree before going to court may be decided within arbitration proceedings. The delivered arbitration verdict may not be revised and is as binding on the participants of the arbitration proceedings as a valid court order. The law states that any natural person who the contractual sides agree upon may be the arbitrator. If a specific statute or the law on arbitration do not state otherwise, s/he must be adult, fully eligible to conduct legal affairs, should have experience of such work and should not have a criminal record.

mediation (as amended) i.e. an out-of-court activity undertaken by a mediator registered with the Slovak Ministry of Justice (*further only SMJ*) or;

- mediation carried out in accordance with Act no. 27/2009 Coll. about Social and Legal Protection and Social Curatorship (as amended) by employees of the Office of Labour, Social Affairs and Family (*further only OLSAF*), as a special method aimed at removing conflictual relations within families or;
- mediation in accordance with Act no. 550/2003 Coll. about Probation and Mediation Officers (as amended) carried out in criminal matters by probation and mediation officers working in court with the status of court officials as an out-of-court means of resolving a dispute between an injured party and an accused or;
- mediation as one of the forms of legal aid provided to people in material need on the basis of Act no.327/2005 Coll. about Provision of Legal Aid to Persons in Material Need, carried out by mediators registered with the SMJ and/or employees of a Legal Aid Centre (*hereon only LAC*).

In all these different areas, mediation represents an institution established on the same principles, the main purpose of which is the settling of conflicts and disputes. The organization, operations and status of people carrying out mediation in the above cases are all different, however.

#### ***Act no. 420/2004 Coll. about Mediation (as amended)***

Act no. 420/2004 Coll. about Mediation is the basic framework law regulating the institution of mediation, its operations, organization and uses in the area of civil law. In § 2 par. 1) of this law, *mediation* is defined as an out-of-court activity in which the opposing parties use a mediator to solve a dispute arising from a contractual relationship or another legal relationship. According to § 1 par. 2) this act deals with disputes arising from civic and legal relations, family relationships, and business and working relations. It also deals with crossborder disputes arising from similar legal relations, but does not cover disputes arising from rights and obligations which the parties cannot address and which are dealt with in other specific legislation.

Based on this and within the context of Act no. 420/2004 Coll. about Mediation, *mediation* as an out-of-court activity can be understood as a variant on court proceedings in the civil legal sphere and a means of resolving legal disputes.

According to the above law, a *mediator* may only be a person who is on the register of mediators kept by the Ministry of Justice of the Slovak

Republic, a person who practises mediation professionally on the basis of this specific legal provision. In their work, mediators must be independent and impartial experts who carry out this activity in their own name and at their own risk. Theirs is not, however, work covered by a business licence as defined by Act no. 455/1991 Coll. about Trade Licensing, but is specialized work carried out on the basis of a specific law, in this case Act no. 420/2004 Coll. about Mediation.

To be entered into the register of mediators, applicants must have not only a second level university degree but also other qualifications. These include completion of an accredited training course for mediators as well as an exam certificate obtained at one of the educational institutions authorized to offer the course and exam programme accredited by the Slovak Ministry of Education in accordance with Act no. 568/2009 Coll. about Lifelong Learning (as amended).

In view of the fact that Act no. 420/2004 Coll. about Mediation brought with it a new legal institution which, at the time of the law being passed, lacked the trained personnel for it to function independently, mediators were given the status of freelance professionals who were without a corporative body and whose activities were not subject to supervision by the Slovak Ministry of Justice. The powers of the SMJ in relation to mediators are at present confined exclusively to the area of registration and record keeping of mediators, mediation centres and mediation educational institutions (*§ 8 of the Act*), and to the area of further education and examination of mediators if they do not fulfil their educational requirements as defined by the law (*§ 10a of the Act*) or if an applicant mediator has repeatedly failed the professional exam at an educational institution and instead requests to be examined by the SMJ (*§ 9 par. 3 of the Act*). At present, with the number of mediators registered with the SMJ exceeding 700 and interest in such work from university graduates increasing all the time, demands for regulation of the legal status of mediators and/or the strengthening of the powers of the SMJ in relation to mediators are becoming more and more frequent. These demands principally call for the supervision of mediators' activities or for a law demanding the creation of a corporative body similar, for example, to the Slovak Chamber of Advocates, a body which would fulfil tasks dealing with mediatory administrative matters.

The aim of mediation, as laid out in Act no. 420/2004 Coll. about Mediation, is to reach an agreement which, according to § 15 par. 1 of the Act, is legally binding on all parties involved in the specific case of mediation. This agreement should serve to settle the claims of the parties which at the start of the dispute were conflictual. Inasmuch as mediation



carried out in accordance with Act no. 420/2004 Coll. should be equal in validity to a court proceedings, the law grants such an agreement the same powers, in the interests of its parties, as an official court decision, i.e. a distraint order on the basis of which, in the event of its forced (involuntary) fulfilment, an application for distraint can be submitted in accordance with Act no. 323/1995 Coll., Distraint Procedure. The powers of the distraint order can ensure that the agreement made as a result of mediation in accordance with § 15 par. 2 of Act no. 420/2004 Coll. is, according to conditions specified in the law, drawn up in the form of a notarial memorandum, or approved as an accord before the court or organ of arbitration.

Using mediation in accordance with Act no. 420/2004 Coll. about Mediation is appropriate in almost all disputes in the area of civic and family law and is becoming increasingly common in the area of commercial and labour law. It is necessary to emphasize that mediation carried out in accordance with Act no. 420/2004 Coll. about Mediation is an effective means of resolving a dispute not only for the separate sides in the dispute but also for the courts; if thanks to the use of this institution, the vision of settling conflicts fairly can be fulfilled, then a lot of the burden is lifted off the shoulders of the courts. Given the courts are deluged with an inordinate number of disputes, many of which result from the mishandling of relatively minor conflicts or are a reaction to other, already foreclosed legal disputes the verdict of which one or more parties cannot accept, the work of mediators in the form of mediation in accordance with Act no. 420/2004 about Mediation is of considerable benefit. The result of their work in the form of an agreement can, with the approval of the court in the form of a legal accord, resolve a dispute to the satisfaction of its participants and of the state, inasmuch as this result of a court proceedings in the form of a court ruling carries the same legal weight as a court decision which cannot be appealed against.

The legislature has passed a number of laws in order to encourage the use of mediation carried out by mediators in accordance with Act no. 420/2004 Coll. about Mediation and to include it in civic court proceedings. The first of these was the reform of § 99 of Act no. 99/1963 Coll. (Civil Procedure) which came with the enactment of Act no. 420/2004 Coll. about Mediation. This enabled courts to recommend participants to use mediation as a means of reaching an accord. As this form of recommendation proved ineffective in practice, however, a new law was passed with effect from 1.1.2013 stating that if the circumstances of the case allow it, the court may, before or during the first hearing, urge participants to try mediation as a means of reaching an accord and arrange a meeting

with a mediator who is in the official register of mediators. At the same time, through this amendment of § 99 par. 3 of Act no. 99/1963 Coll. (Civic Procedure), the court has precedence in deciding whether to approve an agreement on mediation as a legal accord. In cases in which the law itself specifies the time period within which the court has to decide about the claim of a party in a specific suit, the court decides whether it will approve an agreement on mediation as a legal accord on the matter by the end of this period at the latest.

In order to make both participants in court proceedings and judges more aware of mediation, another legal reform came into effect on 1.4.2012. This is a statute of the Slovak Ministry of Justice, Statute no. 543/2005 Coll. about Administrative and Clerical Procedure for District and Regional Courts, the Special Court and Military Courts. According to § 75a of the statute, titled Accord through Mediation: “It is necessary to enable parties involved in a proceedings, after preliminary agreement and approval by the judge before or during the first hearing, to meet with a mediator and try to reach accord through mediation. The chairperson of the court should create suitable conditions so that such a meeting can take place within the actual court.”

In the light of these reforms, it is undeniable that the legislature is making efforts to increase the use of mediation in ongoing court proceedings and thus make the settling of disputes a faster, cheaper and, above all, more effective process. At the same time, however, it is also important to consider what other legislative reforms may be introduced to enable more effective collaboration between courts and mediators in fulfilling their mission. The advantage of considering these reforms now, as opposed to during the period when Act no. 420/2004 Coll. about Mediation was passed, is the experience we have gained since then of mediation in practice, both in Slovakia and abroad, as well as the fact that in those nine years many reforms in this field have been passed in foreign countries which we can be inspired by. We believe that one very important factor in more effective cooperation of mediation and court proceedings is that our legal environment has traditionally had a number of similar institutions */though not specifically mediation/* which mediation as defined by Act no. 420/2004 Coll. can naturally follow on from. These include, for instance, conciliation proceedings regulated as a provisional proceedings carried out in court before the start of a legal process in reg. § 67 – 69 of Act no. 99/1963 Coll. Civil Court Procedure, the essence of which is that if the nature of the case allows it, it is possible for any court competent to propose such a solution, to attempt to reach an accord (through conciliation proceedings), and then decide whether to approve it if such an accord

has been reached. Despite the fact that the conciliation proceedings institution still exists, however, it has not been used for decades. Suitable legislative reform would make it possible for accord to be reached in such cases using mediation. The law could also be changed to make it easier for courts to approve an agreement of mediation through an accord in cases where court proceedings have not even started.

In terms of reforming the activities of the court, it would also be beneficial to include mediation in such a way that judges can use it whenever they feel it is appropriate to the nature of the specific case. In our opinion this would not be mediation merely for the sake of it but would be a court activity aimed at bringing accord within a proceedings that has already begun (attempting to reach accord being the duty of the court according to the law). In introducing further legislative reform, we should be inspired by other countries (the Czech Republic, for example) and enable the courts to order warring parties in a legal case to use mediation or at least take part in an introductory meeting with a mediator. Calls for mandatory mediation, especially in divorce disputes, are becoming more and more common these days both from the mediation community and from outside it.

We personally believe there is no reason to fear the effects of greater inclusion of mediation within the activities of the courts given that in Slovakia we have a tried and tested model of such inclusion provided by the work of a notary acting as a court commissioner in inheritance proceedings. This may serve as a model for including mediation in the activities of the court not just in inheritance cases. For comparison, we should state that the task of a notary entrusted to act as court commissioner is to lead legatees towards closing an inheritance agreement, the court only acting in the event of agreement not being reached or a legatee requesting a continuation in proceedings within 15 days of receiving an inheritance certificate. Similarly, in cases which are not inheritance proceedings, it would be appropriate if the court granted to the mediator the powers to draw up an agreement which the court would then approve in the form of an accord. If no agreement is reached, the court would then continue in its proceedings. We are convinced this conception would greatly contribute towards much shorter court proceedings, a lighter workload for the courts and satisfaction of those involved in legal actions with their course and result. Given our experience of inheritance proceedings, we also believe that this model would be welcomed by both the judicial community and the general public here in Slovakia and that there would be no major problems with its implementation. We expect that such cooperation between the courts and mediators would also lead to a shift in the status of

mediators: rather than being merely entrepreneurs, they would be commissioned by the state to carry out conciliation activities in the same way as surveyors, notaries, or administrators of bankruptcy proceedings. This would undoubtedly involve a change in the competences of the Slovak Ministry of Justice towards mediators and/or the foundation of an administrative organization for mediators by law.

Other legislative innovations which would stimulate greater use of mediation include changes in the following areas: court fees (*e.g. lowering court fees for those who can demonstrate they have tried to solve their dispute through mediation*); costs of court proceedings (*e.g. not to declare them or to transfer them to a participant who has refused to attempt to resolve a dispute using mediation*); possible tax relief for people using this institution (*e.g. a tax bonus equal to a certain part of the court fees which a participant in a case would otherwise have to pay for a proceedings taking place before the court*) etc.

***Act no. 550/2003 Coll. about Probation and Mediation Officers (as amended)***

Act no. 550/2003 Coll. about Probation and Mediation Officers gives a legal definition of mediation in matters dealt with in criminal proceedings. According to § 2 par. 1b) of this law, for such purposes *mediation is understood as an out-of-court means of resolving a dispute between an injured party and an accused party.*

Mediation in the criminal area has been incorporated into our legal code as part of the move towards so-called restorative justice, which calls for wider use of alternative punishments instead of custodial sentences. The result of such mediation, for example, may be an agreement which compensates the victim for damage incurred, or some kind of accord. In certain circumstances, the mediation agreement has legal weight in terminating a criminal proceedings. Another result of such mediation may be the conditional cessation of a criminal suit. Such a cessation together with an accord are, in the case of Slovak law, only possible with less serious crimes (with deliberate crimes where the maximum custodial sentence does not exceed three years and with crimes of negligence where the maximum custodial sentence does not exceed five years).

In the context of mediation carried out in criminal matters, it is necessary to emphasize that Act no. 550/2003 Coll. about Probation and Mediation Officers does not use the term *mediator*. Acts of mediation within criminal proceedings may only be carried out by a probation and mediation officer, who has the status of a court official. Unlike mediators, who carry out their work in accordance with Act no. 420/2004 Coll. about

Mediation, probation and mediation officers are public servants working for the state.

Mediation in criminal matters is different in character from the out-of-court activities covered by Act no. 420/2004 Coll about Mediation. Instead it is used more as a special method which a probation and mediation officer may use in certain appropriate cases which the prosecutor or judge has first agreed can be dealt with in this way. The agreement of both the injured and the accused party must also both be obtained before mediation may be carried out.

Even though mediation carried out in criminal matters by a probation and mediation officer is conducted on a similar basis as mediation carried out in civil matters (*in terms of the status of a probation and mediation officer as mediator* between the injured and the accused party, communication techniques etc.), its organization, effects and the legal status of the probation and mediation officer, as opposed to a mediator, are quite different.

§ 5 of Act no. 550/2003 Coll. requires applicants for the position of probation and mediation officer to have a second level university degree in any of a wide range of fields including law, education, theology or another field of social sciences. The Judicial Academy then provides further education to successful applicants.

In practice in Slovakia, mediation between victims and perpetrators of more serious crimes (such as domestic violence and sexual abuse) is almost never undertaken. In our view, this is not just a form of discrimination against a certain group of potential clients (who have no option of using mediation because of the unpreparedness of the law and of professionals) but also a failure to use what can be an important tool in preventing acts of recidivism.

#### ***Act no.27/2009 Coll. about Social and Legal Protection and Social Curatorship (as amended)***

Because of the sharp increase in the divorce rate and a deterioration in family relations in recent years, the legislature have codified a new form of mediation which is carried out by trained employees of the Office of Labour, Social Affairs and the Family (OLSAF) in accordance with Act no. 27/2009 Coll. about Social and Legal Protection of Children and Social Curatorship, which in § 11 par. 3 a) states: *If the organ of social and legal protection of children and social curatorship discovers in the course of its legal duties that a child, parent or other person looking after the child needs help because they are unable to solve a problem or conflict in the family, or to adapt to a new situation in the family; or if the family has*

*a specific problem and it is impossible to carry out measures according to par. 1 or § 10, the organ may propose mediation as part of the measures it is taking in order to alleviate these problematic situations.*

In order to differentiate between mediation carried out by employees of the OLSAF and that carried out by mediators registered with the Slovak Ministry of Justice, § 11 par. 4 of Act no. 27/2009 Coll. about Social and Legal Protection of Children and Social Curatorship states that: “*Mediation according to this law is not an out-of-court activity for resolving a dispute in accordance with a specific legal provision,“ which is Act no. 420/2004 Coll. about Mediation.*

In terms of what qualifications employees of OLSAF must have if they wish to carry out mediation as part of their jobs (as defined by Act no. 27/2009 Coll. about Social and Legal Protection of Children and Social Curatorship), § 93 par. 7 of Act no. 27/2009 Coll. about Social and Legal Protection of Children and Social Curatorship states that: *Only natural persons who have completed a specialized accredited training course for mediators may carry out mediation to resolve disputes involving the legal and social protection of children and social curatorship.*

When comparing this law with Act no. 420/2004 Coll. about Mediation, we can observe that in Act no. 27/2009 Coll. about Social and Legal Protection of Children and Social Curatorship, *mediation* is understood as a special method of alleviating conflictual situations in families; in this case it is not an out-of-court activity for resolving disputes as in Act no. 420/2004 Coll., and the act does not even use the term *mediator*. It does stipulate, however, that mediation for disputes involving social and legal protection and social curatorship may only be carried out by natural persons who have completed specialized and accredited training. Despite this, there is often some confusion in questions about mediation in the area of social and legal protection of children and social curatorship. Employees of the OLSAF are often incorrectly referred to as mediators, which can cause misunderstanding for people who are undergoing the process, especially with respect to the effects of the mediation and the responsibilities of the people carrying it out. Again it is important to stress that OLSAF staff are state employees who do not provide mediation as an out-of-court activity; the powers of this form of mediation are not identical with those of mediation carried out in accordance with Act no. 420/2004 Coll. about Mediation. Equally the responsibilities of employees carrying out mediation as a method chosen to fulfil their professional duties according to the relevant act are very different from the responsibilities of mediators who carry out mediation as their profession on the basis of the specific law which regulates it.

***Act no. 327/2005 Coll. about Provision of Legal Aid to Persons in Material Need as an amendment and annex to Act no. 586/2003 Coll. about Advocacy as an amendment and annex to Act no. 455/1991 Coll. about Trade Licensing (the business licence law) as amended by Act no. 8/2005 Coll.***

With effect from 1.1.2012, clauses dealing with mediation in Act no. 327/2005 Coll. about Provision of Legal Aid to Persons in Material Need were reformed. The purpose of this law is to create a system of provision of legal aid, to the degree specified by law, to natural persons who, as a result of material need, are unable to use legal services in order to fully exercise and protect their rights in matters of asylum, deportation or eviction proceedings, and that way help prevent the occurrence of legal disputes. On the basis of this law, the Legal Aid Centre (LAC) was established, branches of which are now located all over Slovakia. These offices provide legal aid to people in material need, the above law primarily covering provision of legal aid in civic, commercial, labour (employment) and family affairs, as well as crossborder disputes. As of 1.1.2012, the law regulates another kind of mediation and that in the form of legal aid provided by the state to people in material need. Regulation § 4 par. 1 of the act states that for the purposes of this law, legal aid is understood as the provision of legal services to people covered by the law in order to enable them to exercise their rights. These services mainly include: legal counselling; aid during out-of-court proceedings including provision of mediation as a means of dispute resolution; writing court depositions; representation in court proceedings and commission of certain associated actions; and complete or partial covering of associated costs.

The Legal Aid Centre decides which form of legal aid should be provided by examining the circumstances of the case and choosing appropriate protection of the rights of the eligible person (or eligible foreign citizen). According to § 5b par. 4 of the act, if it is appropriate and clear from the circumstances of the case involving the eligible person, or eligible foreign citizen, that mediation could enable resolution of the legal dispute, the centre will propose mediation to the eligible person, or eligible foreign citizen, and then, with the agreement of the eligible person, or eligible foreign citizen, and the mediator, appoint a mediator. If it is appropriate given the circumstances of the case, the centre will only appoint a mediator after gaining consent to it from the other side of the dispute.

The mediator appointed by the Legal Aid Centre can be either an employee of the centre with the qualifications stipulated by Act no. 420/2004 Coll. about Mediation, or a mediator from the register kept by the Ministry of Justice. The centre makes its decision about which form of legal aid

to use and if their choice of mediator is registered with the ministry, the centre requires the eligible person to sign an agreement about starting mediation with the appointed mediator. Later the mediator is obliged by law to inform the centre in writing, without unnecessary delay, once mediation has finished and, at the request of the centre, to inform it about the course and current state of the mediation process. A registered mediator appointed by the centre is then entitled to financial remuneration in accordance with Slovak Ministry of Justice Ordinance no. 337/2011 Coll. about Remuneration to Mediators Providing Legal Aid to Persons in Material Need.

Even though the law in this case does not explicitly state that mediation carried out in accordance with Act no. 327/2005 Coll. about Provision of Legal Aid to Persons in Material Need by employees of Legal Aid Centres is a specialist method, as it is in the case of mediation provided by OLSAF employees, we personally believe that it should be given that the status of LAC and OLSAF employees when carrying out mediation is identical; in both cases, providing mediation is one of the tasks which these employees have to fulfil by law and in accordance with their job descriptions. Act no. 327/2005 Coll. about Provision of Legal Aid to Persons in Material Need actually involves a combination of mediation used as a specialist method if it is being carried out by LAC employees, and mediation as an out-of-court activity if it is being carried out by an external mediator working on the basis of Act no. 420/2004 Coll. about Mediation.

As can be seen from this short analysis of the legal provisions governing mediation, both legislative development and experience clearly indicate that in Slovakia, mediation should not be considered merely an alternative to court proceedings but should be seen as institution which can be implemented by the state at various levels of a whole range of cases in which disputes and conflicts need to be resolved. At the same time, however, it is essential that people involved in such disputes retain the right to choose this institution either in preference to or together with state-controlled methods of dispute resolution such as court proceedings.

We commend the efforts of the legislature so far in widening the possibilities of using mediation in various forms and fields. At the same time we also call for a strengthening of the position of mediation carried out by mediators in accordance with Act no. 420/2004 Coll. about Mediation, as well as a strengthening of the status of the occupation of mediator, a profession which can and should serve as an invaluable aid to the long- overloaded courts.



## Sociocultural aspects of ADR

In recent years, there has been more and more discussion about ADR in Slovakia. Students of the helping professions have, as part of their final dissertations, submitted various research projects that reveal increasing public awareness of ADR. Informational programmes have been shown on television: in 2010, a programme about mediation called *...a just! (dohoda možná)* (...now more than ever (agreement possible)) was shown, for example. A number of DVDs propagating mediation have been made in Slovakia, professional and academic conferences held, conference notes and instructions published and flyers for the general public distributed.

As elsewhere in the world, Slovaks daily meet with conflicts of varying levels of seriousness; everyone must somehow deal with such conflicts. In Slovakia, however, there seem to be various tendencies which lead to conflicts not being satisfactorily resolved. These include, for example: denying that there is a problem, avoiding looking for a solution, accusing others, remaining passive and not seeking expert help (such as mediation).

It is impossible therefore to be satisfied with the current level of use of mediation here in Slovakia. It appears that Slovaks do not have much confidence in it and are still more inclined to prefer using the courts to resolve their dispute than using an out-of-court method. The general culture in Slovakia and relative newness of our democracy both contribute to the fact that the principle of fulfilling obligations on a voluntary basis has still not properly taken root here. A mediation agreement is therefore seen as being less reliable than a court decision which can be enforced through the threat of sanctions. This truth is undoubtedly a result of our history. We are a Slavic people and experts in the field of Slavic studies have discovered that during the first phases of Slavic settlement of eastern Europe, the Slavs were divided into dozens of tribes. The conflicts which naturally arose between these tribes were resolved in culturally specific ways. In the words of one chronicler: *“When Slavs have different opinions, they either agree immediately or never reach agreement. When they do make agreement, however, they quickly break it because everyone wants something else and no-one wants to make concessions to anyone“* (Zavarská, Kršák, 2008, p. 8). One experienced Slovak mediator (Magura, 2013) claims that it is naive to think that a person will fully and voluntarily keep their side of an agreement which they have committed themselves to; there first has to be the threat of some kind of sanction in the event of them not doing so. Magura (2013) adds that mediation is something which we have adopted from another culture and legal system, from one where voluntary fulfilment of obligations is built into the thinking of

people without having to be legally enforced by the state. Magura (2013) also argues that the newness of our democracy still requires the state to enforce certain measures to ensure people fulfil their legal and contractual obligations. Educating society to voluntarily abide by the law, respect regulations and automatically fulfil their civic obligations is a long-term process in the development of society which has to make allowances for the country's cultural and historical background.

According to Pargament (1997), when facing problems “we are guided and grounded by an orienting system. The orienting system is a general way of viewing and dealing with the world. It consists of habits, values, relationships, general beliefs, and personality.” Depending on the character of the *orienting system*, “it may be a help or hindrance in the coping process, for orienting systems are made up not only of resources but of burdens as well” (pp. 99-100).

The experience and traditions we have acquired in the course of our national history are inevitably a part of such an “orienting system“ and influence our attitudes towards conflicts. Slovaks are often referred to as a “dove-like“ nation: we have never started any wars and are not a belligerent people. For long centuries, too, we were not an independent country; throughout history we were under the hegemony of one nation or another. We undoubtedly have the tendency to be passive and subordinate, taking out our inner dissatisfaction by grumbling and complaining, drinking too much and acting violently towards weaker individuals (women and children).

Our mentality has also been greatly influenced by the Communist era (1948-1989). This was characterized by such phenomena as a general censorship of information, absence of free elections, punishment of political opponents and restriction of certain basic human rights (such as political and religious freedom, freedom of speech, freedom of assembly and rights to education). People who did not agree with the regime basically had three choices: “to be active in the dissident community, to emigrate or to opt for so-called ‘inner emigration‘, meaning that you cooperated or at least created no trouble on the outside but inside you retained your own opinions (*Komunistický režim v Československu*, 2013). Most people simply did what they were told to do. Dissimulation became commonplace – the main thing was that things appeared to be in order. People did not have many choices to make because almost everything was decided for them. At present, therefore, many Slovaks seem to be afraid when they suddenly have to decide something for themselves and take responsibility for their decisions; we can observe a tendency for alibistic behaviour. The deep-rooted mentality of doing things *pro forma* lives on.

Communist interference in the freedom of education has also left its scars. Slovaks were largely unable to draw from the huge knowledge base of the Western countries, a fact which unarguably hindered progress in the area of education and research. Although the most widely used language in the academic world is English, in Communist Czechoslovakia, Russian was the main foreign language taught in schools. This created a language barrier which persists until today, many Slovaks, not only academics, having great problems now overcoming this barrier. A result of these factors is that in many areas there are a lack of genuinely erudite professionals here. Many people pretend that they are professionals but it seems they have not yet acquired the Socratic wisdom and humility (“I know that I know nothing<sup>2</sup>”) which grows in proportion to the depth of knowledge which a person really has.

The roots of many of the values which mediation is based on, such as respect for others, humility, solidarity, responsibility, hope, forgiveness and reconciliation, as well as the whole concept of restorative justice, can all be found in the Christian religion. Christianity has a long tradition in Slovakia and dates right back to the first centuries after Christ. According to the latest surveys, 84% of Slovak citizens claim to be Christian (SlovakiaSite.com, 2013), which should mean Slovaks are favourably disposed towards mediation. The Communist regime, however, probably contributed towards a deformation of religious attitudes in Slovaks. After 1945, all Catholic schools in Slovakia were taken over by the state and in 1948 Communist politicians started to persecute the Church by confiscating property, outlawing the Christian press and limiting the powers of bishops. In the 1950s, the Church came under the complete control of the state, seminaries and monasteries were closed down and many priests and monks were imprisoned for professing their beliefs while Christians working in state administration and members of the Communist party were forbidden to publicly practise their faith (SlovakiaSite.com, 2013). During Communism, Christmas was not referred to in public as Christmas but as the ‘Peacetime Holidays’ and St. Nicholas was replaced by ‘Grandad Frost’. Today the religious situation in our country is very different<sup>2</sup>; attitudes towards mediation, however, fail to reflect this.

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<sup>2</sup> Today Slovakia guarantees its citizens freedom of religion for all faith groups. At present there are church schools here for pre-schoolers, infants, juniors and secondary school students, as well as a Catholic university. Religious education is a compulsory subject for Catholic children, while children of other denominations may study Ethics instead if they wish. The Church publishes its own magazines and newspapers; in Slovakia there are religious publishing houses, as well as Christian radio stations and television channels. There are regular religious programmes on public television and in politics the Christian

How can we explain the fact that Christianity in its Slovak form has not proved very helpful in promoting the use of mediation? We believe that it is a result of the abovementioned deformation of certain dominant Christian values such as love for one's neighbour, the cross and sacrifice, and the role of suffering, forgiveness, reconciliation and atonement (Michančová, 2011). The suppression of religious freedom during Communism, decades without religious education and the obstruction of many areas of research, including the theological, have all undoubtedly left their mark on us.

One problem is the lack of proper differentiation regarding the meaning and practical execution of some religious values. Yet this differentiation is extremely important in the religious realm. As Pargament (1997) points out: "In fact, the first acts of creation, according to Judeo-Christian tradition, were acts of division. The separation of light from darkness, the division of water and land, and the days of creation that followed are successive differentiations. Religious traditions are vitally concerned about differences: how virtue differs from sin, what is sacred and what is profane, who is a member and who is not a member of the group, pathways to follow and pathways to avoid. Distinctions such as these are summarized in shorthand form through commandments, catechisms, and codes. But most religious groups do not stop there. Over centuries, religious leaders and sages have developed rich commentaries and theologies that elaborate further upon these basic distinctions. Killing is said to be generally wrong, but it may be justifiable in some situations. Even though marriage is a sacred covenant, the contract can, in some instances, be nullified or broken. Finer distinctions of this sort make the tradition relevant to a wider range of life demands. Many people, however, are not aware of the fine distinctions among beliefs, practices, and moral codes that are part of their faiths. What they know mostly about are the shorthand summaries. (...) Religious education often ends in adolescence, just when the young adult is developing the capacity to engage in and appreciate the more abstract, differentiated thinking of the tradition. What many people take from their religious education are the abbreviated guidelines for living and summaries of doctrine that cannot provide an adequate response to life's multiple challenges. (...) Those who lack a well-differentiated religious orienting system (...) appear to be vulnerable to major life stressors. (...) Simple solutions to difficult problems, including religious ones, can make matters worse" (Pargament, 1997, pp. 342-343).

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Democratic Movement (KDH) is very active. There are churches in almost every town and village (SlovakiaSite.com, 2013).

The connection between understanding of religious values and practical attitudes towards conflicts can be seen in everyday practice. This was confirmed by research into a sample of Slovak women who suffered violence at the hands of their partners and whose erroneous understanding of key Christian values led to unnecessary prolongation of violence (Karlošková, 2012).

Although we have in Slovakia a relatively solid legislative framework for ADR, the application of ADR in practice is still not at a satisfactory level. And although we live in what is formally a democratic society, we lack the genuine spirit of democracy where rights and obligations are respected equally. Perhaps it is unsurprising that Slovakia is perceived as being the fifth most corrupt country in the EU (Transparency International Slovensko, 2012). In the area of law enforcement, Slovakia is also at the bottom of the EU list (European Commission, 2013).

### **Challenges in the area of ADR in Slovakia**

If ADR is to become more widely used, it is necessary that the values it represents become more socially normalized, a process which will require education of both specialists and the general public. The theory and methodology of ADR should be incorporated into the undergraduate and postgraduate education of all the helping professions, as well as into the formal and informal education of citizens generally (for instance as part of pastoral teaching for Christians of all ages).

Increased collaboration between all experts and institutions involved is also necessary to ensure more effective implementation of ADR in practice. Professionals responsible for conflict solving (lawyers, police, public prosecutors, courts, social workers, counsellors, psychologists, psychotherapists, pastoral workers in various denominations, non-profit organizations etc.) should make greater efforts to work together to upgrade the quality of the whole system. Breaking down barriers to cooperation is especially important; it is sad that many judges, lawyers and notaries see mediators either as unwanted competition or as incapable of resolving disputes (Magura, 2013). Respect for another's profession (at least in the form of refraining from making unjustified insults) and concentration on what is best for the citizen and society at large should be the main priority for all interested professions and institutions and should govern their attitude towards their clients.

Nor should we forget the importance of research and monitoring in the area of ADR. Every case should be evaluated and improved where possible on the basis of new experience and insights. Evidence-based practice should be an imperative, especially when using ADR for specific conflicts

in which there is a clear power unbalance between the different parties involved.

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## MEDIATION IN POLAND: LEGAL SITUATION AND SOCIAL PERCEPTION

Sylvia Pelc

### Introduction

Mediation is a form of alternative methods of disputes resolution, collectively referred to as ADR (Alternative Dispute Resolution). Until now it has no uniform normative definition in international law and domestic legislation. The doctrine and mediation practice define mediation as a dispute resolution method in a mode of special negotiations carried out by parties to a dispute aided by a neutral third party - a mediator. According to Donald Peters, *Mediation is best understood as assisted and enhanced negotiation and negotiation is the most common process employed to create legal relationships and resolve disputes* (Peters, 2005, p. 15).

An interesting definition is presented by a professional mediator, Dorota Fedorowska, according to whom "mediation is a constructive dispute resolution, it is coming to an agreement in the presence of a mediator, who is impartial and not involved in the dispute. They help the parties spot their resources and strong points. Most time is devoted to the constructive present and future, instead of the past related to the current conflict, which cannot be changed anyway" (Fedorowska, 2011, p. 48).

The newest and broadly discussed vote in the civil mediation field is the EU 2008/52/EC directive, which, in article 3, defines mediation in the following way: "*mediation means an organized proceeding of voluntary character, regardless of its name or definition, in which at least two parties to a dispute try to reach an agreement, themselves, in order to resolve their dispute, aided by a mediator. Such proceeding can be initiated by the parties, or it can be proposed or ordered by a court, or imposed by the law of a member state. The term includes mediation carried out by a judge, who is not responsible for any court proceeding pertaining to the specific dispute. However, it does not include attempts made by the court or a dispute in the course of a court proceeding pertaining to the specific dispute*" (Morek, 2008, p. 93).

A definition of mediation is also formulated by the Polish Ministry of Justice, which defines mediation as: *"an attempt of bringing about an amicable conflict resolution, satisfying both parties, by way of voluntary negotiations carried out and aided by a third person, impartial towards the parties and their conflict, i.e. a mediator, who supports the course of negotiations, reduces tension and assists - yet not imposing any resolution - in working out a compromise"* (www.ms.gov.pl), while the Minister of Justice, Jarosław Gowin, claims that *"mediation builds a feeling of trust among the parties, subjective justice and achievement of goals, through common conciliation without a feeling of a failure"* (Gowin, 2012, p. 1).

### **Mediation in Poland - legal regulations**

The first legal regulations in Poland, related to using mediation as an instrument enabling amicable solving of a problem, were implemented in 1991 to the act on collective disputes resolution, as a part of a compulsory dispute resolving procedure concerning a collective dispute between employees and the employer. The institution of mediation, in criminal cases, was implemented in 1998, by codification of the Code of Criminal Procedure, therefore becoming a tool meant to fulfil the idea of restorative justice. In 2000, by means of amending the Juvenile Delinquency Proceedings act, mediation was included as an alternative way of reacting to undesirable juvenile behaviour. In 2001 regulations of the Commercial Inspectorate Act concerning mediation proceeding in disputes between an entrepreneur and a consumer came into force. Pursuant to these, mediation is carried out by Wojewódzki Inspektor Inspekcji Handlowej [Province Inspector of Commercial Inspectorate] or employees authorised to do so. In 2004, pursuant to the Act - Law on Proceedings before Administrative Courts, mediation proceeding was implemented in cases belonging to cognition of Province Administrative Courts, between a public administration authority and a party to the case.

In 2005 there came a very important moment - a new institution of civil cases mediation was implemented to the Polish legal system by way of the act dated July 28th 2005 amending the act - the Code of Civil Procedure and some other acts, published in the Journal of Laws of September 9th 2005, No. 172, pos. 1438). The act came into force on December 10th 2005. The act is an effect of activities of Codification Committee for Civil Law to the Minister of Justice, within the scope of works by the task-based team for arbitration. Experts from legal and economic circles participated in the Committee's works: the Polish Arbitration Association, Polish Confederation of Private Employers Lewiatan (which presented its own project regulating economic mediation) and Business Center Club.



The act was fulfilment of recommendations set forth in resolutions of the Committee and the Council of Europe, in particular - Recommendation of the Council of Europe dated 18.09.2002 on civil mediation. What is important, the Act preceded the Directive of the European Parliament and the Council of Europe - 2008/52/EC of May 21st 2008 on some mediation aspects of civil and commerce cases. The main aim of this regulation is to implement the institution of mediation to the Polish law of civil procedure and, this way, to establish a way, alternative to court proceeding, of resolving civil cases. Such proceeding should lead to fast dealing with some disputes, in a way most efficient for both parties - by way of a settlement. As assumed by the authors, a mediation proceeding in civil cases should be attractive enough for the parties to a relation under civil law so that the parties could take advantage of that. That is why a principle has been agreed that mediation-related solutions should be simple and uncomplicated. Mediation is meant to facilitate claims in civil cases and, at the same time, provide effective legal protection to entities, which have chosen this way of claiming damages. Following these assumptions it has been agreed that by way of mediation one can resolve a civil-law dispute by reaching a settlement with a mediator. Such settlement will be valid in law as a court settlement when approved by the court (art. 18315 of the Code of Civil procedure). Issuing a mediation proceeding will also interrupt the statute of limitation (art. 123 § 1 of the Code of Civil Procedure). Solutions concerning mediation costs have also been implemented and these should create a financial incentive to take advantage of a mediatory way of resolving civil-law disputes. In order to make it possible for parties to relation under civil law as broad use of mediation as possible, it has been agreed that, by way of mediation one can resolve any and all civil-law cases that can be resolved by way of a settlement reached before a court (art. 10 of the Code of Civil procedure).

Polish civil law stipulates mediation proceeding in two forms, pursuant to a contract, as unofficially referred to by mediators - private, which is carried out prior to eventual court proceeding, and mediation started pursuant to a court decision. None of these forms is obligatory. Actually most mediation proceedings in Poland take place pursuant to a court decision. In order for mediation to take place, both parties to a dispute need to agree to mediation, since one of basic mediation principles is its voluntary character and, at the same time, each party has the right to give up mediation, at any of its stages, which cannot be a proof against the party during an eventual court proceeding. The court, by referring a case for mediation, determines a maximum one month deadline to carry out mediation proceeding and it is possible to prolong the period, pursuant to an unani-

mous application of the parties, yet this can be applied for only once. In the court decision a mediator is determined and this is selected by a judge from the list of regular mediators for a competent court. In Poland, pursuant to art. 183 & 1 of the Code of Civil Procedure, a mediator can be a person having full capacity to perform acts in law, enjoying full civil rights. In order to become a regular mediator enlisted for a given court one needs to obtain so-called recommendations from a social or professional organization, eventually from a higher school, which can run mediation centres and list regular mediators. The aforesaid institutions submit lists of mediators to the head of a district court. In reality the institutions enlist their mediators under the condition that the persons have completed a suitable mediation-related training session. Standards of such sessions were established in 2007 by the Civic Council for Alternative Dispute Resolution to the Minister of Justice. Currently a discussion concerning standards of training for mediators is taking place in Poland. According to mediators themselves, the standards are too general. This results in poor quality of services provided by mediators and, as a consequence, causes unwillingness of judges-related circles towards mediation proceeding, which, on the other hand, has an impact on the number of cases referred for mediation, which, in Poland, is still very low.

### **Mediation in Poland - statistical image based on data obtained from the Ministry of Justice.**

Poland, despite the level of interest in mediation as an alternative method of disputes resolution is increasing year by year, is still a country where only a slight percentage of court cases is referred for mediation. Analysing the table below it is worth remembering that approx. 13 million of civil cases are investigated by courts in Poland.

The table below shows that the number of civil cases referred for mediation pursuant to a court decision is increasing and, in district courts, it has doubled while in regional courts it has increased by almost 50%. However, pursuant to the aforesaid data, one can notice that only a slight percentage of mediation ends with discontinuation of proceeding as a result of reaching a settlement before a mediator. Thus a question comes to mind - what does it result from?

Table 1. Mediation proceeding in civil cases in the years 2006 - 2011

Years	COURT PROCEEDING				NON-JUDICIAL PROCEEDING				
	Number of cases in which parties were referred for mediation pursuant to a court decision (art. 183 <sup>8</sup> § 1 of the Code of Civil Procedure)	Number of protocols submitted by mediators (art. 183 <sup>9</sup> § 2 of the Code of Civil Procedure)	Proceeding was discontinued as a result of approving the settlement reached before a mediator (art. 183 <sup>14</sup> § 1 and 2 of the Code of Civil Procedure)	Approval of the agreement was rejected in the mode of art. 183 <sup>14</sup> § 3 of the Code of Civil Procedure	Number of protocols submitted by mediators (art. 183 <sup>14</sup> § 1 of the Code of Civil Procedure)	Number of settlement approval applications	total	including those when an enforcement clause was granted (art. 183 <sup>14</sup> § 2 of the Code of Civil Procedure)	Approval of the agreement was rejected in the mode of art. 183 <sup>14</sup> § 3 of the Code of Civil Procedure)
<b>district courts</b>									
2006	1 053	546	25	3	22	1	3	1	-
2007	1 021	707	38	9	4	2	2	1	-
2008	1 061	760	54	11	27	5	3	1	-
2009	1 349	914	27	2	49	2	6	10	-
2010	1 535	1 076	47	8	56	5	15	-	-
2011	1 656	1 231	54	8	29	9	6	-	2
<b>regional courts</b>									
2006	395	235	68	12	23	25	15	8	10
2007	378	210	73	6	9	7	16	4	1
2008	394	167	65	12	27	13	15	11	3
2009	493	297	63	6	30	18	14	8	4
2010	661	368	101	28	15	16	14	5	4
2011	858	519	105	40	45	38	33	16	5

Source: <http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/>

In my opinion, this is a matter of several issues. First of all, quite often mediation does not result in reaching a settlement owing to the fact that, taking into account the conflict escalation theory, a case is referred for mediation too late. A conflict stage is often quite advanced and this causes that parties have a negative attitude to one another, they do not think constructively and rationally, they are embraced by bad emotions, directed to a revenge instead of reconciliation. The other, very important cause for such state of affairs, is, quite often, improper professional preparation of mediators and this causes they are not able to suitably carry out the mediation process. Yet another cause is noticeably negative attitude of

the parties towards mediation by their attorneys and legal advisors, who advise their clients against signing a settlement before a mediator.

A significant part of civil cases referred for mediation are family cases. Polish judges are willing to refer such cases for mediation, in particular divorce and separation cases. This results from the fact that by way of mediation it is easier to reach an agreement satisfactory for both and concerning the following issues: culpability of breakdown of marriage, exercising parental authority over a juvenile, contacts with a child, amount of alimony for the child, division of joint property of the parties.

Table 2. Proceedings concerning family cases in common courts, as a result of a mediation proceeding in the years 2006 – 2011

Specification	Result of a mediation proceeding		
	settlement	no settlement reached	other
<b>2006</b>			
Altogether	<b>127</b>	<b>83</b>	<b>60</b>
Carried out by institutions	36	25	23
Carried out by trustworthy persons	91	58	37
<b>2007</b>			
Altogether	<b>155</b>	<b>95</b>	<b>76</b>
Carried out by institutions	42	25	27
Carried out by trustworthy persons	113	70	49
<b>2008</b>			
Altogether	<b>216</b>	<b>146</b>	<b>65</b>
Carried out by institutions	72	51	25
Carried out by trustworthy persons	144	95	40
<b>2009</b>			
Altogether	<b>340</b>	<b>247</b>	<b>129</b>
Carried out by institutions	131	83	50
Carried out by trustworthy persons	209	164	79
<b>2010</b>			
Altogether	<b>439</b>	<b>380</b>	<b>169</b>
Carried out by institutions	173	221	80
Carried out by trustworthy persons	266	159	89
<b>2011</b>			
Altogether	<b>471</b>	<b>461</b>	<b>217</b>
Carried out by institutions	174	240	71
Carried out by trustworthy persons	297	221	146

Source: <http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/>

Recent data obtained from the Ministry of Justice for the first half of the year 2012 show that, in civil cases, the number of mediation proceedings was increasing the slowest. 1297 mediation proceedings were reported, while in the same period of the year 2011, there were 1236 of them.

The increase is by 4.9%. The largest number of mediation proceedings pertained to criminal cases - 2339 (increase by 22.7%) but in cases pertaining to the labour law the largest increase was noted - by 483%. Nevertheless, only 181 settlements were signed. As far as economic cases are concerned, only 1196 mediation proceedings were noted (increase by 101%) and in family cases, excluding juvenile-related ones, 1006 (294%). It is worth emphasizing that in district courts the number of mediation proceedings in civil cases dropped by 2.3% and there were only 819 of such (the Ministry of Justice). This is presented in the table below.

Table 4. Mediation statistics for the first half of 2012.

<b>Number of cases referred for mediation, SR + SO together</b> (I and II means the half of the year; in the table for the year 2012 identical flow of cases referred for mediation was assumed in the second half of the year 2012 to calculate the annual variable).	<b>2011</b> (I and II half of the year)	<b>2011</b> (1st half of the year)	<b>2012</b> (1st half of the year)	<b>Annual variable %</b> (positive values - increase, negative - decrease of mediation cases)
Civil cases	2514	1236	1297	4,9
Economic cases	1429	594	1196	101,3
Family cases (excluding juvenile cases)	1435	255	1006	294,5
Juvenile cases	253	128	218	70,3
Criminal cases	4479	1907	2339	22,7
Labour cases	66	31	181	483,9
<b>Number of cases referred for mediation, as divided into district and regional courts</b>				
<b>Regional courts</b>	<b>2011(I+II)</b>	<b>2011 (I)</b>	<b>2012 (I)</b>	<b>Annual variable %</b>
Civil cases	858	398	478	20,1
Economic cases	1053	463	871	88,1
Family cases (excluding juvenile cases)	1435	255	1006	294,5
Juvenile cases	253	128	218	70,3

Criminal cases	4461	1905	2332	22.4
Labour cases	65	26	181	596.2
<b>District courts</b>	<b>2011(I+II)</b>	<b>2011 (I)</b>	<b>2012 (I)</b>	<b>Annual variable %</b>
Civil cases	1656	838	819	-2.3
Economic cases	376	131	325	148.1
Family cases (excluding juvenile cases)				
Juvenile cases				
Criminal cases	18	2	7	250.0
Labour cases	1	5	0	

Source: <http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/>

Mediation-related experiences in Polish reality, though relatively short and mediation as such is not as popular as in other countries, neither among the judge-oriented circles nor among the citizens, constitute a basis for positive assessment of its effective application, since, undoubtedly, it brings enormous profits for the judiciary, as well as for the Polish residents, who can take advantage of it. First and foremost, a mediation proceeding makes it possible for the interested parties to direct the settlement process and thus they can shape their own social and legal reality. One cannot disregard the fact since the conciliated parties, contrary to those, whose conflict was settled by a court, less often go back to the court to continue the dispute there (Cebula, 2011, p. 5). This results from the fact that both parties have the same influence on solving a conflict through mediations and this is them who decide how it to be resolved, while a settlement can only be reached when its solutions are approved by both parties, thus nobody is defeated. Persons settling their conflict in a court do not quite have influence on its settlement, since it is the judge who decides and thus, despite their good will, is rarely able to satisfy both parties, usually one party leaves the court with a feeling of a harm, defeated. Yet another significant benefit resulting from mediation is avoiding the mere court proceeding, its lengthiness, lengthy procedures, involving witnesses, appointing experts. All that has an impact on decreasing the costs of the entire court proceeding and relieves courts - more than 13 million of civil cases are directed to Polish courts a year (Kuban, 2012, p. 2). From the

point of view of parties to a dispute, common citizens, mediation gives a chance for relatively cheap and quick conflict solving, with a possibility of saving good mutual relationships: family, neighbourly, professional or business ones. Since mediation is not of confrontational character, parties participate in it feeling safe and calm, which is very important when it comes to future relations between them. What is most important is that mediation allows for real and permanent resolution of a dispute. Taking into account huge work overload of Polish courts, felt every day by both judges and citizens, mediation is undoubtedly a good alternative for both parties and, more and more often, and this is appreciated by them.

### **Mediation - social perception**

Until recently knowledge about existence of mediation as an alternative way of out of court conflict solving was possessed by a very small percentage of Polish residents. A change concerning the level of knowledge of the Polish about mediation can be noticed since 2010, when the Ministry of Justice began popularization of the mediation idea by a social campaign within the frameworks of the European Social Fund within the frameworks of priority V "Good management" of the Operational Program "Human Capital" 2007-2013. – "facilitating access to the judiciary". First activities of information and educational character concerning ADR began in October 2010 and, since then, they are run under the slogan "You have the right for mediation". The action was most intense and visible in August 2012. Then the Ministry of Justice was implementing a monthly, all-Polish outdoor campaign promoting mediation. In many Polish cities public debates, conferences, mediation-related training sessions and informative meetings for common citizens were taking place in Polish courts. This caused that the Polish society started to notice mediation and now, more and more often, people express their consent for that. Research conducted in 2012 by TNS Polska for the Family Mediators Association shows that 54% of respondents knows about this method of conflicts solving. In 2011 it was known only to 43%. The vast majority of respondents is aware of many advantages of mediation. Percentage of positive responses, for most statements describing advantages of mediation, is more than 90%. Almost half of the respondents claim that a settlement reached before a mediator is a better solution than a court decision. Currently more than half of the respondents declare that in a case of a dispute they use mediation (54%) and every fourth person is not quite convinced (26%) (Kuban, 2012, p. 2).

Taking into account the legal and social aspect of mediation in Poland, as well as the statistical picture based on data from the Ministry of Jus-

tice, as presented in this article, it must be stated that Poland has just begun using mediation - the alternative form of disputes resolution. What should be done so that the Polish society is more interested in mediation? First of all mediation-related knowledge should be popularized by introducing the subject in educational program, from the very beginning of secondary level education. Several-hours meetings of teens with a mediator, teens who often participate in or observe many conflicts between their contemporaries or families, would make it possible for them to acquire knowledge concerning such topics as: what is mediation, what it consists in, what a mediation proceeding looks like, what are its principles, who is a mediator and what their work consists in. Such knowledge would increase trust towards mediators and thus to mediation itself. Moreover, suitable qualifications of mediators and specific educational standards, as well as compulsory and constant professional perfecting should be defined in the act as this would standardize the mediators training system, raise its level and this would mean increased trust of judges towards mediators. As an effect of that the number of cases referred by judges for mediation would increase, too. It would be justifiable to impose - on courts and other authorities - a duty to inform the parties to a dispute and propose them an opportunity to take advantage of mediation, since parties quite often have absolutely no knowledge about such opportunity of resolving a dispute. All the changes would bring the Polish society closer to resolving their conflicts through dialogue leading to a settlement, as this is what mediation is meant for. Participation in mediation is also assuming responsibility for one's decisions, thus this is a perfect way to maturity and active taking part in social life, in which there has always been and will be disputes. Active participation in social life is one of basic elements of civil society that we so much strive for.

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## THE STATE OF ALTERNATIVE DISPUTE RESOLUTION IN HUNGARY

Eszter Posch and Borbala Fellegi

### I. Legal Framework

#### 1. Definitions for ADR

Before turning to the legal definitions of different ADR methods, it might be useful to have a look at the meaning of ADR itself. ADR is used as an abbreviation for “Alternative Dispute Resolution”, whereas the A could also stay for assisted or appropriate (WAMS, 2012) when considering the meaning of the expression. Nevertheless, *according to our understanding, ADR techniques can be applied as a complementary system to the formal judicial processes and do not necessarily replace formal processes* (Rúzs Molnár, 2005).

ADR refers to non-judicial processes in which an impartial person assists parties in a conflict situation to try and resolve the issues between them.<sup>1</sup>

The form of assistance in conflict management might be facilitative, advisory or determinative (WAMS, 2012). From this aspect mediation is facilitative and arbitration is determinative.

Taking the facilitative form of the assistance, we can distinct the cases where the conflict situation is amongst more or less equal parties from those where there is a victim and an offender. Victim-offender mediation (VOM) along with conferencing methods and peacemaking circle methods are all tools of the *restorative approach*.

The restorative approach focuses on directly involving the key persons affected by the conflict - *this means more people than solely the victim(s) and offender(s) themselves* - and facilitate those involved to be able to repair the damage done to their connections. Community and the way it is working is fundamental for restorative assistance. The emphasis is on the restoration of connections and on avoiding further or repeated harm-

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<sup>1</sup> From a broader point of view ADR can also include conflict management approaches that enable parties to prevent or manage their disputes without outside assistance, however this summary focuses on those with assistance.

doing. Instead of punishment the focus is on the parties' needs and responsibility-taking. Still, to make an agreement to be fulfilled after the parties return to their everyday lives, the integrative power of the community can be a decisive motivator because "a key element of a community sanction is that it does not require the offender to suffer some form of deprivation of liberty; instead, it requires the offender to fulfil obligations, to have a positive attitude and to be active" (Hatvani, 2010).

As one might notice, all the facilitative assistance forms aim in some way to „repair connections” – this is why the restorative approach is working for most of the non-criminal cases as well: „it increasingly penetrates issues of discipline in schools, neighbourhood conflicts, child welfare and protection matters, and other fields of social life” (Walgrave, 2010). This wide applicability and the different role restoration can have within the social and criminal justice system are illustrated in Figure 1 (Fellegi, 2009, p. 28.).

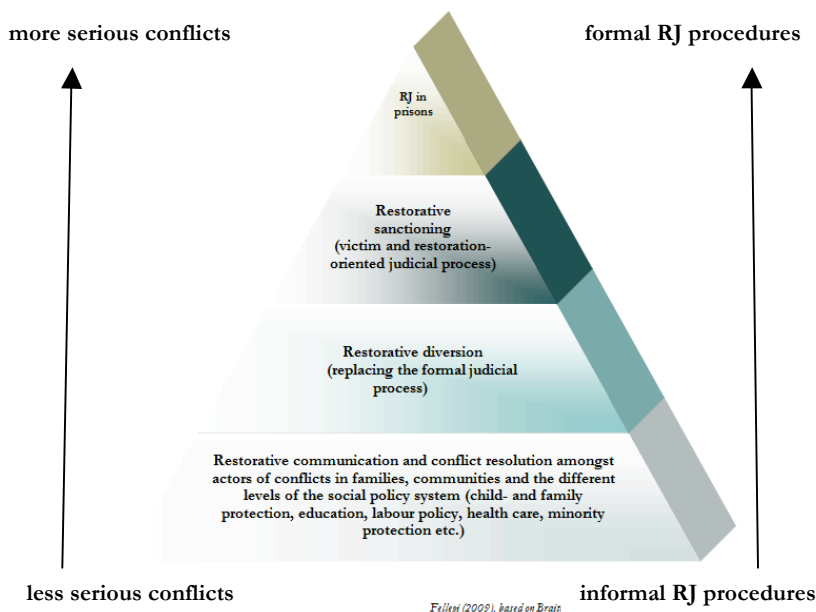


Figure 1: *The applicability of restorative justice (RJ) practices on the different levels of the social and justice system* (Fellegi, 2009)

## 2. Appearance of definitions for mediation in the particular jurisdiction

Mediation as a method of conflict resolution has been used in Hungary since 1992 in civil cases like in labour, family or divorce disputes (Fellegi, Torzs and Velez, 2012). While the adaptation of the model law for arbitration dates back 1994, the first act regulating mediation has been passed in 2002, the Act LV of 2002 on Mediation (Act on Mediation).

The Act on Mediation defines mediation to be a special non-litigious procedure conducted in accordance with the Act (see below the responsibilities) to provide an alternative to court proceedings in order to resolve conflicts and disputes where the parties involved voluntarily submit the case to a neutral third party (the mediator) in order to reach a settlement in the process and lay the ensuing agreement down in writing.

Act CXXIII of 2006 on Mediation in Criminal Cases provides a definition and the purpose according to the different context:

„(1) Mediation proceedings means

- an *attempt to resolve conflicts*
- *resulting from a crime,*
- in an attempt to *find a negotiated solution* – fixed in writing – between the victim and the author of the offense,
- mediated by a *competent third person* (mediator)
- *independent* of the court hearing the criminal case, and of the public prosecutor,
- which might *mitigate the effects of the crime* and
- might *steer the defendant to abide by the law in the future.*

(2) All mediation proceedings shall be aimed to *reach an agreement* between the victim and the respondent, *facilitating the contrition of the respondent.*”

## 3. Responsibilities and competencies of the ADR provider

The Act on Mediation defines the responsibilities of the Mediator as „mediating negotiations between the parties

- *to the best of their abilities*
- *in an unbiased and*
- *conscientious manner*
- *in order to reach an agreement* in conclusion of the process.”

The Act also includes the *obligation of ensuring equal treatment* for all parties. Some conditions of the mediation process can be regarded as responsibilities of the ADR provider and vice versa.

In addition to the above, the Act on Mediation in Criminal Cases continues: „the mediator shall proceed with *due respect for the dignity of the parties* during proceedings and shall ensure that the parties *treat each*

other with respect as well”, it also emphasises *independency of the court hearing* of the criminal case and *strict confidentiality*.

There is no national code of conduct for mediators, but the majority of mediation associations follow the European Code of Conduct for Mediators (Törzs, 2011).

The most important competencies for a mediator are named in the training specifications listed in the Decree on Professional Training and Post Certification Degree of Mediators as discussed later under Accreditation.

#### *4. Mediation contract and its effects: Enforcement of agreements reached through mediation*

Although the agreements reached through mediation are generally more likely to be implemented voluntarily in the EU, the *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* requires all the Member States to establish a procedure whereby an agreement may, at the request of the parties, be confirmed in a judgment, decision or authentic act by a court or public authority.

The aim is to allow **mutual recognition and enforcement** throughout the EU of agreements reached through mediation, under the same conditions as those established for the recognition and enforcement of court decisions in civil and commercial matters and in matrimonial matters and matters of parental responsibility (Summaries of EU legislation, 2011).

In Hungary it is possible for parties to make the content of their agreement resulting from mediation enforceable. They can request the court or a public notary to incorporate the agreement into a judgment or an authentic instrument, which can be enforced afterwards (Törzs 2011).

#### *5. The appearance of ADR approaches in the particular jurisdiction*

Several institutions of social policy (including criminal policy) bear the opportunity to use alternative ways to judiciary processes in solving conflicts apart from or jointly with mediation. Here follows a brief review of their appearance in Hungarian legislation.

##### a) *Mediation in family and child protection matters:*

Mediation in child protection matters was introduced in 1 January 2005 (under the 2003 amendment to the Governmental Decree 149/1997 on Child welfare agencies, child protection and guardianship proceeding), in cases where the parents or other persons authorised to maintain relations cannot agree either on the manner or on the time of contact. Mediation in such cases can be initiated on the basis of a joint application of the

parties to a child protection mediator. The register of the child protection mediators is kept by the National Institute of Family and Social Policy (European Judicial Network..., 2007).

According to the amendment in 2002 of the Child Protection Act, or the Act XXXI of 1997 on the Protection of Children and the Guardianship Administration, in case of a conflict emerging during a process about either the regulation or the execution of contact between a child and his or her family members the Child Protection Authority is entitled to initiate to settle the conflict via mediation/in the frame of a mediation process.

A contact agreement reached in child protection mediation proceedings must be presented to the court of guardians within 8 days. The court of guardians approves the agreement at the parties' request. If no agreement is reached in mediation, proceedings will be initiated by the court of guardians (European Judicial Network, 2007).

b) *Mediation in educational matters*

Mediation Service for Education (MSE, 2011) was established in 2004 by the Ministry of Education in order to provide mediation services for free of charge in any conflict raised between actors of the education system (students, teachers, parents, founders, etc), requested by any of the parties.

MSE is a small organizational unit within the Hungarian Institute for Educational Research and Development with a special status and autonomy, in charge of helping the participants of education in their conflicts with advice and mediators.

In Hungary it has become an educational right of stakeholders of the education system to turn to the MSE for help in conflict settlement.<sup>2</sup> The MSE can delegate a mediator based on the common will of the persons affected by the conflict, and the mediator is trying to help them to reach consensus.

The Act on Higher Education provides the students and all workers of the institute of higher education the right to turn to the MSE, the Act on Education is declaring the right of the parents to do so, while the decree on Operation of Pedagogical- and Educational Institutions declares the right of the institution itself in cases where the causes endangering the child/student or the community of children/students cannot be eliminated by pedagogical methods.

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<sup>2</sup> Declared by the 2009 amendment of the Act LXXIX of 1993 on Education and the Act CXXXIX of 2005 on Higher Education, and the 11/1994. (VI. 8.) decree by the Minister of Education on the Operation of the Pedagogical and Educational Institutions.

c) Court Mediation

According to the CXVII Act of 2012 on Judicial and Administrative Matters Amending Laws, the Act on Mediation shall be complemented so that judicial clerks – who are appointed by the president of the National Office for the Judiciary<sup>3</sup> - are entitled to conduct court mediation after having proved to complement the required training as referred to in the Act on Mediation. The followings are listed (along with basic information on mediation itself and its advantages) regarding Court Mediation on the homepage of the Hungarian Courts (A bírósági közvetítői eljárás, 2012):

- To take part in a court mediation one has to be a party in a starting or ongoing judicial process.
- The court mediation is free of charge.
- The court mediator is helping to restore communication between the parties. In a direct meeting, after hearing the parties' own stories, the mediator makes an attempt to approve the agreement between the parties.
- In case the parties succeed in agreeing, the agreement is validated by the court officially responsible for their case upon their request.

d) Mediation in Criminal Matters

According to Article 221/A of the Code on Criminal Procedure (Act XIX of 1998), the mediation process may be used in criminal procedures dealing with certain offences against the person, property or traffic offences **if**

- the crime is punishable with no more than five years' imprisonment, and
- the offender has made a confession during the criminal investigation (Közigazgatási és Igazságügyi Minisztérium..., 2010).

The Act CXXIII of 2006 on Mediation in Criminal Cases declares that mediation proceedings shall be conducted

- a) by a *probation officer* engaged in mediation activities of the national probation service of jurisdiction by reference to the seat of the court of trial of the criminal case or the public prosecutor, or
- b) by *an attorney*<sup>4</sup> registered by the national probation service in the register of attorneys engaged in mediation activities being in contract – as a result of a tender with the probation service (Act CXXIII of 2006 on Mediation in Criminal Cases).

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<sup>3</sup> In Hungarian: Országos Bírósági Hivatal (OBH).

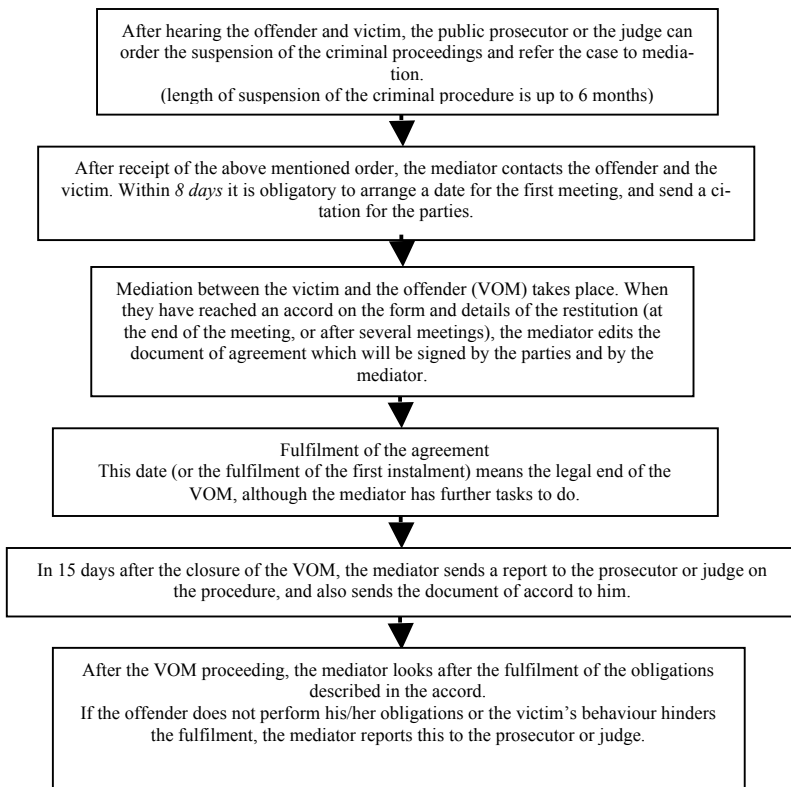
<sup>4</sup> Since January 1, 2008

The mediation process in criminal cases is exempt from duties and free of charge.

If the conditions set down in law are met, the mediation process can be voluntarily initiated by either the offender or their defence lawyer, or the victim or their lawyer. The decision on whether the case will be referred to mediation is always made by the public prosecutor or judge.

Mediation may only be used once in a given criminal procedure.

The mediation procedure can be depicted as follows:



**Source:** Fellegi, Torzs & Velez (2012)

e) *Mediation in matters of public administration* (Kovács, 2012)

In case there is a dispute between some kind of state authorities and their clients, the citizens the 2004/CXL Act on Administrative Procedure and Services offers in some cases (e.g. if many clients involved) official mediation. The scope of duties of the official mediator in such cases con-



sists of providing for the citizens authentic, professional and easy-to-understand information, and to sum up their points of view for the authorities.

f) Mediation in healthcare

The alternative way of dealing with legal disputes concerning service provision by healthcare providers to patients begins with the submission of a request to the regional chamber of judicial experts by the healthcare provider or/ and the patient. The aim is to ensure fast and effective enforcement of the parties' rights.

The healthcare provider must make the register of regional chambers of judicial experts public in an accessible manner. The register of healthcare mediators is kept by the Hungarian Chamber of Judicial Experts (European Judicial Network, 2007).

According to the 2000/CXVI Act on Mediation in Healthcare once the parties start to be engaged in an out-of-court process in case they have a case in court proceeding originating from the same claim, they are obliged to request the latter to suspend.

g) Arbitration:

Arbitration is used for the purpose of conflict resolution instead of court proceedings in relations where at least one of the parties is a person professionally engaged in economic activities to which the legal dispute relates as set out in Act LXXI of 1994 on Arbitration, which has been an adaption of the UNCITRAL (United Nations Commission on International Trade Law) model law. In case the parties agreed so previously in writing, it is binding on the parties just as the judgement of the arbitration court, which cannot be appealed. This both characteristics are untypical for mediation, as participation is as a rule voluntary and agreements are not officially enforceable *without further efforts to be undertaken*.

Similar to mediation, parties must be in the capacity to freely decide on the subject of the procedure (exclusions by law exist also in certain civil matters). Arbitrators must be independent and impartial, they may not accept orders in the course of the proceedings and must maintain complete confidentiality. The effect of an arbitration ruling is the same as that of a valid court judgment, and the legal rules on judicial enforcement are applicable (European Judicial Network, 2007).

Permanent courts of arbitration can be established only by nationwide business chambers. A central institution providing arbitration services is the Hungarian Chamber of Commerce and Industry.<sup>5</sup>

*h) Labour matters:*

Conciliation, mediation and arbitration is offered by the 1992/XXII Act on the Labour Code for parties involved in collective labour-related disputes. This is carried out by the Labour Mediation and Arbitration Service<sup>6</sup> established under the same act. For individual workplace conflicts (and not collective labour disputes) parties can request mediation service from any independent mediation provider regulated by the Act 2002/LV on Mediation.

*i) Consumer protection (European Judicial Network, 2007)*

The 1997/CLV Act on Consumer Protection established conciliation bodies *attached to the regional economic chambers* to offer out-of-court settlement for consumer disputes, aiming at a more effective and simple way for enforcing consumer rights. The conciliation bodies deal primarily with the out-of-court settlement of consumer disputes relating to the application of rules on the quality and safety of goods and services and product liability, and to the conclusion and implementation of contracts.

The aim of the Conciliation Body procedure is to settle disputes between consumers and enterprises by agreement, and if failing to achieve this than to reach a ruling in the interest of enforcing consumers' rights quickly, effectively and simply. The bodies have no jurisdiction in disputes for which a rule establishes the competence of some other authority. Conciliation proceedings are initiated at the request of the consumer or, in the case of more than one consumer and with the authorisation of those concerned, of the civil organisation representing consumer interests.

If the necessary conditions are met, the competent local court appends an enforcement order to a binding decision of the consumer protection conciliation body or of the healthcare mediation council and to an agreement concluded before the healthcare mediation council (see below).

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<sup>5</sup> Their homepage is available at: <http://www.mkik.hu/index.php?id=64>. Their Budapest chamber has a mediation department which is available at <http://www.bkik-mediacio.hu/>.

<sup>6</sup> Their homepage is available only in Hungarian: [http://www.tpk.org.hu/engine.aspx?page=tpk\\_MKDSZ\\_A\\_szervezetrol](http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_A_szervezetrol)

## II. ADR schemes and providers

### 1. Preconditions and conditions for performing ADR in relation to providers and recipients

Mediation is *voluntary*, only applicable if both parties agreed so. However, to apply mediation as an alternative to court decision is only possible when the *parties are not bound by statutory provision*.<sup>7</sup>

As for the providers, natural persons and the employees of legal persons become *entitled to engage in professional mediation* as of the date on which they are officially admitted in the register (*Act on Mediation*, Chapter II., Section 7 (1)).

Once all preconditions mentioned above are fulfilled, the last one is to *avoid conflict of interest*, as it is specified in the Act on Mediation.

The conditions of providing mediation to recipients are specified in the Act on Mediation, beginning with the *obligation of confidentiality* (regarding any and all data and information obtained in a mediation process even after the termination of the professional mediation activities), continuing with the commencement of the session with the mediator *informing the parties* as specified in the Act and in some extent including the above mentioned *responsibilities* of the mediator.

### 2. Payments

The rules governing the different types of proceedings set out clearly the system of payment of the costs to be borne by the parties. In certain cases the parties are free to agree on the fees and costs incurred in the proceedings, while in other cases the amounts are specified in legal regulations (European Judicial Network, 2007).

For example in *arbitration proceedings* the court judgment sets the amount of costs and who is to bear them. Court mediation and mediation in criminal matters are free of charge, whereas in *mediation proceedings* provided by individual mediation service providers, the parties and the mediator are free to agree on the amounts of the fees and costs and who is to pay what. In case they can or do not agree otherwise, the parties shall cover the fees and costs of the mediator and the expert, if any, in equal proportions.

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<sup>7</sup> As it is the case e.g. in terms of the validity, the existence or non-existence of a marriage as well as the annulment or dissolution of a marriage, establishing paternity, guardianship process affairs, public administration affairs, or enforcement affairs. See Chapter one, Section 1 of the Act on Mediation.

### III. Regulation of ADR providers

#### *Registration, content and extent of trainings, continual education*

##### - The Register

According to the Act on Mediation *Ministry of Public Administration and Justice* is responsible for the registration of mediators<sup>8</sup>. The register is available from a central governmental website.<sup>9</sup>

The register is provided also with general information about the meaning and applicability of mediation and the responsibility of the mediator (referring to the Act on Mediation), the confidentiality of the process and the fee of the mediator (being subject to negotiation). The mediators can be listed by name, county of operation or language skills from the register.

##### - Accreditation

To be able to register as a mediator, the Act on Mediation specifies that the applicant<sup>10</sup> needs to

- a) have a degree in higher education and at least five years experience in the respective field from the time of obtaining the said degree;
- b) provide proof of having completed the professional training course decreed by the minister for mediators;
- c) have no prior criminal record and not be restrained by court order from practicing the activities of mediators.

According to the Decree 63/2009. (XII. 17.) by the Ministry of Public Administration and Justice on *Professional training and post certification degree of mediators* in order to register as a mediator, the applicant must have completed

- a 60 hour theoretical unit with specified content (understanding and skills of: conflict theory basics, basic negotiation practices, mediation techniques and methodology, process engineering and dynamics, inquiring techniques, mediation techniques adequate for different levels of conflicts, handling of problematic actors, [basic] psychology, and the legislative background for mediation) and
- a practical unit consisting of a fully completed, mediated case and its feedback from the trainer - either in the form of 1) simulation, or 2) real mediation with a mentor, or 3) involvement in a case study group, or 4) writing a case study based on a real and own-mediated case, or

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<sup>8</sup> also containing the names of legal persons employing mediators

<sup>9</sup> direct url: <http://kozvetitok.irm.gov.hu/>, central link: <http://igazsagugyiinformaciok.kormany.hu/kozvetitok>

<sup>10</sup> in case of a natural person (for legal persons the criteria are different, see the Act on Mediation)

5) participating in a method-oriented supervision of a case mediated before.

The decree also specifies the professional standards of the training provider regarding required professional experience, the maximum number of students in one group etc.

- Training

The organizations registered for offering basic and advanced general mediation trainings are the ones entitled according to the Ministry's specifications to train mediators.<sup>11</sup> Any organisation intending to attend the list with a training program has to prove the training is in accordance with the Decree.

Besides some universities offering mediation courses and degrees, here are some of the well-known NGOs providing approved mediation trainings: the Minority Mediation Institute<sup>12</sup>; Lege Artis Bt<sup>13</sup>; Partners for Democratic Change<sup>14</sup>; Kapcsolat Alapítvány/Contact Foundation<sup>15</sup>; National Association of Mediators Hungary<sup>16</sup>; Family, Child, Youth Association<sup>17</sup> and Rézler Gyula Mediation Institute<sup>18</sup>.

- Continual education

According to the Act on Mediation, natural persons are required to participate in continuing professional training programs. The minister shall have powers to grant an *exemption* from this obligation by way of a decree to a mediator who is *engaged in mediation activities under a specific legal relationship on a regular basis*, or who *partakes in such professional training programs in the capacity of a lecturer in a specific number of hours*.

The continuing professional training program is comprised of consecutive education cycles arranged in a sequence *over a period of five years*. The first continuing professional training cycle begins on the day of admission to the register of the person required to participate in continuing professional training.

The person required to participate in continuing professional training shall attend either of the training courses specified in the decree of the minister as to comprise a part of the continuing professional training pro-

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<sup>11</sup> The latest version of the list of entitled institutions is available at <http://igazsagugyi-informaciok.kormany.hu/kozvetitok> choose: Közvetítői szakmai képzések listája

<sup>12</sup> Their homepage is available at: <http://www.mediare.hu>

<sup>13</sup> Their homepage is available at: <http://www.legeartis.hu>

<sup>14</sup> Their homepage is available at: <http://www.partnershungary.hu>

<sup>15</sup> Their homepage is available at: <http://www.kapcsolatalapitvany.hu>

<sup>16</sup> Their homepage is available at: <http://www.mediacio.hu>

<sup>17</sup> Their homepage is available at: <http://www.csagy.hu>

<sup>18</sup> Their homepage is available at: [http://www.rezler-foundation.hu/index\\_en.html](http://www.rezler-foundation.hu/index_en.html)

gram, and shall provide proof of having completed the said training course to the minister.

#### **IV. Current status of ADR in terms of its use<sup>19</sup>**

##### *1) Community Mediation*

Community dispute resolution is a highly important angle of dispute resolution, not having any particular legislation, but the necessity to be dealt with. Dispute resolution on this level accompanies several forms of community building. There have been and also there are different ongoing attempts. As for examples:

- community mediation in Csobánka, “assisting the community to create constructive dialogue in order to desegregate the settlement’s primary school, revive community life and relations, and establish the institution that can maintain the dialogue established during the project”<sup>20</sup>,
- in Lőrinci, in Verőce and Nagymányok (all funded by the National Crime Prevention Committee (NCPC) program<sup>21</sup>). In course of the last NCPC programme for 2012 6 projects won from which one has dealt with community mediation in Nyírbátor.<sup>22</sup>
- In the frame of the same NCPC program in 2009 Foresee documented its community building and conflict resolution intervention in a small village also in the form of a short film with the title WE also exist<sup>23</sup>.
- At present Foresee is one of the 7 partners in a 4-year long international action research project called ALTERNATIVE which is testing applicability of RJ methods in intercultural conflicts on community level, funded by the European Union’s Framework Program 7.<sup>24</sup> In the course of this project Foresee is focusing on the applicability of restorative justice in intercultural context, such as in communities of Roma and non-Roma people.

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<sup>19</sup> The following review’s first three chapters are focusing on NGO-s to our best knowledge but cannot be regarded as complete as there is no central database for all the previous and ongoing projects engaged in ADR.

<sup>20</sup> <http://www.pallai.hu/en/work-experience/community-conflict-resolution/> also but only in Hungarian [http://www.negos.hu/Kozossegi\\_mediacio.html](http://www.negos.hu/Kozossegi_mediacio.html)

<sup>21</sup> unfortunately all the information regarding these projects have been under maintenance for the last year before that were available at <http://www.bunmegelozes.info/?q=hu/node/16> and [http://www.tettprogram.hu/Telepulesi\\_mediacio](http://www.tettprogram.hu/Telepulesi_mediacio)

<sup>22</sup> <http://www.partnershungary.hu/en/komplex-halozatok-a-helyi-konfliktusok-megelzeseben-es-a-bnmegelzesben.html>

<sup>23</sup> <http://foresee.hu/en/films/>

<sup>24</sup> <http://foresee.hu/en/projects/>

- There has been launched a mentor program in Bag by the non-profit association BAGázs.<sup>25</sup>
- Consensus Foundation is also active in the field of facilitation and mediation in community or institutional conflict situations.<sup>26</sup>

### 2) Child protection and family matters:

Kapsolat Alapítvány/Contact Foundation<sup>27</sup> has been active in the field of ADR since 1992. They invented a network of Connection Emergencies (Kapsolatügyeletek) in 58 sites across Hungary with the help of the EU and the Ministry of Social and Family Affairs.<sup>28</sup>

Community Service Foundation Hungary<sup>29</sup> has been long active also in dispute resolution with a restorative approach between youth and their surrounding community.<sup>30</sup>

Family, Child, Youth Association established in 1993 aims to support the protection of children and the strengthening families accomplished by fortifying, training and providing services to helping professionals. The Association publishes books, training materials and also for 20 years the only Hungarian professional journal on family and child welfare and protection, since 2000 on-line.<sup>31</sup>

### 3) Education:

In the area of education one of the recent challenges Hungary (as well as most EU countries) faces is how to prevent and handle violence (Violation of rules) in school according to MSE (Mediation Service for Education, 2011). One of MSE's priority aims is to enhance cooperation between institutions dealing with children to prevent violence in schools.

They have experienced that there is not sufficient co-operation between the participants of the education, hence, infringements, inattentions, conflicts in the schools lead to confidence deficiency and distrust between school citizens.

MSE deals with mediation, conciliation, giving information about educational rights and educational conflict-solving methods.

In the following we are listing some programmes and/or NGOs (having been) active on this field:

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<sup>25</sup> <http://www.bagazs.org/hu/mentorprogram/mentorprogram-2011>

<sup>26</sup> <http://www.konszenzus.org/angol/programs.php>

see: [http://www.police.hu/sajto/sajtoszoba/orf\\_090505\\_01.html](http://www.police.hu/sajto/sajtoszoba/orf_090505_01.html) in Hungarian

<sup>27</sup> <http://www.kapsolatalapitvany.hu>

<sup>28</sup> <http://www.kapsolatugyeletek.egalnet.hu>

<sup>29</sup> <http://hu.iirp.or>

<sup>30</sup> <http://hu.iirp.edu/articles.html?articleId=680>

<sup>31</sup> <http://www.csagyi.hu/en/>

- The National Institute for Family and Social Policy<sup>32</sup> launched a program in 2009 called PACR, in which also professionals of Foresee took part. Initiators of Partnership for the Alternative Conflict Resolution (PACR) program (2009-2011)<sup>33</sup> realised that extending aggression in schools and divisive disputes affecting school communities and their neighbourhood make the usage of „peaceful problem solving” methods more and more necessary in education. After a nearly one year long workshop period, teachers could apply for accredited courses targeting more effective conflict management through introducing methods of mediation and an enlargement of teachers’ set of tools. Following the 30 hour long practice-oriented training course, teachers could become able to strengthen their school communities and adapt methods of restorative conflict management in their own social environment.
- In the frame of the National Crime Prevention Committee’s (NCPC) yearly program in 2011, a film featuring high school students about school conflicts' alternative resolution methods and their most important principles has been created within Foresee Research Group's KLIMA+ (Positive Climate) project.<sup>34</sup>
- There are some institutions applying ADR methods in their daily routine, a reference educational institution the Green Rooster (Zöld Kakas) has been amongst the first doing so, they started in 2001.<sup>35</sup>
- The so called Hejőkeresztúr model (Roma Produktíós Iroda, 2011) is dealing with sharply differing social backgrounds with a great success – motivating children to be interested in learning, in a supportive mutually respect based environment.
- Community Service Foundation Hungary has been engaged for long in the field of education by leading groups to strengthen and restore teacher-student relationship; by improving positive school climate through case-conferences and supporting teacher circles and by consultation, mentoring and supervision to apply restorative methods in schools and institutes engaged in the field of child protection, family support and jurisdiction.<sup>36</sup>

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<sup>32</sup> <http://ncsszi.hu/>

<sup>33</sup> <http://foresee.hu/en/segedoldalok/news/76/26be802deb/5/>

<sup>34</sup> <http://klima.foresee.hu/en/>

<sup>35</sup> [http://foresee.hu/uploads/tx\\_abdownloads/files/ZKtanulmany.pdf](http://foresee.hu/uploads/tx_abdownloads/files/ZKtanulmany.pdf)

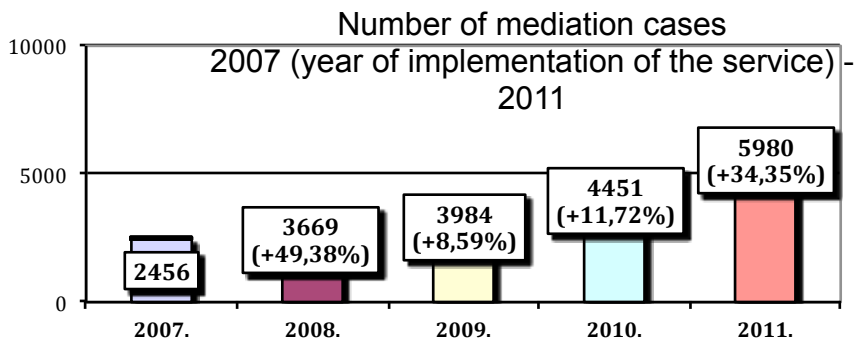
<sup>36</sup> <http://hu.iirp.edu/Kepzesek-es-szolgalatasok.html>



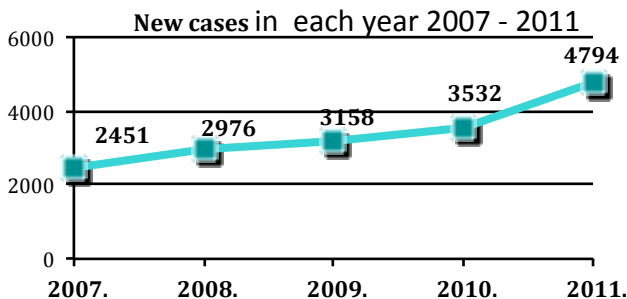
4) *Mediation in Criminal Matters* (Justice Service, 2011):

According to the annual report<sup>37</sup> of the Prosecution Service of the Republic of Hungary the number of offenders in whose case there has been a hearing was 70,085 in 2010 and 73,753 in 2011.

In 2011 probation officers along with the attorneys engaged in mediation assisted 5,980 mediation cases as shown below (meaning a 34% rise in the number of cases from 2010).



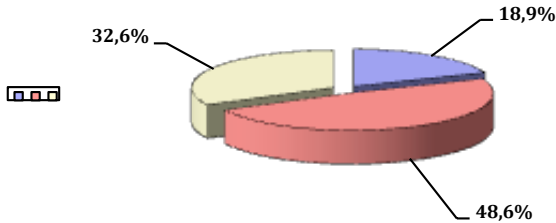
The number of **new cases** among the 5,980 being in progress were 4,794 in 2011, showing a clear increase year by year ever since 2007, the year this service has been implemented.



The *distribution of cases by the type of crime in 2011* has not changed since 2010. Almost half of the total mediated cases were offences against property, followed by traffic offences (one-third) and offences against the person (19%).

<sup>37</sup> <http://www.mklu.hu/repository/mkudok6381.pdf>

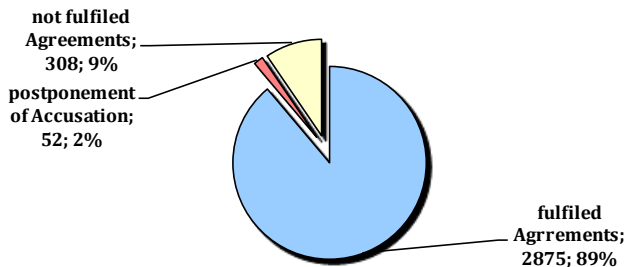
**Distribution of cases by type of crime in 2011**



The following table shows the number of closed cases in 2010 and 2011, the number of those cases which ended with an agreement respectively and finally the fulfilment rate of the reached agreements.

	<b>2010</b>	<b>2011</b>
Number of closed cases	3,275	3,950
from which reaching an agreement	2,634	3,235
proportion of closed cases reaching an agreement	80.4%	82%
number of fulfilled agreements	n.a.	2,875
fulfilment rate of agreements	92.9%	89%
fulfilment in process under postponement of accusation	1.6%	2%

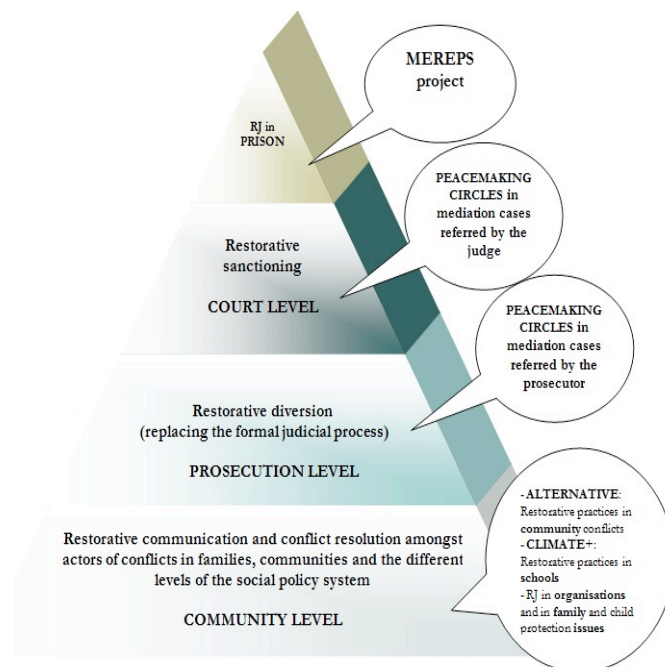
**Fulfilment of Agreements in Mediation Cases closed in 2011**



5) Restorative justice projects operated by Foresee Research Group

Foresee Research Group is involved both in the prevention and the resolution of conflicts, in civil as well as in criminal cases. Foresee is wor-

king on mostly EU-funded projects with a wide group of consultants and researchers in conflict management aiming at implementing culture and practice of ADR into the different layers of society in an innovative way.



**Figure 3:** Conflict resolution projects by Foresee on the different levels of the social and criminal justice system

- To name a few of the projects already completed or still in progress:<sup>38</sup>
- **RESTORATIVE JUSTICE IN COMMUNITY CONFLICTS**<sup>39</sup>- community development and conflict resolution with ADR methods (meaning a much wider approach in which mediation was also included)
  - **CLIMATE+**<sup>40</sup>- school intervention with restorative methods of ADR
  - **MEREPS**<sup>41</sup>- testing the implementation of ADR in prisons (funded by the European Commission’s Criminal Justice Programme 2008)

<sup>38</sup> To see the full lists of the projects, please go to: <http://foresee.hu/en/projects/>  
<sup>39</sup> <http://foresee.hu/en/segedoldalak/news/80/2570e255df/5/?http://privatepracticesecrets.com/template1/joevilla/ENVIO.txt#>  
<sup>40</sup> <http://foresee.hu/en/segedoldalak/news/508/0669abfbc6/5/?http://privatepracticesecrets.com/template1/joevilla/ENVIO.txt#>

- **PEACEMAKING CIRCLES**<sup>42</sup>- on-going implementation of this special ADR method along in partnership with the Hungarian Probation Service (funded by the European Commission's Criminal Justice Programme 2010)
- **ALTERNATIVE**<sup>43</sup> – testing the applicability of RJ in intercultural community conflicts (funded by the European Commission's 7<sup>th</sup> Framework Programme)

Members of the Foresee Research Group also hold lectures and give trainings on ADR at various universities in Hungary on both under- and post graduate levels as well as in professional trainings (e.g. for judges, police, local administration etc.) about the complex applicability of restorative justice and the different methods of alternative dispute resolution.

## V. Vision regarding the future of ADR

*„The development of restorative justice in Hungary has been primarily a top-down process initiated by the State. There have been some initiatives taken by civil organisations, but these stayed rather isolated attempts that had some, but not a broad or significant social impact. The weakness of the influence of NGOs mirrors the weakness of civil society in general. It also reflects the low level of social cohesion, which is a relevant issue from a restorative justice perspective” (Fellegi, Torzs & Velez, 2012) - these words are true for the present, so it seems the first step is to strengthen social cohesion in each and every way it is possible.*

On the other hand, in order to effectively spread ADR techniques in the society, some political will and support is inevitable, also. Parallel to the bottom-up activities, high level initiatives are necessary to promote the culture and principles of ADR in the society so that people know about it and feel trust towards requesting this service. Further attempts are needed to harmonise the different ADR regulations and services and facilitate the cooperation amongst them.

Experiments, pilots, innovations can be well done in different projects by small NGOs (from bottom up) and these experiences can largely contribute to create adequate legal, methodological and institutional framework for ADR. However, to bring it to the systemic level and make it mainstream, top-down support and will are inevitable. Otherwise, these practices remain marginal, ad hoc, temporarily sustained and inaccessible for every citizen.

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<sup>41</sup><http://foresee.hu/en/segedoldalok/news/75/dc892e1d7b/5/?http://privatepracticesecrets.com/template1/joevilla/ENVIO.txt=>

<sup>42</sup> <http://foresee.hu/en/segedoldalok/news/592/bf41d09c06/5/>

<sup>43</sup> <http://foresee.hu/en/segedoldalok/news/603/e455218b8c/5/>

Therefore, our aim is to spread ADR in every possible way in order to give the chance to as many citizens as possible to resolve their conflicts with a „win-win” approach.

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## ADR GENERAL LEGAL FRAMEWORK IN ITALY

Maria Francesca Corradi

### **Civil mediation**

In implementation of L. 69/2009 art.60 the latest regulatory intervention is D.lg.vo 28/10 and DM n.180/10 implemented by Ministerial Decree 145 of 06.07.2011 (G.U. 25.08.11 entered into force 26.08.11) and L. 148/2011 (GU N. 216 16.09.11 entered into force 17.09.11).

**Definitions.** For the purposes of this Decree, shall apply:

- a) mediation activity, however named, carried out by an impartial third party and designed to assist two or more parties in finding an amicable agreement for the settlement of a dispute, both in the formulation of a proposal for resolution of the dispute;
- b) mediator: the person or persons who, individually or jointly, take place without the mediation remains, in any case, the power to make judgments or decisions binding on the recipients of the service itself;
- c) conciliation: the settlement of a dispute following the course of the mediation;
- d) the body: the public or private entity, which may take place at the mediation proceedings under this Decree;
- e) register: the register of bodies set up by the Minister of Justice pursuant to Article 16 of this Decree, and, until the adoption of the decree, the register of bodies established by the Decree of the Minister of Justice July 23, 2004, n. 222.

These rules have introduced compulsory mediation for certain subjects: building, real rights, family agreements, succession, compensation for medical liability, libel, contracts, banking and insurance, liability for damage from road accidents.

The system of civil and commercial mediation has also absorbed the settlement for company disputes.

Remain in force and parallel, instead, proceedings governed in terms of agricultural contracts (article 46 Law 23/1982) and the procedures for the protection of consumers (137,140,140 ar. a D.lg.vo n. 206/05 Consumer Code).



The rule, if some case is designed to attempt to recover a relationship between counterparties belonging to the same social context (building, heritage, family agreements, etc.), others have the declared intent to decrease the load of pending cases in our courts (road accidents, medical liability, etc.).

**Procedure.** The citizen who intends to promote a cause in this field should make an attempt at mediation by the bodies accredited by the Ministry of Justice. If the other party does not appear a negative verbal shall be drawn up and you can start legal proceedings. If the judgment has begun until the first hearing, the parties may be sent to mediation by judge ediation is not intended for emergency procedures: validation evictions, arrears, holders measures, injunctions.

**Training.** To become a mediator is expected for at least 50 hours, the ministerial decrees on Jul-August 2011 above mentioned, have provided rules ensuring the competence of the mediator it is necessary in addition to the DM 180/11 (three-year degree course + 50 hours) also demonstrating that he had participated in at least 20 mediations per year, and then was introduced assisted training (free of charge) at the accredited bodies (forced to do so by article 8 dm 180/10 +145 / 11). It 's also recommend the indication of competence.

The L. 148/2011 amended the Legislative Decree 28/10 providing for a penalty when it is experienced mediation for non-participation without good reason, to pay the entrance to the state budget by an amount corresponding to the amount of CU (Unified Contribution) due on the judgment (Article 8 of the d.lg.vo n.28/10 c.5).

**Current status:** On 24/10/12, the Constitutional Court declared unconstitutional for misuse of delegated legislation, Legislative Decree no. 4 March 2010, 28 in so far as it provided for a compulsory mediation.

The unconstitutionality of the mandatory mediation for "excess of mandate" is a vice of unconstitutionality of the legislative decrees. In adopting the Decree. the government has exceeded the limits of the delegation, not following the principles and guidelines laid down by the law of delegation. The Constitutional Court, under Article. of the Constitution, declared the illegality of a rule adopted by the Government. It follows that, fortunately, the installation of the instrument of mediation conciliation was not at all affected by the pronouncement and that the concerns would be far higher if the Court had declared illegal the whole system of civil and commercial mediation pursuant to Articles 3, 24, 25 and 102, paragraph 1 of the Constitution. Waiting to know the reasons for the sentence you want to point out that, in reality, it is not a decision that affects mandatory but who goes to censor the behavior of the government in rela-

tion to the resolutions passed by Parliament with the Enabling Act (Article 60 Law 69/2009) in the implementation of the European Directive known.

**ARBITRATION** (Civil Code Procedure art.806/840)

(from Latin *arbitratus*, ie judgment) is an alternative method of dispute resolution (ie without recourse to a judicial procedure) for the solution of disputes in civil and commercial, performed by the award of a specific assignment to one or more third parties to the dispute, such Arbitrators, usually in number of 3, 2 of which are chosen by each of the parties and the third appointed by the parties whether in agreement or their officials, or in the absence of agreement, by a person above the parties (eg the President of the Court), which produce their own pronouncement, said the award , which contains the solution of the case is most appropriate.

The decision to entrust the resolution of the dispute to an arbitration panel can not be agreed and signed before the end of the trial period, if applicable, or if at least thirty days have elapsed from the date of conclusion of the contract of employment. This is done by inserting a special arbitration clause or later after the onset of disputes , with the signing of a special agreement, the arbitration agreement .

**Discipline and effectiveness.** The institution of arbitration is provided for in the Code of Civil Procedure (Book IV, Title VIII, Art. 806-840). It is forbidden to resort to arbitration for matters relating to family law and for those "who can not be the subject of the transaction", that is the only real limit to the unavailability of the right to arbitration is therefore the lack of negotiating capacity of the same .

The arbitration is a private judgment, the award negotiating an act of private autonomy as an alternative to ordinary civil proceedings. The award has no *jus imperii*, ie it is based on the consent of both parties, and it is inevitably given to arbitrators without judicial authority of the empire Neither the form (detection and declaration of the consequences), or the process highly "structured" nor enforceable by decree of the judge assigned to arbitration awards are sufficient to equate the award to a judgment: Arbitration panels are not courts State or courts in general .

The clause that undermines the resolution of any dispute the outcome of arbitration (arbitration clause) must be expressed in the contract (or agreed in a separate document, affected), and can never be assumed. The arbitrators must always be an odd number so that you have determined outcome of the arbitration (it is always possible, that is, a decision taken by a simple majority) and even if the contract provides for an even number, the President of the court appoint a Another add-in.

The award, if ritual is binding as between the parties and is likely to achieve effective enforcement, if lodged at the Registry of the Court of the place in which it was issued and allocated capacity enforceable by the court, like the judgment by 'ordinary judicial authorities. The award remains a private act, to which the law relates the same effects of the declarative sentence. The award also, not considering its enforceability, may be contested for invalidity or revocation for third party opposition.

**Process of Arbitration.** The arbitration process comes from the request for arbitration, the act by which the object is detected in the process, which basically coincides with the object of the award. The submission of the request for arbitration, is equivalent to the claim in the courts, so we can say that:

- 1) the commencement of the application of arbitration is adapted to interrupt the course of the prescription and consequently the suspension of the same, from the moment in which it is given up to the moment in which the decision of the arbitrator (arbitration) is not more challengeable;
- 2) having the legislature established the possibility of transcription of the request for arbitration, in relation to real estate and movable property recorded, also with regard to the protection of the parties

Against third parties has the same type of effect of the ordinary process: once you start the arbitration process can happen that a party proposing an exception for interpretation, the validity and effectiveness of the arbitration agreement.

Pleas to the jurisdiction: it refers to the event that during the arbitration process will be put at the court issues that do not fall within, thus going beyond the expectation of the arbitration agreement and compromise, (something's jurisdiction as of ' existence of the power to judge the merits of the dispute) if its challenge to jurisdiction is not invoked during the proceedings, once issued an award, this is no longer challenged for breach of incompetence of the referee, it creates a tacit compromise.

The plea of incompetence absence, disability and invalidity of the arbitration agreement is enforceable in the first defense after the appointment of the arbitrators. In legal language, the referee is the one who performs the function of resolving the dispute.

## **Classifications**

Arbitration can be classified according to various criteria. A first major classification is found paying attention to the modalities of the procedure. Indeed, if the arbitrators in their judge to follow the rules of the Code of Civil Procedure it comes to binding arbitration and the final rul-

ing, that ruling, although similar in shape to a judgment, it can take force only through a judicial procedure: through the deposit of the award with the clerk of the court responsible for the area and the subsequent ruling, by the court, a decree that declares executive.

If however, the arbitrators establish themselves how to conduct the arbitration procedure will be amicable and the final ruling will be effective negotiations.

In addition, the arbitration shall be divided into arbitration in accordance with law or arbitration in equity, depending on whether the referees judge during the proceedings in accordance with the substantive requirements of a legal or equitable criteria.

A further distinction can be made between domestic arbitration and international arbitration. International arbitration, more precisely, the international commercial arbitration, in order not to confuse it with the arbitration between states, disputes concerning those who have a particular character of transnationality, for example between parts one Italian and the other foreign, or when the 'subject of the dispute submitted to arbitration is inherent to international trade law.

For the law arbitration is international when one of the parties, if an individual has a residence in a foreign country or, being a corporation, is based in a foreign country [Art 830, third paragraph cpc].

The importance of this distinction is inherent in the different approach taken by the national legislature to the interests of international trade that need less stringent constraints and formalisms in the field of arbitration.

There is also the case of *Lodo non-existent, ineffective* (same regime that applies to sentences, sentences are void, ranging appeal in the terms that must be alleged defect under penalty of *irrilevabilità* and judgments do not exist, the defect which may be claimed by anyone and everywhere) The first case of non-existence of the award, which can then be invoked by anyone at any time, is the pronouncement of a right unavailable, then there is the case of the absence of an arbitration agreement, the non-existence of an object with the award and a right is not identified (the latter two cases are also detectable in the regime of validity of the judgment).

### *The Arbitration Chambers*

In Italy, the establishment of Rooms arbitration is entrusted by law to the chambers of commerce and associations are not regulated such as the AIA (Italian Referees Association) or the ANPAR (National Association for Arbitration and Conciliation). Arbitration is one of the alternative sys-

tems to deflate the ordinary processes pending before the ordinary courts is therefore included in full in the ADR (Alternative Dispute Resolution).

### *Arbitration for disputes labor law*

Initially, the reconciliation took place behind voluntary request of both parties, only for layoffs, and the rejection of the proposal could have an effect on the decision.

With the legitimacy of the arbitration clause and the obligation to devote the dispute to arbitration, and the composition of the arbitration panels in the Provincial Directorates of Labour managed by the relevant Ministry, it overcomes the limitation of constitutional reserve the task of applying the law with an independent judiciary executive, and replaced it with a new structure controlled by the government.

The arbitration shall be governed by Articles. 806-840 of the Code of Civil Procedure provide that: equal to the number of arbitrators, one requirement of citizenship and non-ban, majority voting, and requiring transcription and deposited with the registry of the court, like a judgment, award open to challenge nullity, unless the parties in the arbitration office has requested an opinion on an equitable basis (Article 822) or abandoned on appeal (judgment in equity are zero or if the waiver contained in the arbitration clause, Art. 808), for disputes Article. , the clause is void if prejudice to the right of the parties to the judicial authority (Article 808, paragraph 2) enforceability may be appealed (art. 825), or suspended pending judgment by the Court of Appeal (Article 830).

With the changes introduced by Law no. (cd: "Connected Work"), in addition, the employee has the opportunity to decide, before the end of the trial period, if applicable, or 30 days from the date of conclusion of the contract, if resort to 'arbitration in advance and not just the onset of a dispute. In case of dispute during the employment relationship, therefore, the lender has the right to choose whether to entrust the decision of the dispute to arbitration, ie third parties who are not members of the judiciary, or by a court vested with the jurisdiction . These changes do not affect the dismissal, whose appeal remains, however, the ordinary jurisdiction of the court and must be filed within 60 days of receipt of notice of termination by the company (or by the statement of reasons if not contextual) (art . 6 L. 604/1966).

The "Work Offline" also extends to labor disputes in the public sector Articles. 410, 411, 412, 412 ter and quater of the Code, with the simultaneous repeal of Articles 65 and 66 of Legislative Decree no. N. 165/2001.

Family Mediation is not regulated in Italy, yet. Mediators may be accredited or not by private Bodies/Societies such as the SIMEF-AIMEF

and others. A regulation of the matter would be highly recommendable, although any effort to date has proved ineffective.

### **The Future of ADR: Justice in a new culture**

The difficulties encountered to ensure, as appropriate, to citizens and businesses, the protection of their rights are well known. Everyone must have the opportunity to access procedures effective, inexpensive, fast and simple, where those rights have been violated. One problem is felt everywhere in our country, from politics to civil society: the excessive length of proceedings. It's a widespread sense of uncertainty and dissatisfaction in the apparatus and justice, and there have been legislative action on the immediacy, concentration and orality, but the procedural rules remained complex and articulated. There is also a problem of supply and demand on justice. With regard to the demand side the citizen feels the need to assert their individual reasons, so we are in the presence of increasingly fragmented rights that need special protection. Regarding the supply side, efforts should continually be done on the apparatus and judicial resort to other means more appropriate.

Exist, therefore, a distortion between supply and demand of justice, we must take different forms, outside the judicial field, which resolve conflicts, so that the parties can reach shared solutions, and therefore profitable. We must act in such a way that the offer is different, since the conflicts take on increasingly large and diverse forms, to resolve disputes, it is necessary to use alternative modes and extra judicial methods to give, so, breath to justice apparatus and reconcile justice and peace

It is therefore necessary to give the correct alternative to ordinary Justice, ADR useful tools to be considered as a voluntary justice that favors the continuity of relationships. The dispute is seen as an opportunity for change and growth, trying to overcome their own point of view to reach a shared solution, after giving the correct evaluation of other ideas.

Conflict and confrontation are positive events, new elements that encourage discussion and the growth of relations, the argument is treated in a different way and then you go in search of new ways: the tools of justice alternative to the ordinary justice system. State jurisdiction is considered as the natural forum for resolving disputes, but its prevalence in this cannot be considered obvious and inevitable, resulting from cultural attitude, training and legislation. Is used to solve consensus for an appropriate response to conflict. The method of A.D.R. dispute resolution is not intended to be secondary or alternate, but parallel to the judicial system. None of the parties in relation to its non-compliance, should feel more protected by a "Slow" Civil Justice .

This is why you have to promote the dissemination of these instruments. People, for the protection of their rights, should have the possibility of a free choice, depending on the characteristics of the dispute to be resolved, including various methods of efficient and guaranteed resolution: resolution by direct negotiation between the parties to the mediation, arbitration and, therefore, the ordinary judgment, only as a last resort.

So we can say that we have two ways to follow: on the one hand, greater efficiency and effectiveness of judicial proceedings, and on the other the development of procedures that are not part of the judicial acts.

As a first step we have had a successful start in 2009 with the reform of the civil trial, with regard to the second way, however, the aim is to subtract the judiciary processes that have little economic value.

To improve judicial procedures are necessary rites simplified for disputes of less value, reducing the procedural formalism to a minimum, so as to effectively protect the rights of the parties. There is also an excessive fragmentation of the rites in addition to the ordinary civil process, we must not, therefore, to exaggerate this verse, because they are the cause of many failures and delays. In this regard, a law has recently provided both for the introduction of the interim proceedings of cognition and is going to simplify the rites which, today, are about thirty. However, together with the reform of the civil trial in order to obtain the effects of a certain size, it is necessary to revise the whole system; no court procedures should be developed.

With the Legislative Decree no. N. 28/2010, on "mediation aimed at settling disputes in civil and commercial" has been simplified user access to conflict resolution, with the intention to address a number of disputes to an instrument "out of court." An efficient mechanism of conciliation is indeed an important resource for civil justice, given that a choice should be a privilege for a person seeking an efficient, streamlined and inexpensive may be mandatory and not merely optional. The story of reconciliation is lost in the mists of time. Among the ancient Romans sought to resolve a dispute by an amicable settlement of the dispute before going in front of the magistrate, who, in the event that the parties had reached an agreement, confirmed their will with the judgment. The Church has played a very important role in the dissemination of the culture of conciliation as a dispute resolution: from the priest who was invited to mediate disputes among his parishioners, to the actual papal settlements through which the Popes are carrying on work to mediate disputes between different States. Reconciliation of modern times is an institution that identifies the free and voluntary effort, by two or more parties to reach a negotiated settlement with the help of a neutral third party, impartial and independ-

ent: the "mediator", who has not the meaning of "mediator" but "conciliator". In fact in our Legal Legal exists the "mediatore" provided for in Article 1754 et seq. of cod. civil.

In Europe. "The Community has set itself the objective of maintaining and developing an area of freedom, security and justice in which ensure the free movement of persons. To this aim, the Community is to adopt, among other things, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market. "The instruments of ADR should therefore ensure an area of freedom, in the sense of a regulated procedure but released by procedural mechanisms, where obtain substantial justice evenly, as far as possible for all European citizens.

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PART THREE

MEDIATION IN THE FAMILY SETTING

## FAMILY MEDIATION IN CZECH REPUBLIC

Lenka Holá and Lenka Westphalová

### Introduction

We should take the introduction of this chapter to be a brief historic excursion into the occurrence and development of family mediation in Europe and the rest of the world. This has been the foundation for the nature of family mediation in the Czech Republic and its current status.

Mediation has implanted itself as a method in the field of family conflicts. The International Society of Family Law was founded in April 1973 by Professor Zeev Falk at Birmingham University in Great Britain. Three years later, the ISFL held a conference with worldwide significance. The conference in 1982 in Cambridge was devoted to the topic of „solving family conflicts“. Family law is a topic of discussion with relevance on a European level. Strasbourg hosted the fourth European conference about ‘family mediation’ in 1997. The European Council issued recommendations concerning mediation in divorce situations in 1998. This is not the first enterprise of this international association in relation to civil rights law. This is despite the fact that institutionalised usage of family mediation and other procedures for solving such issues is a relatively new method in member states of the European Council. If we are dealing with the notion of ‘mediation’, then this term appeared in the terminology of the European Council not long ago. This is also true of European law about the rights of children, whereby mediation is mentioned along with other methods related to deciding conflicts, which involve children. It is indeed this regulation, which leads to the recommendation about family mediation.

According to research about family mediation, which has been performed by the European Council in individual member states, family mediation and methods leading to its development are concurrent. Mediation develops either within the framework of civil procedures or out of court.

The aim of this chapter is to provide a critical analysis of family mediation in the Czech Republic including its legislative conditions, specific characteristics, participants, particularly the participation of children, the

practice of the provision of mediation and professional competence along with the qualifications of mediators in family conflicts. The theoretical and research-based focus on these questions in the Czech Republic is still in an early stage.

### **Characteristics of the current Czech family**

The institution of family is influenced by and formed by society and has undergone numerous changes throughout history. These gradual changes, which mostly have deep roots, became more evident in the second half of the 20<sup>th</sup> century. The traditional family and the family of a modern society are two totally different notions. The secularisation of society played a large role in the change of family.

Christian society held a long-term monopoly on so-called rightful sex, which is gradually disappearing and pre-nuptial sex is becoming generally rightful. As a result of a rising number of children born out of wedlock (since the beginning of the 70's), the family is also losing its monopoly on procreation. According to Christianity, marriage used to be understood as an uncancellable binding until death „*The permanence of family was guaranteed by a transcendent imperative: what God built should not be dismissed by man.*“ (Možný, 2002, p. 20). This notion is slowly being replaced by an understanding of marriage as a legal contract, from which either party can withdraw.

Important roles in changes in the notion of family have been played by divisions and types of work along with the development of various institutions, which are gradually beginning to take on a range of traditional functions, which used to belong exclusively to the family (eg. nursery schools, protection living for pensioners, foster families, and mass media). Family used to be, in its typical form, generations of patriarchal rule. The dominant position of the father was the most important. Economical activity played an important role, especially in the area of production, which was shared amongst all members of the family. As an example, we can devote our attention to a typical country family, which acts as an economical unit. Everything it produces yet does not consume it then changes into other consumables. The living place gradually stops being a workplace. The man goes elsewhere to work and the woman generally takes care of the household. (Možný, 2002). As soon as work stops being physically demanding, thus more suitable for men rather than women, then women start to engage themselves in professional careers and leave the household (approximately at the end of the 50's in the 20<sup>th</sup> century). We notice a further change in family development connected to choice of partner. Our current society involves a free choice of partner, whereas the

choice of partner used to be heavily influenced by the needs of the family. Ownership of property and role in society used to be of the same importance.

The characteristics of the current Czech family have been studied by, for example, Pavlát (2008). His findings were, in many ways, concurrent with those of Giddens (1992, 2003) and Možný (2002). The authors concur that marriage is, nowadays, founded overwhelmingly on the emotional communication between couples, with this communication leading to satisfaction in the long term. Indeed, the fact that marriage (family or partnership) is only based on emotions and agreements between partners, makes it less stable, voidable and vulnerable (further examples: Beck 2004, Beck-Gernsheim 1995, Singly 1999). It is not built as a socially and economic unit- nobody knows who should do what and who makes decisions. There are no clear rules or obligations, no strategies in decision-making. There is frequent competition between partners over power and position. Women have become equal to men and this equality has complicated decision-making. The traditional roles of men and women are not possible to maintain and there is no foreseeable solution. Women are, therefore, confused, and men lack security. There are also new forms of families occurring in society (eg. homosexual partners adopting children, women 'ordering' children without a father on purpose), whereas the level of prestige of single mothers or divorced women has risen. 28.5 % of children are now born out of wedlock, women are bearing their first child at a later age and large age differences between partners are common. The rights and priorities of children are being pushed to the side in favour of freedom and happiness. This leads to divorce no longer being a taboo as 2011 saw divorce rates up to 46.2 %. This is, in fact, a drop compared to the record of 50 % set by the previous year. The divorce rate 20 years ago was at 34.8 % (Czech Statistics Office, 2013).

### **Family conflicts, family breakup**

Relationships within the family are very personal and satisfaction derived from them influences subjective satisfaction in life. Relationships between close persons, be they husband and wife, parents and children, siblings, even grandparents, are significant in that the protagonists invest not only money, yet particularly non-tangible input such as time, energy, fantasy, manual labour with the aim of developing the relationships with an eye on ultimate satisfaction. In terms of relationships amongst closely-related individuals, we should not look for rights, truth and fairness, yet we should look for solutions, which bring about possible communication, satisfaction and level long-term relationships. If the family fails to

achieve long-term satisfactory relationships, then long-term conflicts may lead to the breakup of the family.

The breakup of the family may come about due a number of factors. Examples include the death of one or both parents, divorce or separation of the parents. A more focused interest, in recent years, in problematic families reflects the presence of a whole range of negative notions, with which the family is connected: lack of stability, growth in so-called 'problem families', growing number of divorces, etc.

If a family breaks up, then its disruption is complete. This does not mean, however, that the broken relationships have ended. The psychological overview of this is far more complicated than the legal overview. This is just like the definition of the roles of actors of this social event. On the contrary, decisions about the future of infants are not influenced in law by whether or not they were born in wedlock.

Legal terminology had nothing to do with social reality in cases of divorce before 1. 1. 2014. The party submitting the proposition for divorce was the accuser, with the other party being the accused. Current terminology labels the participants of divorce proceedings merely as spouses, whereby there is even the possibility of both parties handing the proposition in together. This makes it possible for the court to not have the obligation of examining the reasons for the breakup of the marriage if the decision to divorce was taken freely. In counselling and mediation we can make the terminology simpler, in line with Novák and Průchová (2007), by labelling the parties proposers, or initiators of divorce proceedings. The proposing party may consist of both spouses, one of them, or even a close person to one of them, often a lover. Divorce from marriage is ruled by § 755 and subsequent laws 89/2012 Coll., civil code (hereinafter only CC).

Family breakup is usually characterised by the necessity to forget about investments into the relationship and to come to terms with losses. „*This loss is always on both sides, yet isn't necessarily symmetric. One side may lose significantly more than the other. This fact is often linked to manipulation and fantasies about gaining revenge on the other party.*“ (Klimeš, 2010, p. 11).

Conflicts in family law are often solved by court proceedings. These cases are most common whereby infants are involved and steps must be approved by a court. This is the principle behind state intervention in family relationships, especially between parents and children with the aim of protecting the child and its rights in accordance with its best interests (Králičková, 2009, p. 72). Family breakup is such a personal loss that it may have a long-term effect on other relationships.

### *Divorce in current Czech society*

The law deals with divorces in law number 89/2012 Coll., of the civil code. In comparison with the previous amendment in law number 94/1963 Coll., about the family, it did not reveal any great changes. The one principle behind irreversible divorce is the separation of both partners in terms of cohabitation. We differentiate between the reasons behind divorce in terms of whether or not the court investigates the reasons behind the marriage breakup. If the court does not do this, then the divorce is considered to be non-contestable, whereby the court divorces the couple as long as both parties agree and whereby the partners have not been living together for longer than 6 months yet have been married for at least one year. Furthermore, the spouses must agree upon steps to be taken with infants after the divorce and the court must approve of their proposals. The final condition is for the spouses to make a proposal concerning property, cohabitation and sometimes alimentary obligations of one of the partners.

The Czech Republic belongs to the upper echelons of the European divorce league. According to the Czech office of statistics (2012), 2008 oversaw a total of 31 300 divorces, 65 % were initiated by women. 72.1 % of cases involved the first divorce of both participants. The same year oversaw a total percentage of 49.6 %, which was only superseded by 49.3 % in 2004. Divorce rates in 2011 reached 46.2 %. This means that approximately half of all marriages end in divorce. This indicator of divorce rates in the Czech Republic has been on the rise since the end of the 90's and has reached such high figures. The average duration of marriage before divorce proceedings was 12.3 let, just as in 2007.

Statistics reflect, to a certain extent, social reality. However, it is necessary that these values are not absolute. Numbers of closed and divorced marriages increase every year yet the number of weddings per annum is on the decrease. Thus, the number of absolute divorces is on the increase. Furthermore, statistics do not illustrate the fact that one individual may repeatedly marry and get divorced.

In terms of children, the early 80's saw over 30.000 infants living with both parents. This was, in 1990, almost 1.5 % of the population of dependent children living in complete families (Št'astná, 2005). The nineties oversaw a slight decrease in divorce cases with infants and the number of divorces without children involved went up. The period between 1990-2000 saw over 340 thousand children lose contact with one of their parents (usually the father), which means almost a quarter of 1.4 million children born to married mothers in the 80's (between 1980-1990) (Št'astná, 2005).

The main reasons, which have been given for the growing number of divorces in the Czech Republic, are linked to freer legislation, general tolerance towards divorce and, above all, the growing individualisation of Czech society. Social norms connected with divorces come in various forms from historical and cultural standpoints. „*Various societies, even layers of the social hierarchy, differentiate to a large extent from each other in the demarcation of everything which the partner must deal with before finding formal solutions to marital problems.*“ (Možný 2006, p. 204).

Czech society is a society where divorces are tolerated. ISSP 1994 and ISSP 2001 research showed that tolerance towards divorce has been on the increase since the mid-nineties. The current trend is such that divorce is losing its negative connotations and many people see it as the correct solution to serious problems in the marriage. There is a similar situation in the cases of attitudes of informants towards the divorces of families with children involved. Just one third of informants believe that the spouses should remain together even though they do not get on with each other. Children are, in current times, no reason for participants in a marriage to remain together and avoid divorce.

There are negative results of divorces including a rapid decrease in standard of living (this mostly applies to single mothers) and loss of contact with children (mostly applies to men). In the Czech Republic around 50 % of incomplete families live under the level of the 50% above the accepted minimum. The majority of such families involve women, who are often discriminated against on the labour market. Despite this, two thirds of divorce cases in the Czech Republic are instigated by women (Czech Statistics Office, 2011). Dudová (2007, p. 29) concludes that men tend to concentrate on their jobs after divorce and often lose contact with their children.

### **Possibilities of solving family conflicts in the Czech Republic**

The quality of the partners' relationship is one of the key predicates of problems in the personal, emotional and social development of a child. This fact was pointed out as early as the 1930's in published works by, for example, the following authors: Towle, 1931; Adams, Hubbard, 1936. An overview study by J. Pavláta (2005, N° 5) is the most prominent Czech example. This work contains results of American research carried out in situations of divorce and arrangements after divorce. The author states that the peaceful nature and type of conflict between the parents are vital in terms of the child's subsequent psychic and social malfunctioning. The Czech environment has, so far, paid insufficient attention to the experien-



tial investigation of this matter. Thus, the methodical studies of Lacinová, Michalčáková and Ježek (2009, N° 1), which bring first hand experience with methods of following the perception of conflict between parents and children in the Czech Republic have proved to be significant contributions.

Traditional marriage guidance counselling usually ceased whereby a divorce seemed inevitable. This led to psychologists being replaced by lawyers. New disciplines in the forms of pre-divorce, divorce and post-divorce counselling appeared in the USA in the 1970's and in the Czech Republic in the 80's. The propagators of these disciplines in the Czech Republic were, eg. Ivo Sedláček, Zdeněk Dytrych, Zdeněk Matějček, Ivo Plaňava, Eduard Bakalář. Kressel and Deutsch (1977) and considered the achievement of an emotional divorce, sexual disengagement and, the most difficult of all, keeping the function of parental roles to be the marker of success. According to Novák and Průchová (2007, s. 19), the counsellor doesn't have to merely advise, i.e. act as an intermediary for information, yet may also fill the role of mediator. According to our opinion, this is difficult in nature as the integration of more than one professional role in one person carries numerous large risks. This is why this deserves more attention, which we unfortunately don't have the capacity for in this work.

Elements of divorce counselling are now visible in the Czech Republic in a range of institutes and specialist organisations (eg. Civil guidance, mediation centres, associations for the social protection of children by law, non-state non-profit organisations, which are focused on problems between children and family, psychology clinics, lawyers). The potential of clinics focused on family, partnerships and peoples' relationships is limited by the fact that the vast majority of divorcing families doesn't seek their help. If we leave aside the one-off activity of psychologists as authorised experts, with the task of providing qualified decisions in disputes about child custody, then we are left with social workers who provide the most input in families, which are breaking up. Experience with enlarging the content and style of work with these families shows that social work may be a purposeful context for therapeutic guidance and also mediation aid for families.

### **Specific family mediation**

A basic principle in family mediation is finding out whether or not the divorcing parents have any capability of being competent parents or not. This is how we differentiate between conflicts between partners and conflicts between parents (Holá, 2011, pp. 180-181). Mediation in family conflicts is one of the widest fields for using mediation. It is currently

subject to disunity in terms of terminology. We encounter notions of ‘family mediation’, ‘mediation in partner relationships’, ‘divorce mediation along with other notions. In foreign literature, the notion of family mediation is generally used in divorce proceedings (eg. Parkinson, 1997). Czechs tend to differentiate between family and divorce mediation. *Family mediation* deals with solving conflicts, which occur due to members of families living together (parents, children, grandparents, etc.). *Divorce mediation* is a method of solving conflicts within the framework of the divorce procedures between two spouses. As divorces are dealt with by a court, family mediation is connected to them along with mediation in justice. A specific feature of divorce mediation is the double overview on divorce:

1. The socio-psychological view, whereby the divorce comes about through long-term conflicts between the two partners.
2. The legal perspective whereby the divorce is seen as a legal institute. For it to occur, it must comply with the law. The law plays a significant role in divorce proceedings and family mediation must respect this.

Divorce mediation is understood in the Czech Republic to be a field of family mediation. Here, we mostly operate with the notion of ‘family mediation’. This is due to the fact that it is irrelevant whether or not the parents were ever married in terms of the upbringing of infants for the future. The notion of ‘family mediation’ is also better at cover a number of fields of mediation, which are connected to the split up of the relationship between the parents and its further functioning (eg. possibilities of contact between grandparents and grandchildren, relationships with more distant relatives, relationships with the parents’ new partners). The notion of ‘family mediation’ even supports the best possibilities for relationships of parents for the future and for the parents to continue to function as parents. Casals (2005) suggests that, when we speak about divorce mediation, we are focused upon adult spouses only, whereas family mediation involves a wider circle of members of the whole family.

The purpose of family mediation is to stabilise the affairs of members of the family, mostly parents and children. A further aim is to offer a communication space for solving family conflicts, thus avoiding dysfunctional families. The aim is also to improve family relations, attempt to remove problems and shed light upon misunderstandings. It is imperative to teach family members to speak about their problems and to find mutual solutions.

Positive experience from other countries shows us that the application of family (divorce) mediation leads to a reduction of conflicts, the contin-

uation of relations between parents and children, a reduction in the time necessary for solving conflicts and a reduction in societal and economic costs of divorce (Kubicová, Jusanová, Patera, 2012).

### *Family conflicts, which are suitable for mediation*

Mediation in family conflicts is a short-term form of intensive help, which is not only influenced by the actual breakup of the family (eg. Holá, 2003; Bakalář, 2006). It is generally accepted that all types of family conflicts are open to judgement during the mediation process. It is then the task of the mediator, upon agreement with the clients to decide which topics are to be given attention. Mediation, after family breakup, generally deals with questions concerning the child in terms of upbringing, contact with the child and matters of financial and other property. In order for unwanted circumstances to be avoided, whereby the spouses have been unable to agree with each other, even after a number of years, attempts have been made for the spouses to come to an agreement between themselves concerning mutual property without the need to delay the process any further (Fiala, 1999, pp. 79-81).

Mediation may also involve a number of further questions, eg. amendments to a child's upbringing, assurance of the child's state of health, contacts with more distant relatives etc. (Hrušáková, 1999). Mediation in the area of family and partnerships involves conflicts related to divorce and settlements after divorce along with other questions concerning family and partner relationships (eg. expected behaviour, communication child upbringing, family finances, spending of free time, conflicts amongst adult siblings) and family conflicts, i.e. conflicts before, during and after all changes in the family (eg. pre-nuptial agreements, conflicts between parents and pubescent children, multi-generation family conflicts, family businesses, inheritance).

Mediation during parental separation generally deals with questions about child custody, its upbringing, care for and contact with the child, financial and other property and the method of cooperation between the parents. Parents, with the help of the mediator, clarify their view of the needs of the child and also acquire an overview of the legal details of family relationships. After this, the parents may decide upon changes to respect in their cohabitation or they may form the foundation of an agreement to be approved by a court during divorce proceedings. If positive experience is gained then there is the possibility of future cooperation with mediators in dealing with new situations.

Family mediation is suitable for solving sensitive emotional problems in a much more effective manner than legal procedures. This is particular-

ly true of divorce cases, whereby a consensual approach can be taken, thus reducing conflict in the interests of all members of the family. Mediation systems should be directed towards acting in the best interests of children, particularly when ensuring their care and planning the contact parents have with them. This voluntary and peaceful method should limit harmful results of family breakup and should have the opposite effect of supporting further relationships amongst family members. (Radvanová, 2001, pp. 10-11).

If the relationships between the family members involve a degree of violence, then mediation is not necessarily incongruous yet it has a number of further requirements. Mediation, in cases of violence between partners, requires intensive intervention. The mediator needs to address complex, unbalanced and tense relationships between partners and partners with children. In order to avoid the risk of harming the clients, the mediator must have very good knowledge of the problematic area of domestic violence, developed skills in managing such cases and an approach to managing resources. In cases of violence, the mediator may suggest meetings in the presence or absence of the child. This decision may lead to very serious results. It is imperative to know the individual needs of the child in order to provide the appropriate form of help.

These are cases whereby the relationship between the partners is unbalanced and one of the partners is afraid of the other. This is typical of conflicts connected with violence. Research has proven that mediation does not necessarily need to be eradicated as an inappropriate approach. We should differentiate between violence as a long-term characteristic of a close relationship and one-off cases of violence, which have led to long-term conflicts in the relationship. The former case, in our opinion, should be first of all subject to psychotherapy (counselling), whereas the latter case could be dealt with by a combination of a psychologist and mediation. (Holá, 2006, p. 11).

### **Children as participants in family mediation**

The direct participants of family mediation are the clients and the mediator(s). Clients are understood to be family members, partners, spouses or former spouses and all parties, who are affected by the family conflicts, above all children. This part of the chapter is devoted to the participation of children during family mediation. Indeed, this is how family mediation is different from other fields of mediation.

### *Interests of the child*

The interests of the child is one of the basic principles of family mediation, just as in family law (eg. Hrušáková, Králíčková, 2006). According to § 26, paragraph 4 of the law concerning family, the court focuses primarily on the interests of the child when making decisions about custody and focuses on its personality, especially ability, development possibilities, talents and the living standards of the parents. Care is taken for the rights of the child to be cared for by both parents and for the child to be kept in regular personal contact with both parents with an eye on the right of the second parent, who does not have custody, to be regularly informed about the child. The court takes the following elements into account: the emotional background of the child, the abilities and level of responsibility of the parents, the stability of the future environment for upbringing, the ability of the parents to agree with each other, the emotional relationship of the child towards siblings, grandparents and other relatives and the financial background of the parents including living standards. According to § 26, paragraph 5, the court always considers who has been responsible in the past for the upbringing of the child in terms of emotions and morals.

We are faced with the question of which method is suitable for ensuring the interests of the particular child in a particular situation? The well-known family expert John Eekenlaar (1994) suggests that objectification should be used to determine the interests of the child. The evaluating specialist uses the prerequisite that one or more solutions are applicable for an objective solution to the entire problem. Eekenlaar suggests it is impossible to propose the possibility of a totally reliable objective solution. This is due to the fact that it is impossible to find a general agreement about which solutions are correct. As an example, we can examine the question of a child's upbringing, which may not be suitable in cases of homosexuality or domestic violence. Eekenlaar suggests that the decision-making process should be complimented with a further element, namely „dynamic self-determination“. The child should be brought up in an environment, which is considered safe and is, simultaneously, exposed to a wide spectrum of outer influences. The child, throughout its upbringing, should be encouraged to decide for itself how much outer influences become relevant. In order for dynamic self-determination to be included in its upbringing, it is necessary to be aware of the wishes of the child. However, it is not correct to put the following question forward: „*Do you want to be with mummy or daddy?*“.

Specialists agree that the problematic area of the child's age, especially its needs for a successful and harmonic development (in layman's

terms), should be defined by the following notions in the following order of importance:

1. "the court, above all, considers" the interests of the child, i.e. the right of the child to both parents,
2. "the court always considers", who has been so far responsible for the upbringing
3. "the court, likewise, considers" the abilities of the parents to make agreements with each other about the upbringing of the child.

The ability of the parents to resolve important questions concerning upbringing and care for the child is an element, which the court merely 'considers' during the decision-making process.

It is difficult to make a precise definition of the interests of the child. The interpretation is often based on a subjective judgement of individual actors. Judges in courts, in practice, agree that keeping the family together, where possible, is the ultimate solution in the interests of the child. If this is not possible, then the child should be in contact with both parents even after divorce as long as the parents are pathological and are not likely to disharmonize the child in later life.

It is generally suitable for the child to be in contact with the second parent. The reason is not only a legal one concerning parental rights, yet also involves a range of psychological issues. The measure and form of such contact should be determined on an individual basis.

#### *Integration of children from a legal perspective*

According to § 12, arrangements about the rights of children, the child with the ability to formulate its own opinions, to freely express itself in all situations in which it is involved must be complimented with careful attention and its opinions must be respected in relation to its age and level. For this purpose, the child should be provided with the possibility of being heard in procedures, which involve its future. The afore-mentioned paragraph complies with the following amendment in the new civil code in regulation § 867 „ *Before a decision is made concerning the interests of the child, the court supplies the child with the necessary information in order for the child to formulate its own opinion and to let this opinion be known. If the court discovers that the child is incapable of forming its own opinion or is incapable of letting it be known, then the court listens to the party capable of defending the interests of the child. The court must deal, under this circumstance, with an individual, who does not act in contradiction with the interests of the child. Children above 12 years of age are considered to be capable of relaying their opinions. The court devotes careful attention to the opinions of the child.* “

We find a similar amendment to the arrangement about the rights of children in article 6: „In procedures involving children, the court must, before making a decision... In suitable cases listen to the child, if necessary in private, either via other persons or organisations in the best interests of the child, allow the child to express its own opinions and take the child’s opinions into consideration.“ The child has, according to arrangements about the rights of children, the right to information. The results of the proceedings must be explained to the child. The child is provided with information, which is deemed appropriate in relation to the level of understanding of the child and its age. The information must not harm the rights of the child. The information should not infringe with the rights of the child. The relevance of the child’s opinion depends upon the age and maturity of the child. There is no specific age barrier to determine the relevance of the child’s opinion.

The process right of a child to express an opinion can be found in § 100 paragraph 4 of the CPC, according to which the court proceeds to establish the child's opinion. Unlike previous adaptations, this amendment to the Civil Procedure Code establishes the priority in identifying opinion by the court itself. Only in exceptional cases, with regard to the negative impact that a hearing might have on the child, the representative, expert opinion or authority ASLPC may determine the opinion of the child. The child may be heard without the presence of others, who may affect the child's testimony. Rules about exclusion particularly apply to parents, or their legal representatives. The content of the child’s opinion is subsequently introduced into the file. The interrogation of a minor counts as a new law in special judicial proceedings (House Document No. 931/0) in § 19 paragraph 4, according to which the court proceeds so that the minor was given the necessary information about the proceedings and was informed about the possible consequences of compliance with his opinion, and the consequences of the judgment.

We should consider the sensitive nature of manipulating with such information. Discovering the opinion of the child through a court (for ensuring its rights) has its (psychological and social) risks. According to Bakalář and Novák (2003), the child is incapable of realising the consequences of some of its requirements as it hasn’t yet reached moral, understanding and emotional maturity. The child’s psychic state is easily influenced. The level of risk depends on the age and character of the child. Discovering the child’s opinion doesn’t necessarily lead to the obligation of it being fulfilled.

### *Involving children from a socio-psychological point of view*

If a child is implicated in the decision-making process and its upbringing environment is taken into consideration, then it is imperative to consider the social and psychological aspects. It is necessary to hereby look for the correct limits, time and manners.

First of all, the parents must inform the child about their divorce. This is a painful moment for all parties. It is necessary to inform the child in a sensitive manner as children are connected to their parents by complicated mechanisms during difficult situations. If their specific needs and priorities are not identified when deciding upon future family arrangements, then children may continue to live in fear (Mullender et al., 2002). This is why it is important to identify the individual needs of the child together with potential risks at the earliest possible stage before moderating the situation.

Children should avoid getting into the situation of „*vulnerable victims of their own situation*“, yet should be individuals, who bring an important perspective to the decision making process. Hester (2006) claims that asking children about the conflicts, which they encounter at home, may help the child to overcome fear and have other positive effects. Research also shows that children are reliable witnesses when it comes to describing events and are generally eligible to express opinions about decisions, which will affect them (eg. Kaltenborn, 2001; Smith a Taylor, 2003). Their parents tend to have the same opinion (Cashmore and Parkinson, 2008). Adults are responsible for the main decisions. However, if they listen carefully to their children and understand how events affect them within the family, then they may make future arrangements with the children in mind.

### *Participation of children in family mediation*

There were initial concerns about the participation of children in family mediation in foreign countries yet experience has shown positive results. According to Taylor (1998), this leads to, however, a situation whereby children are considered to be incompetent and vulnerable persons, who should be protected from controversies between their parents.

One of the basic conditions for the participation of children in family mediation, in our opinion, is the suitable timing of the participation. The initial phase of all mediation processes should deal with the question as to whether the mediation is suitable at all. For this purpose, a framework was developed outside the Czech Republic and this framework is used by accredited mediators (acting as mediators in court procedures) when they acquaint themselves with the case and the question of the suitability of the



mediation. The aim is to evaluate the level of preparation of each party to make free decisions (Kaspiew, 2008).

A responsible choice of case is one of the indicators of the ‘successes’ of mediation. During the evaluation process it is necessary to find out just how well the parents understand mediation and react to the possibility of it. Part of this decision involves the evaluation of the appropriateness of the participation of children.

As mentioned above, a basic condition for the effective solution of divorce and family is the determination of, „*what children want*“. In cases whereby the mediator does not have the power to make such an evaluation or is unwilling to act in a double role (mediator and child psychologist), then specialist consultants enter the fray. The consultants explain the situation firstly to the parents and separately to the children with the aim of properly understanding the interests and needs of the children.

The sensitive nature of information is crucial at this stage. It is imperative to establish priorities and rules related to relaying information. It is recommended for unpleasant information to precede positive pieces of information when presented to the parents (Feather, 2007). The discovered wishes of the child should be presented to the parents as its needs. The information gained during mediation is subsequently applied to find suitable solutions. Children sometimes become involved during this phase, when the parents are able to suggest positive solutions to them and discuss them. In terms of subsequent mediation, it is necessary to engage in a wide range of topics related to upbringing. These are generally of a complex nature. It is very demanding for the mediator to hold meetings in a purposeful and detailed manner whilst helping parents to evaluate the suitability of their proposals and keep up such a tempo for the required amount of time.

### **Legal anchoring of family mediation in Europe and in international agreements**

In 1998, the European Council accepted a recommendation about family mediation Rec(98)1E/21 January 1998 and in 2002 a recommendation about civil mediation Rec(2002)10E/18 September 2002. The UN commission for international business law (UNCITRAL) accepted model law for business mediation in 2002.

The European Union also has prepared regulations concerning community law engaged in the area of mediation. These regulations aim to anchor a quicker, cheaper and, above all, more amicable method of solving disputes. Taking the reasonable success of mediation in criminal mat-

ters into account, such as consumer protection<sup>1</sup>, the commission included ‘partnership for European restoration’, also the European parliament and Council guidelines 2008/52/ES dated 21. May 2008 about certain aspects of mediation in civil and business matters<sup>2</sup> into the so-called Hague program in 2005. The programme contained 10 priorities for the next five-year period. No amendment to family mediation was suggested but this forum.

However, other documents also place emphasis on peaceful solutions to conflicts, especially article 13 of the European arrangement about children’s rights, which establishes that the aim is to avoid disputes and court proceedings affecting children. This is why both parties agree to support intermediary aid and other methods of solving disputes whilst using them to come to agreements. According to art. 7 letter b) arrangement about contact with children, courts make suitable steps towards parents and other persons with an influence on children having the motivation to concluding arrangements about peaceful contact with children. This method may even aid family mediation and other methods of solving disputes in the future.

The afore-mentioned recommendation of the European Council about mediation was approved by a commission of ministers on 21. 1. 1998 as recommendation N° R/98/1(hereinafter only recommendation). We are presented with eleven points, which explain the acceptance, sending and necessity of this alternative consensual solving of family disputes. It is possible to say that *„these eleven brief points describe the necessity of mediation after family breakup in a convincing and perfect manner“* (Radvanová, 2001, p. 10). This recommendation precisely defines the strange nature of family disputes, which involve the fact that they involve persons who have interconnected relationships, which will last into the future. Furthermore, family disputes occur in connection with emotional unbalance, which gets worse with the divorce process and has an influence on the entire family, especially children. We can make a link to the European arrangement for children’s’ rights to show that family media-

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<sup>1</sup> See Commission Recommendation of 4 April 2001 on-court authorities to resolve consumer disputes entered into legal agreements (OJ. L 109, 19th 4th 2001)

<sup>2</sup> The Directive does not bind Denmark, since the latter due to the special protocol attached to the Treaty of Amsterdam is not bound by Community regulations according to Title IV of the EC Treaty. The directive applies to cross-border mediation disputes in civil and commercial matters except as regards rights and obligations, which are not according to the relevant applicable law (typically it will be some family or employment matters).Not, in particular, to revenue, customs or administrative matters or the liability of the state for acts and omissions in exercise of State authority (acta iure imperii) (see Article 1 paragraph 2 of the Directive).

tion brings about the possibility of improving communication amongst family members, soothes conflicts between parties in dispute, contributes towards the keeping of personal contacts between parents and children, lowers social and economic costs arising from divorce not only for the parties involved, yet also for the state. It also significantly reduces the time it takes to solve conflicts.

According to the recommendation, mediation should be used in family affairs between members of the family either related by blood or by marriage and between persons who live or had been living together in family relationships according to the regulations of national law.

The recommendation places certain requirements upon the shoulders of the mediator. For example, he or she, at suitable moments, should inform both parties about the possibility of gaining advice about their problems in marriage guidance counselling or about the possibility of employing a different form of counselling as a medium for solving marital or family problems. Furthermore, the mediator should act mostly in the interests of children and protect their interests and should focus on the parents showing more interest in them and should remind them of their responsibility to provide the children with a satisfactory life and upbringing.

The recommendation mentions the problem of domestic violence, whereby the mediator should pay attention to the past history of domestic violence between the parents and the threat of it in the future.

### **Czech legal amendment of mediation in civil disputes**

The reason for passing the law about mediation according to the explanatory report is the attempt to allow everybody to find an alternative solution of their conflicts in a speedy and cultivated manner out of court. Further reasons include overburdening of the courts, the possibility of avoiding legal disputes and solving issues without long delays, without unnecessary financial costs and without the parties suffering unnecessary psychic burdens. Last but not least, the explanatory report presents that the interests of children are one of the deciding criteria, whereby the significant ability of parents to communicate in family matters. The institute for mediation can significantly contribute towards the improvement of this situation.<sup>3</sup>

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<sup>3</sup> Government proposal to issue a law about mediation and amendments to be made to certain laws. Explanatory report I. General part. Quoted from: <http://www.psp.cz/sqw/text/orig2.sqw?idd=72721> [12. 2. 2012].

### *Legal amendment to the law about mediation*

On 1. 9. 2012 law number 202/2012 Coll., about mediation and amendments to certain laws (about mediation) came into effect. The law established legal effects in the area of the commencement of mediation and suggested the idea of partially obligatory mediation (in the form of an obligatory meeting with a mediator) as alternatives to a court process. One of the main thoughts behind this amendment was the assurance of the effect of mediation on persons, who have been trained in what it involves and this training forms a solid basis for the successful performance of the mediators. The preparation of this law was influenced by the European Guidelines and Council document number 2008/52/ES. However, it was focused on something larger than a mere harmonisation of Czech law with the guidelines of the EU, which mostly deals with foreign civil and business disputes.

The law in §2 defines mediation as *a procedure for solving conflicts aided by the participation of one or more mediators, who support communication between persons in conflict in such a manner for them to achieve a peaceful solution by concluding a mediation agreement. There is also family mediation, which is focused upon solving conflicts, which have arisen due o family relations.*

Current Czech law does not exclude the possibility of mediation occurring outside the regime of law, i.e. via unregistered mediators. However, such mediation has been lacking in consequences related to the outset of mediation in relation with periods of limitation and foreclosure periods (Kohoutek In. Pavlová, Veteška, 2010, p. 14).

### *Legal amendment to civil court proceedings*

The new legal amendment, which has currently novelised the arrangements of the civil court, amends the problematic area of prescribing mediation in a totally different dimension. According to the previous version of the civil court rules, the court was able to prescribe participation in mediation meetings. Currently, the court is able to organise the first meeting for participants with a registered mediator for up to 3 hours (arrangement § 100 paragraph 3 civil court rules). We consider a further change to the civil court rules to be advantageous: this is the stress placed on the informing obligations of the court and the possibilities of employing mediation, which stresses information at the phase of preparatory proceedings without being forgotten in the later stages. Using mediation in execution procedures is impeachable as the conflicts at this stage are usually ‘deep-rooted’ and the level of willingness to find a peaceful solution is usually limited. However, it is necessary to take heed of the constant at-

tempts of legislators to find a peaceful resolution to conflicts. It is, however, necessary, to stress the obligation of the court to inform about the possibilities of using mediation especially in the initial phase of court proceedings.

The court has the obligation of information particularly in § 99 paragraph 1 of the CPC., when the presiding judge, given the nature of things, highlights the possibility of using mediation in proceedings according to the Mediation Act, or the possibility of using social counselling according to the Act on Social Services (Act No. 108/2006 Coll). The provision of expert advice involves a social service in professional social counselling focusing on the needs of individual areas of social groups of people in civil counselling, marital and family counselling, counselling for the elderly, counselling for persons with disabilities, counselling for victims of crime and domestic violence, this guidance also includes social work with people whose way of life may lead to conflict with society (the provisions of § 37 of this Act).

Similarly, in relatively new, so-called pre-trial proceedings (in the amendment to CPC since 2001, changed gradually between 2005 and 2009), the emphasis has been more on the fastest possible end to the dispute. Not only is the accuser in the case obliged to describe the relevant facts and evidence, yet the defendant is required to express an opinion too. Part of the court's new obligations is to inform the participants about the possible use of mediation (the provisions of § 114a paragraph 2 Code of Civil Procedure.).

The possibility of mediation is regulated in § 100 paragraph 3 of the CPC., When it is practical and appropriate, the presiding judge may order the parties to participate in the first meeting with a registered mediator for 3 hours and postpone the proceedings, but not for longer than three months. If the participants, without undue delay, agree on a mediator, then they select the mediator from the list maintained by the Department of the President of the presiding judge. After the expiry of three months the court proceedings continue. The first meeting may not be required for the duration of the preliminary measures according to § 76b of the Code of Civil Procedure., which protects victims of domestic violence. The court may order participation in extra-judicial mediation if it deems it worthwhile and appropriate, whereas the wording "*may*" should not express the discretion of the court, yet its responsibility to save a situation (David et al., 2009, pp. 464-465). The court should also decide whether its steps are equal to formal measures, which delay the inevitable or not (Bureš, 2009, p. 649).

Furthermore, the Code of Civil Procedure expressly states in § 137 of the CPC. that the reward for the mediator to, according to the Law on Mediation, for the first meeting with the mediator ordered by the court according to the provisions of § 100 paragraph 3 of the CPC. will continue to be regarded as recoverable costs, which shall be borne by one who was unsuccessful in the case. In non-contentious proceedings, each party bears its own costs. If there are reasons worthy of special consideration or the participant refuses to attend the first meeting with the mediator without good reason, the court is not obliged to pay all or part of the costs (the provisions of Code of Civil Procedure § 150.). At the same time, however, the provisions of § 140 Code of Civil Procedure state that if the participant pays for the first meeting with the mediator and is then exempt from court fees, then the state pays the mediator fee.

To appeal the decision of the court to order the first meeting with the mediator is impossible according to the provisions of § 202 paragraph 1 point. p) Code of Civil Procedure.

The possibility of the first meeting with the mediator for three hours has remained unchanged in the enforcement proceedings in matters of custody of minor children (the provisions of § 273 paragraph 2 letter a) of the CPC.). When parents' disputes reach the stage that one of them does not voluntarily adhere to the court's judgment, or court approved agreement, for the care of minors, then a file may be petitioned to the court again. The enforcement of decisions concerning custody of minor children treated in § 272 et seq. Code of Civil Procedure is very specific and differs from other types of enforcement. The aim is to provide care to the child as stipulated by the decision, allow the child to come into contact with the other parent, or return the child (in the case of international abduction). For this purpose, there are different tools that the court may apply. First of all, the court should impose fines. This procedure should not be formalistic (low fines imposed repeatedly) and should lead to voluntary compliance decisions. Before proceeding to court enforcement by removing the child (which is done in conjunction with welfare authorities and the Czech Police<sup>4</sup>) an amendment to the Civil Procedure Code has, since 1.10.2008., when, there are two other options. It is able to provide, if appropriate, the adaption mode (for gradual contact with the authorized person) or save those who fail to comply voluntarily judicial decisions, participation in an extra-judicial mediation meeting (the provisions of § 273 paragraph 2 point. A) of the CPC). The wording of this provision is to suggest that mediation can save a debtor (the person who has a child

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<sup>4</sup> 142/2007-ODS-Org., Instructions from MSp, MV, MZ, MŠMT and MPSV, which are amended in the performance of court decisions about the upbringing of young children.

present). It is to be hoped that it will have a legitimate interest to eliminate conflict in the interest of the child that is most affected by the forced withdrawal. However, it should be asked whether, at the stage of enforcement proceedings, when the relations of the parties are already so acute, nor does the court decision and commit the crime of obstructing an officer, it is possible and feasibly and purposefully mediate. Maybe it will be the first step towards understanding the conflict.

If the parties enter into a mediation agreement, the court may approve it, According to § 67 paragraph 2 of the CPC. The decision has to be made within 30 days of conciliation (the so-called Praetorian settlement). This approval makes the enforceability of the mediation agreement, as the court approved a settlement to affect a final judgment. The court shall make an order against a resolution approving a settlement is not possible to appeal. The arbitration proceedings shall be subject to the fee obligation that arises as from the approval of the settlement, rather than filing a petition for peace. A settlement can not be concluded in matters of status (divorce) and matters that may be commenced without design (for example, treatment ratios for minor children after divorce). In those cases, the parties will enter into while in the process of mediation agreement must file a court action where the present agreement as a basis for the court's decision. According to a court settlement is also possible to subsequently enter into an agreement to meet claims arising from the mediation agreement in the form of a notarial or executor registration to consent to the operation.

Mediation in Family Law Matters uses most frequently in areas such as management regarding the treatment of conditions to minors (married and unmarried couples), as well as in divorce proceedings in maintenance between spouses, between divorced spouses, settlement of marital property, alimony for unmarried mothers, the international civilian abductions of children - here usually provides mediation directly to the Office for International Legal Protection of Children in the headquarters in Brno.

#### *Payment of the costs of family mediation*

As one of the obstacles in participating in mediation involves finances, in practice many methods of solving this problem have evolved. First of all, the mediation should be paid for by the participants of the mediation conflict. This would mean that mediation would not be abused so often. This problem is more visible whereby the parents have differing financial backgrounds, whereby the mother is on maternity leave, or on family allowance, and the father insists on paying half the costs only. One of the forms of providing mediation is financing it as a social service (so-

cial counselling), furthermore agreements of mediation centres with the OSPOD concerning settlement of mediation. Sometimes mediation centres provide mediation free of charge within the framework of projects from state institutions.

### **Mediation according to the proposed law about non-contentious court proceedings**

The government proposal is to divide mainly unchallenged control of Civil Procedure and special regulation. With regard to the preferred amicable solution to the conflict, there has been a proposal to establish a worded obligation to inform the court about how the mediation hearing (§ 9 of the draft law). Since divorce proceedings are included under this act, the court will have the obligation to provide information about the possibility of mediation negotiations. In this procedure, however, there is no possibility of mediation meeting to order.

The court for the custody of minors, namely deciding on the care of a minor child, the determination of maintenance to the child, parental responsibility, delivery and return of the child, the child's representation on the management of its assets agrees with the legal acts of a minor concerning the possibility of mediation provided in § 470 of the proposed Act. Thus ensues that, in order to protect the interests of the child, the court leads parents to find an amicable solution. The court may impose a maximum period of three months participation in extra-judicial conciliation or mediation meetings or family therapy, or order them to meetings with experts in the field child psychology on parents. The court may impose other forms of alternative dispute resolution, mediation than mediation according to the law. Unfortunately, the wording of the Act makes us look back to the formulation of the mediation meeting, not to the first meeting with the mediator. It is difficult to imagine that the parties in the conflict were ordered to try to conclude a peace deal, i.e. communicate with each other and agree upon a solution to their conflict.

Other family law disputes, such as the settlement of marital property, maintenance obligations between spouses or ex-spouses, alimony to unmarried mothers, etc. continue after the adoption of the proposed amendments as part of the Civil Procedure.

### **Family mediation as a tool for social and legal protection**

Within the framework of social and legal protection, the state provides assistance to children and their parents, which is designed primarily to protect the child, to encourage positive development and proper education along with restoring negatively affected family functions. We encounter,



in this field, the social-legal protection of children as defined in § 4 of Act No. 359/1999 Coll, on Social and Legal Protection of Children (hereinafter ZSPOD). Their basic function is to prevent disputes and work as an advisor to families under threat. Threats may be manifested by the fact that parents do not properly fulfil their duties, which they derive from parental responsibility or the child has behavioural problems that parents can not handle, or parents are in dispute about modifying the child's upbringing or in case of contact with the child.

The social-legal protection of children helps parents in solving educational problems related to child care, or provides them with professional counselling. If such assistance is recommended and parents do not use it, the body of socio-legal protection of children (in § 12 ZSPOD) obligates parents to use professional counselling. The municipal authorities of municipalities with extended powers can save parents from the obligation to use professional counselling if parents are not able to solve the problems associated with raising a child without professional counselling assistance, particularly in disputes about modifying the child's upbringing or visitation with the child or if they fail to heed the recommendations made to them by authorized persons, providers of specialist services or mediator.

It is now also in the catalogue of educational provisions in § 13 ZSOD included beside this warning, surveillance and restrictions on the ability to *save* their parents or other persons responsible for the child's upbringing obligation to use expert advice or assistance required to participate in a meeting with a registered mediator within three hours. These educational measures may be imposed by municipal authorities of municipalities with extended powers. It should be noted that, in practice, the social-legal protection of children rarely recommends mediation and rarely imposes regulations.

A fine of up to CZK 20,000 is imposable in cases whereby the parents are obliged to use the help of professional bodies or have the obligation to participate in the first meeting with a registered mediator or family therapy, as determined by ZSPOD.

### **Family mediation according to the law about social services<sup>5</sup>**

In 2006, the Czech Parliament passed the adoption Act No. 108/2006 Coll of Social Services (hereinafter the SSL Act). This Act regulates the conditions for providing assistance and support to individuals in difficult social situations through social services and care allowances, the condi-

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<sup>5</sup> The compilation of this sub-chapter was taken from a publication by NOVÁKOVÁ, S., HOLÁ L. *Rodinná mediace jako sociální služba* (Family mediation as a social service). In: HOLÁ, L. a kol. *Mediace a možnosti využití*. 1. edition. Prague: Grada Publishing, 2013.

tions for issuing licenses to provide social services, public administration in social services, Social Services Inspectorate and conditions for the exercise of social services. The law also regulates the requirements for the profession of social worker.

The basic principles of the law are entitled to free basic social counselling (According to § 37 paragraph 2 of the Act) on resolving difficult social situation and its prevention and the principle that social services must be provided in the interest of people and in sufficient quality such that was always to ensure respect for human rights and fundamental freedom.

According to this Act, social services are understood to be the activity or activities providing assistance and support to persons for the purpose of social inclusion and the prevention of social exclusion.

The above-mentioned difficult life situation is defined as the weakening or loss of ability due to age, medical condition, a social crisis, habits and way of life leading to conflict with society, a socially disadvantaged environment, danger to the rights and interests of the criminal activities of other individuals or other serious reason to address the situation so that this solution supports social inclusion and protection against social exclusion.

Under the influence of the above definitions, we have to quickly assess that mediation may have the law on social services in place, though it is not directly defined. Topics, which have dealt with situations and problems clearly show the nature of topics discussed in mediation, eg. divorce as a social crisis, which is often accompanied by the weakening of the ability of communication involved family members and, as a result, this leads to impaired function of the family on a frequent basis (if not this weak communication helps a) conflict with or even criminal behaviour amongst legal family members.

Family mediation provided as a social service is limited by two above-mentioned laws (SSL and ZSPOD). Specifically, in particular the obligations under § 88 of the Act of SSL and quality standards of social services (According to Annex 2 to Decree No. 505/2006 Coll) and the obligations of authorized persons of the particular § 53 of the Act of SPOD, both laws while the issue resonates as an invalid question. Every social service is obligated by the act on SSL and manages content standards. The obligations referred to in § 88 and quality standards, as obligated by the processing of its internal rules, workflow and management of the various records, etc.. Implementation of quality standards and the fulfilment of the obligations arising from § 88 and other provisions of the SSL, the inspectorate, which is performed under Act No. 552/1991 Coll on state con-

trol and performs her new since 2012, the regional branch of the Labour Office (inspections so far performed by regional offices and MPSV).

Work with clients is one of the key elements in the SSL standards 3 and 4 - dealing with applicants for social service and contract for the provision of social services. Thus, they shall be paid closer attention. Standard No. 3 stipulates that the provider has written rules, which inform those interested in social service in a comprehensible way about the possibilities and conditions for the provision of social services and, according to these rules, the provider progresses. It is further alleged that the provider discussed with the applicant for the SSL requirements, expectations and personal goals, which, due to its features and possibilities can be realized through social services. The provider has also written rules of procedure for the rejection of the prospective SSL for legal purposes.

In the context of mediation, according to the Law on SSL, is important to enter into a contract for the provision of social services. Matousek (2011) talks about the person who needs social services and providers are required by law to conclude a contract for the provision of social services. In some cases, especially in the case of the provision of social welfare services, operators are required to enter into this agreement in writing. The contract includes the SSL According to the Act and the following elements:

- Labelling of both parties, type of social service
- Range of providing social services,
- Time and place for providing the social service,
- Payment for the social service as agreed in the framework of § 73 up to 77 and the method of payment,
- the arrangements for compliance with the internal rules of the provider for the provision of social services,
- reasons for cancellation and cancellation deadlines,
- length of contract validity.

The newly adopted Act No. 202/2012 Coll on mediation and amending certain laws (the mediation) is included in the contact conclusions. The one in § 4 stipulates that mediation is an initiated conclusion of the implementation of mediation. This agreement must include at least:

- designation of sides of the conflict,
- name, or names, surnames and addresses of the mediator's place of work,
- demarcation of conflict, which is a subject of the mediation,
- remuneration of the mediator for the mediation procedure or the method of determining appropriate arrangements for backup or arrangements that the mediation will be conducted free of charge,

- duration of the mediation, or arrangements that mediation is intended to take place indefinitely.

Furthermore, for the conditions and rules of family mediation as social services, the agreement determines the provision, particularly § 53 of the Act about SPOD, which deals with the obligations of public authorities, other legal entities and natural persons and authorized persons. It states that at the invitation of SPOD are authorized persons required to communicate information needed for free according to this Act and to provide SPO, unless there are special regulations. The obligations of confidentiality according to special legislation (§ 12 paragraph 2 of the Civil Code) cannot be invoked, if they are informed of the details of the suspected abuse, child abuse or neglect it.

Confidentiality regulated in § 100 also in the Act on SSL, which provides that, inter alia, social service providers are required to maintain the confidentiality of the persons who receive social services, which in its activities, learn, unless specified otherwise. This obligation continues even after the employment relationship. The obligations of confidentiality may be the person referred to in the first sentence relieved only by the person in whose interest this obligation, in writing, stating the scope and purpose. Information concerning persons who receive social services, and that when their activity providers learn communicated to others only if so provided in this Act or a special Act (which is meant especially mentioned further amended the Criminal Code or the Code of Civil Procedure).

The duty of social services in the provision of information and cooperation are not defined only to the authorities of SPOD, but also to the Court and the Police, on the basis of § 367 and § 368 of the Criminal Code - when the duty to report suspects of committing crimes against children authorities law enforcement, § 8 et seq. Criminal Procedure – where it is mandatory to provide information at the request of the Police, § 128 of the Code of Civil Procedure (hereinafter CPC) - which imposes an obligation to tell the court the facts that are relevant to the proceedings and decisions.

To understand the complex and unfortunately not entirely clear issues, possibilities, conditions and rules of family mediation as social services, we present a table of basic differences between mediation "commercial" (provided on the basis of a trade license) and mediation as SSL. As a third option here, according to the new law on mediation, acts opportunity to implement mediation as "registered mediator", and this version will be the two above-mentioned (already implemented) also differ in some respects. More, however, is proven in practice.

Here, we consider it important to note that the legal framework for mediation as social services is far from simple, and there are a number of different interpretations, whether legal or psychosocial. This, as is the practice at present mediation as a social service work, is the result of long work of mediators and social service workers working on methodologies and standards, cooperation with external consultants - especially lawyers, resulting in consensus with various co ASLPC and courts.

### **Professional competence and qualifications of mediators for family conflicts**

Competence for the profession are included in the third assumption, when in compliance eg. with Veteška and Tureckiová (2008), Hroník (2007), Tremblay et al. (2002) and Belz and Siegrist (2001) is understood as the ability and the resulting knowledge, skills and habits.

#### *Specialist knowledge and skills*

Expertise can be considered the theoretical knowledge acquired by vocational education or character without it. In terms of the exercise of the profession of mediator, it is necessary to differentiate between:

- specialist knowledge of the problem of conflict and
- specialist knowledge and skills in mediation methods.

The need for expertise substantive issue of conflict (in the case of family conflicts, knowledge of developmental psychology, psychology and sociology of the family, aspects of separation and divorce, intergenerational relationships) usually increases in direct proportion to the clients and tend to ask the mediator assessment, estimates, forecasts or suggestions. The depth of expertise of the mediator is directly related to its orientation and approach to mediation.

Basic knowledge of the legal context of solving family conflicts is a vital condition for the provision of mediation in this area. Experts, however, clash in this case. The consensus is that some knowledge of the law and the law must have a mediator. This also corresponds to the content of training in mediation, where it is also part of the law. However, in the various educational programs of varying scope and depth, knowledge of the regulatory environment in which the agreements moving, In the Czech Republic, are parts of qualifying exams for mediators.

Detailed conditions and requirements for course exams and tests for mediators of family mediation are regulated by Decree N ° 277/2012 Coll of 13 August 2012 about tests mediator fees. This, in § 2 provides an essentials test, when in paragraph 1 we learn that "*the mediator test consists of a written and oral, examination of family mediation consists of only*

oral." And in paragraph 2 states that "... the test is to verify a candidate's knowledge needed to perform the activities of a mediator discovering knowledge of:

- a) mediation techniques,
- b) basic human rights and freedom,
- c) civil, business and labour law,
- d) family law,
- e) consumer protection rights,
- f) process civil rights,
- g) basics of psychology and sociology".

The decree doesn't specify the required degree of knowledge. It then stands in contrast to the degree of knowledge of psychology and sociology, which require only "basic knowledge". Czech experts in mediation work on the creation of such requirements. It's a long process. Their interest is to establish such requirements and criteria for such measurements to assess the competence of candidates were as objective as possible and set up appropriate conditions for entry into the profession of mediator and family mediator.

According to Casals (2005), the experts cannot agree on a suitable profession of a family mediator. Some say that the mediator must help clients to communicate their needs and concerns, helping them to improve their communication. Others emphasize that the mediator must help the parties understand the advantages and disadvantages of their positions and outline their possible scenarios, if not reach an agreement. The last group is of the opinion that the main task of the mediator is to change the clients', i.e. change their hostility to constructive relationships and behaviour. The best interests of their children will require their best relationship as parents. The core of the conflict in the family is often in relationship problems.

### *Education in family mediation*

It is evident that the requirements for the mediator in family conflicts are high. This is why it is necessary to concern oneself with their current and previous education. In the development of mediation, professional organisations of mediators and associations of family mediators focus on the development of unified standards for education in the field of solving family conflicts. There is no, however, any international agreement for this. Requirements for education change according to the state and its legislation for providing mediation.

Although the results of research have shown that the level of education of a mediator doesn't necessarily lead to his or her success (Weck-

stein, 1996). Most family mediators in the private and public sectors are educated in the field of psychology (Pearson, Ring, Milne, 1983), which leads to mediation training with a duration of a minimum of 40 hours (Kovachová, 1994). For example, the association of family mediators in the USA requires its members to undergo a 60-hour course of mediation along with 20 hours of further education every 2 years. Most states require a University degree and training in mediation. The requirements for the qualifications of mediators have not yet attained an academic level (Neilson, 1994, p. 181). Untrained mediators should gain experience in pairs with an experienced mediator. There is also an agreement that states should require proof of further education, especially in terms of practice, from family mediators.

Research into the educational needs of mediators, engaged in family mediation, was a topic taken up in the Czech Republic by Vrabcová (2012). Due to the low number of practicing family mediators, the author chose a qualitative method of research in the form of a semi-structured conversation. The following fields were focused on in the conversation: 1. Achieved level of education and its benefits for the activity of family mediator, 2. Training in mediation and applying of this training to practice as a family mediator, 3. The character prerequisites of a family mediator. The target group consisted of ten mediators. The results of the research showed that the profession of family mediator is highly specialised and requires specific skills and abilities.

It became apparent from the proposals made by the mediators that the education program for family mediators should be meant for people with grammar school or university education, ideally the latter. The education programme should be designed in a multi-disciplinary manner. It should be derived from the basics of law, psychology, sociology and social work. Information about communication, conflicts and mediation should form the basis of education for family mediators. Mediators must adopt techniques of active listening and other specific mediation techniques throughout the courses. It is imperative for the family mediator's education to include a practical part, which should contain exercises about model causes, intervention and supervision. The mediators in the study agreed that 100 hours represents a minimum for the practical part of the exercise.

Education and mediation in the Czech Republic already has its tradition. Since 2002 the association for mediators has been realising mediation exercises with a duration of 100 teaching hours. Further educators include: the Czech bar association, EducoCentrum, s.r.o. Krnov. The focus and form of exercises are comparable with each other. Stress is placed

upon acquiring basic knowledge not only about mediation, yet also about mediation skills in the form of exercises in model situations and discussions. Many other institutes provide short-term courses in solving conflicts and mediation, though the standard varies.

The academic conference „MEDIACE 2011’ also pointed out the need of mediators’ education within the framework of a cultured manner of solving disputes“.<sup>6</sup> In a separate part focused on the problematic area of the professionalization of mediation, participants reached the conclusions that being a mediator should be recognised as a profession, which requires quality preparation and support of further education including supervision. The educator should acquaint future mediators with the specifics of fields of mediation and with mediation techniques in order for the mediator to be able to react to various needs of the clients and lead the mediation to a successful ending. There should be established unified criteria for testing mediators without taking the educator or exercise into account. Last but not least, mediation should be taught as a separate subject in schools for future psychologists, social workers, sociologists and pedagogists.

With this in mind, the legal faculty of Palacký University in Olomouc began a new trend, which saw the outset of new modules of law called ‘solving conflicts and mediation’ and ‘negotiating’ in the academic year 2012/2013. These subjects are taught in the 4<sup>th</sup> year. As mediation is getting a grip in University curricula, this is a further step towards its legitimisation and professionalization. Simultaneously, students of law have managed to enhance their repertoire through studying these subjects. In practice, they will be able to choose the correct procedure on the basis of a given legal case. The faculty is also engaged in teaching mediation in the framework of professional education. Since September 2012 it has introduced four separate teaching programmes for mediation- basic mediation (15 hours), exercises in mediation (100 hours), law for mediators (25 hours) and enhancing mediation skills (25 hours). These subjects are meant for those future mediators who need to be able to deal with conflicts in a constructive manner in their profession. Since March 2013 the faculty has been the venue for family mediation research in the Czech Republic. The PU legal faculty in Olomouc is, thus, the first faculty in the Czech Republic to engage itself in mediation as a conception.

According to Taylor (1994, p. 81), family mediation is a multi-discipline affair and its important elements cannot be recognised and adopted

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6 The conference took place between 14.–15. 10. 2011 at Palacký University in Olomouc. The aim was to open an interdisciplinary discursus about mediation in the Czech Republic and abroad.



after short-term exercises. It is then necessary to create a *specialised, professional and organised programme* to be brought into practice. We believe that this is an authorised requirement, which should not be limited by national, political, legal, professional, economic or societal issues.

## **Conclusion**

Family mediation receives due attention in the Czech Republic especially in practice. This is, of course, a good thing. In order for it to develop more in practice, this field should be then devoted to in a scientific manner. It is necessary to state that a sufficient amount of attention has, so far, not been paid to mediation in the Czech Republic.

This chapter has been a critical analysis of family mediation in the Czech Republic with an eye on legislative conditions, specifics, participants, the participation of children (paid specific attention), and the practice of providing mediation, and professional competence and qualifications of mediators for family conflicts. This topic is very current as the situation was changed by law N° 202/2012 Coll. about mediation. At the current time, both international legal acts and certain Czech laws are applied to the field of mediation. On a Czech level, mediation is mostly regulated by law number 202/2012 Coll., about mediation. Law number 359/1999 Coll., about socio-legal protection of children as subsequently amended also applies as does law number 99/1963 Coll., of the civil court regulations. Mediation may be provided in the framework of social services (law number 108/2006 Coll. About social services), and is also related to law number 89/2012 Coll., of the new civil code, where we find a tendency to attempt to solve conflicts in a peaceful manner. On the one hand, there are numerous possibilities about possible mediation in the Czech Republic. On the other hand, this very fact leads to the possibility of using mediation in a generally unclear legal environment.

The authors of this work have tried to present the fragile and sensitive nature of the (Czech) family and the conflicts within. In order for the mediator to manage all details of conflicts and weigh up possible solutions, then the mediator must have the appropriate qualifications. The concluding part of the chapter deals with mediators' competence and education in family mediation.

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## FAMILY MEDIATION IN SLOVAKIA

Emília Halagová and Beáta Swanová

### Introduction

For all of us, the family should provide a place of peace where we can unwind at the end of a hard day's work. It is very painful, however, if we do not find support, love and understanding there but instead anger, criticism, insults and physical violence. One way out of this kind of suffering can be provided by family mediation.

Mediation is one of the most progressive ways of solving problems within the family and, we should emphasize, a very sensitive alternative means of solving a dispute. It looks for solutions acceptable to both sides while considering their separate interests. It is a form of help which works preventively, reducing the effects of conflictual situations and enabling partners and family members to go on enjoying good relations after the conflict has been resolved. Family mediation is a voluntary and confidential process in which a neutral person helps both sides, through communication, to settle their family conflict by reaching some kind of agreement; it is when participants in the conflict stop communicating that a third party intervenes.

### The family as a place for mediation

The Slovak legal system defines the family as follows: *“A family established by marriage is the basic cell of society. Society protects all kinds of family. A marriage is a union entered into by a man and a woman. Society protects this union and assists in its well-being. A husband and wife are equal in terms of their rights and obligations.”* (Law NR SR no. 36/2005 Coll. par.1, par.2).

A family is a basic unit which society, ever since its origins, has depended upon. A family becomes a family thanks to its stability; it is this which makes it so valuable to its members and to society as a whole. There are principles, values and goals which families live by: the enduring love of spouses, the care and upbringing of children, a shared reli-

gious life and strong moral principles all form an indispensable part of family life.

A family is defined as a “*socially approved form of long-term coexistence of people brought together by conjugal, blood or adoptive ties. These ties are created on the basis of mutual bonds of feeling. We are born into families, grow up in them and as adults, we establish our own. Each of us belongs to two families: the one we were born and grew up in and the one which we establish ourselves, the quality of which we influence through our choice of partner*“ (Darák et al., 2004, p.223). The families people grow up are very important to them and have a major effect on them throughout their lives.

A happy family is one in which a truthful, deep, sincere and stable emotional mood prevails. This forms the essence of a person and is the basis of healthy personal development; familial love cannot survive without a strong root. In everyday life, happy families express their spiritual dimension not only by living and eating together but also by sharing genuine values. Family love is always forgiving, it creates a place where we can test and verify new ideas and attitudes and be given feedback thanks to which we can strengthen our self-image (Ferrero, 2004, p. 69). A family constitutes an exact system of relationships between the people who create it and each member has their own values and fulfils a different role. Members of a family usually live together and form one household, usually made up of two, often three, generations. Mutual relations between family members are determined by their feelings and attitudes, also by traditions passed down in their families and by legal and religious norms. As the milieu which we are most rooted in, the family both influences us and we it. It creates its own cultural environment which both forms a child's personality and reflects the age in which we live, along with its political, social, economic, cultural and ecological conditions, amongst others.

*“It is in the family that people experience their closest and most intensive coexistence. The two basic bonds that are formed here - the bond between spouses and the bond between parents and children - are the strongest and most natural in our culture. The family functions as a social institution which gives children not only material but also emotional and moral security. It is an elementary institution in which the child is brought up and socialized.”* (Gáborová & Gáborová, 2005, p. 111). It is undoubtedly clear to everyone that the family is one of humanity's greatest treasures, an asset which we have to protect and nurture with great care. Every family is an open model in which the father, mother and children can and should create a home, a place of the deepest love, trust and happiness for all throughout their lives. Families exist and will continue

to do so because they are indispensable: no alternative universal means of satisfying personal needs has yet been found.

Relationships in families, i.e between husband and wife, parents and children and between siblings, between spouses and their parents, are usually characterized by mutual fondness, understanding, feelings, mutual support, protection, a sharing of problems, social communication, interaction and perception, shared housekeeping, childcare, respecting the interests and attitudes of the other and harmonious relations. If within these relationships some kind of disharmony or disagreement arises between any family members, a conflict can result. Such conflicts in families are often very sensitive, even taboo issues. And it is partly because of this that mediation can be so useful. The healthy communication which forms the basis of the mediation process can lead to the mediator gradually bringing reconciliation to the family. During mediation family members can regain a feeling of self-trust and start to hope that this method will enable them to manage their problem by themselves.

### **Conflicts, violence and family crises**

Family conflicts arise at all levels – between spouses and siblings, between parents and children, between spouses and their parents and grandchildren. A conflict results from a disagreement in the attitudes and aims of different family members. The most common reasons for conflicts in families and marriages are disagreements about financial matters, children, free time, parents-in-law, over-dependence or independence, uncontrolled aggression, sexual incompatibility, jealousy, infidelity or extramarital relationships and various illnesses. Tension, which may either be overt or repressed, seeps into the family. This can build up and get ever more intense, leading to constant irritability and even family breakdown. When the conflict and tension create a new situation, the family is then in a state of crisis. Crises often lead to spouses neglecting their commitments to one another and to parents neglecting their children. Family law states: *“Marriage spouses are equal both in terms of rights and obligations. They are obliged to live together, to be faithful, to respect one another’s dignity, to help each other, to share the childcare and to create a healthy family environment“* (Act NR SR no. 36/2005 Coll. Par. 3. § 18).

Life brings with it unexpected twists and unpredictable situations which force us to confront one another. Marital life involves having to solve problems we would never have had if we had remained single. Living together means that we have to get used to each other’s various habits. Arguments are thus inevitable for the following three reasons:

1. The sharing of common territory – we have to learn to live our lives together and by territory we understand the living space of a house or flat. This situation is even more difficult when one of the partners moves in with the other.
2. Partners' divergent rhythms or routines – each person has a different perception of time and it is very difficult to harmonize these and may take several years.
3. Different methods of upbringing – family life can be seriously disrupted by disagreements about how children should be brought up and differences in values (Vidal - Graf, 2007, pp. 13-16).

Arguments between spouses are common and can be divided into the following four types:

- always present and following a simple pattern of tension, irritated silence and then reticence leading to a quarrel,
- frequent dramatic quarrels where strong words are exchanged, physical aggression may be mutual and reconciliation and a period of conjugal happiness follow soon after,
- infrequent arguments, usually mild and caused by petty disagreements. Their frequency is influenced by internal factors,
- aggressively preventive arguments which occur when one partner wants to prevent the other from doing something that s/he wants to do (Novák, 2006, p.51).

Children in a family where there are frequent conflicts go through deep suffering. They experience their parents' arguments intensively, their hatred and displays of aggression, and instead of love, the children witness hostility between their parents. Soon the child will take the side of one of the parents and feel hatred towards the other. The emotional instability of the situation, however, may lead the child to side with one parent for some of the time and then with the other at other times. Needless to say, this tension leads to disruption of the child's emotional and social development, a state which worsens with the complete separation of the parents (Gáborová & Gáborová, 2005, p.119).

Every family has its own system and problems which cause disagreements, arguments and conflict. One of the most common sources of arguments is the frustration one partner has when s/he has to do much more housework than the other. Another big problem in marital relationships are arguments caused by money. Money is a key factor in a person's sense of well-being and family problems arise when there are differences in partners' incomes and household finances have to be agreed upon. How to bring up children properly is also a cause of many arguments; spouses have to agree on how children should be brought up because situ-



ations often arise which can easily lead to confrontation. Grandparents and their interference in children's upbringing can also cause tension and have a negative influence on harmonious coexistence. Conflictual situations in families may also lead to domestic violence committed on grandparents when they are old, dependent on the care of their children and socially isolated. Such elderly people often suffer from serious illness and lack self-confidence. If they live with mentally ill adult children, or vice-versa, there is high risk of conflictual situations resulting. Violence committed on old people in the family can be in the form of injustice, insensitive treatment or even deliberate neglect. Daughter-in-laws and mother-in-laws often have long-running feuds with alternating periods of friendship and hostility. Often an inappropriate remark, a challenging or querulous look, a failure to help or lack of interest in the other's health problems is enough to harm a good relationship and start a conflict (Pospíšil, 2007, p. 277). We should remember that a married couple's sexuality also plays an important role. Endless comparisons of sex lives and one partner's sexual dissatisfaction can lead to bitter quarrels. Further causes are conflicting ideas about ways of spending free time, hierarchical relationships in the family and various covert issues. Only a clear definition of the problem can help us find possible ways of solving it and only when we know the exact nature of the problem can we start to tackle it.

A key part of solving a conflict is identifying its reasons, which may be overt or covert. Only by understanding these reasons properly can we succeed in removing their unpleasant effects.

The main reasons for marital upheaval are as follows:

1. The inappropriate, insensitive and irresponsible behaviour of one spouse towards the other or of both spouses towards each other.
2. Marital infidelity. This is a very serious breach of a partner's trust even if it is no longer classed as the crime of adultery. It is an offence which demeans one's partner and leaves them with an acute sense of injustice and violation.
3. Alcoholism, whether inherited or a result of environment and unfavourable circumstances.
4. The unwanted interference of parents in the marriage of their child, most frequently when the young couple do not have their own flat and live with one spouse's parents.
5. The pathological jealousy of one of the married couple.
6. Lack of respect and acknowledgement of one's partner.
7. A negative attitude towards work, lack of responsibility and a careless, slovenly way of life.

8. Sexual differences. Complaints about an egotistical partner in this area come mostly from the side of the woman (Repán, 1980, pp. 305-317).

Either through our own doing or as result of unfortunate events, we encounter various difficult situations in the course of a lifetime. As the number of strong and stable families decreases all the time, so there is a proportional increase in the number of arguments and conflicts.

Unresolved conflicts and frequent arguments can culminate in physical violence between partners. This is referred to as either domestic or family violence. *“Domestic violence can be defined as an abuse of the status and power which one partner has in the family. This is manifested by excessive demands, enforced subservience and control over their partner’s life”* (Vágnerová, 2004, p. 633).

Domestic violence can be mental, physical, sexual or a combination of these and tends to involve all members of the family. Victims of long-term marital violence suffer from various forms of depression and anxiety, are unable to work and often seek refuge in various kind of addictions. Violence occurs between partners (and ex-partners), parents and children, and siblings. Elderly and disabled members of the family may also be abused and neglected by other members of the family or household.

*“Violence is described as any form of hurting, dominating, threatening or exploiting someone using physical, mental or sexual pressure. Violence is seen as any act which leads the victim to doing something s/he doesn’t want to do, to being prevented from doing what s/he wants, or any act which arouses fear”* (Lazarová, 2002, p. 38). Domestic violence is probably the most widespread of all forms of violence, but still has not been given the attention other more conspicuous displays of criminal violence have been given. Through the mediation process, it may be possible to prevent acts of domestic violence, however. Often it is a breakdown in natural and appropriate communication within a family which leads to physical or otherwise wilful acts of violence from individual members. One way of avoiding such situations may be through the mediation process (Svoboda, 2005, p. 25).

### **Mediation in family legal disputes**

*“Mediation in domestic disputes touches on a person’s everyday life and is therefore the most widespread and widely used form of mediation. All family-related issues can be dealt with using family mediation”* (Storová, 2008, p. 118).

Regarding terminology, we should say that the legal definition of mediation does not make any special provision for family mediation. According to Act no. 420/2004 Coll. about mediation as amended, mediation

is defined in § 2 par. 1 as follows: *Mediation is an out-of-court activity in which those persons involved in mediation used the help of a mediator to solve a dispute which has arisen within their contractual relationship or some other legal relationship.* According to § 1 par. 2 this law *applies to disputes arising from legally defined civil, family, business and working relationships.*

Act no. 420/2004 Coll. is the basic legal provision for so-called civil mediation.

Mediation in criminal cases is regulated by Act no. 550/2003 Coll. about probation and mediation officers.

As well as these laws, mediation is also covered by Act no. 305/2005 Coll. about the social and legal protection of children and social guardianship, which defines mediation as a specialized method of mitigating conflictual situations in families.

Aside from its legal definition, ‘mediation‘ is also commonly used, on a theoretical level, in terms like family mediation and divorce mediation. By these terms, we understand the process of dealing with problems between partners and family members resulting from overwork and stress, inappropriate communication, differences in character and attitudes to life, and unwillingness to tolerate a partner’s serious personal and moral failings all of which lead to increased tension in a relationship. Mediation can help tackle such sensitive questions as these, which have often become too difficult for the parties involved to tackle by themselves. Family mediation thus tries to solve conflicts which spring from family coexistence and concentrates on finding an acceptable solution by, above all, renewing communication between family members. *“The aim of family mediation is to stabilize the parents’ mutual relationship and the relationship between parents and the child“* (Storoška, 2008, p.118).

If family relationships are seriously damaged, it is even more desirable to approach all problems with great sensitivity, with especial consideration for the interests of the children, who are often drawn into the conflicts through no fault of their own and are very badly affected by them. Children see their closest relatives fighting one another and it creates such huge stress for them, their young minds are unable to come to terms with it. Living with such stress, they then try to impose their will within the family. Failure to do so can have a profound influence on their behaviour in adulthood, leading to acts of aggression, impulsiveness, cynicism and anxiety (Pospíšil, 2007, p.189). This is why any step, however small, which helps to lower stress in family relationships is welcome. Mediation aims to save marriages but if a marriage is beyond saving, mediation can

at least give partners the opportunity to separate in a civilized manner and to go on communicating that way in the future.

For this reason, staff of the state-run Office for Work, Social Affairs and the Family, as the institution in charge of children's welfare, play a key role because it is they who can propose and apply mediation as a means of avoiding crisis situations in families and of limiting occurrences of sociopathological behaviour. According to the law, staff can in suitable cases use the services of mediators who offer professional mediation.

Providing mediation as a business activity is, by Slovak law, dependent on the fulfilment of specific conditions laid out in Act no. 420/2004 Coll. Eligibility to carry out mediation activity begins with entry into the official register of mediators kept by the Slovak Ministry of Justice.

Unlike in certain foreign countries, there are as yet no special qualifications in Slovakia for mediators carrying out family mediation (in some legal amendments, these are "registered" mediators who offer mediation as their business activity on the basis of their inclusion in the above register), which means that every mediator on the official list of mediators can provide mediation services in the area of the family.

As a result of there being, as yet, no legal definition of family mediation, it is necessary to refer to Act no. 36/2005 Coll. as the basic source of family law when judging whether mediation can be used in dealing with family disputes. According to this division, family mediation is most applicable when tackling disputes between spouses about their rights and obligations as defined by the law, in disputes between parents and children – and sometimes other relatives – arising from the legal conditions stipulated by this act. Although the above family law also contains other legal stipulations for such matters as awarding child custody, adoption and determining paternity, disputes arising from these cannot usually be the subject of mediation because it is official public organs which arbitrate in such cases (adoption, for example), the participants having no legal rights or obligations to decide for themselves.

Sometimes family mediation also covers inheritance disputes (given that these are usually disputes between relatives) as well as other conflicts involving members of a wider family. Legally, however, such disputes are civil in nature.

In mediation theory, we meet not only with the term 'family mediation' but also the term 'divorce mediation', which can be seen as a part of family mediation or a specific area which family mediation overlaps with. Legally this term has not been specified; it is used to refer to contentious questions which are usually related to divorce.

Divorce mediation is thus a method of solving conflicts that have arisen during the course of the legal divorce process. But it is the law court alone which decides about a divorce, issuing a ruling, in the case of children, containing the rights and obligations of the parents towards them after the divorce has been granted.

§ 23 of Act no. 36/2005 Coll. about the family as amended by later acts, states that: *A court can divorce a married couple at the application of one of the spouses if relations between the spouses are so seriously and lastingly disrupted that the marriage can no longer fulfil its purpose and the spouses cannot be expected to renew their conjugal life together* (Act NR SR no. 36/2005 Coll.).

Divorce mediation involves not just points of contention between spouses but also division of their shared property (or estate) after the divorce.

Divorce mediation looks at a divorce in two ways. One of these is from the sociopsychological point of view where the divorce is seen as the culmination of a long-term conflict between partners; the second is the legal view by which divorce is a legal institution and each case has to fulfil the legal norms (Holá, 2003, pp. 136-137). A divorce is the most complicated conflict between partners; there is a strong emotional dimension to it and conflict can be very sensitive. During divorce proceedings, each spouse may be convinced that they are in the right and feel that the court should uphold their claim that they are the wronged party. In life it happens that partners who have been through this whole legal process cool down after a few years, however, and then go back to living with a new partner or even get married again.

Divorce naturally unsettles the relationship between child and parents, deforming or even breaking the bond which connects them. A child becomes a potential bargaining (or blackmailing) chip in the hands of its parents and in their anger, parents fail to realize that they are harming their child more than anyone and that after the divorce, the child needs both parents. There needs to be a great willingness to cooperate and be tolerant, something which a mediation agreement can help with. If it can help adults keep up friendly, or at least civil dialogue so that the child does not lose contact with either of them, mediation can be a good way of preserving family or parental ties even once the marriage has collapsed.

During divorce proceedings, young children are represented by a counsellor, usually an employee of the local Office for Work, Social Affairs and Family. This institution, responsible for the social welfare of children, can as stated above, use mediation for reaching agreements with

parents about important matters related to the exercising of parental rights following a divorce.

Mediators are very useful when it comes to reaching consensus and formulating a parental agreement. If parents are able to agree about their children and formulate an agreement so that it can be included in the court's ruling, the judge will preferentially approve such an agreement and not demand the parents to supply proof of certain information that would otherwise be needed by the court (proof of parents' income; proof of the child's entitlement to certain level of maintenance etc.).

Generally it is parents, and not judges or lawyers, who are able to decide what is best for their child after they have divorced and it is for this reason that mediation can be used in such a case. And it is essential that parents are active and try to communicate during the mediation process. During divorce proceedings, mediation is one way to alleviate the negative effects of the process and help ensure the best possible relations of the divorced couple in future. We do not, of course, wish to idealize mediation; it will never be more than a lesser evil. Because it is a peaceful process, however, it may prove to be the best means of ending a marriage both for the spouses and their children (Čitbaj, 2010, p. 243).

Family counselling can also be used during the divorce process. For the most part, however, its value is limited as most couples, having decided that their dysfunctional family life cannot be repaired, no longer feel the need for such counselling. Instead they concentrate their attention on the divorce itself (Svoboda, 2005, p. 25).

Mediation is the most constructive and humane means of solving a conflict in a democratic way. Discussion is open and dignified, everyone has an equal voice, there is no space for emotional manipulation and parents share responsibility. Mediation is not therapy, however, and does not try to reunite the couple or advise them on what they should do. Mediation in the area of shared property is civil in nature and yet is connected to divorce proceedings as the law whereby married couples share property is no longer valid once a divorce is granted. The divorced owners of the shared property have three years in which to settle their claims either by agreement or through the courts. Agreement details depend on whether shared property includes a house or flat, for which a written agreement has to be made, or movable objects, for which the spouses' mutual confirmation of how they have been divided is enough. Mediation about a couple's shared property (as with shared property in general) is very effective compared to legal proceedings. One negative aspect is the fact that in terms of dividing property (if the shared property law becomes invalid upon divorce) divorced couples can only agree after the divorce ruling has

taken effect (i.e. a settlement can only be made after the shared property law ceases to apply). Mutual division of property is closely tied to setting maintenance (or alimony) payments. Spouses must agree on these during the divorce proceedings or let the court decide them as part of the divorce ruling. Given that divorce proceedings precede division of shared property and that the divorce court is not authorized to decide about property division, it is not possible in the case of one legal proceedings to deal with these two connected issues at the same time. Mediation, however, gives space to divorced couples to agree on both these issues, and to express their interests and reach consensus with regard to the rights of their child or children, if they are from the marriage.

### **Mediation as an opportunity for families**

Mediation during family conflicts contains elements of family counselling and psychotherapy with the married couple, children and other family members taking part and the mediator acting as a neutral third party. Family mediation creates space for compromises involving all interested parties with the mediator facilitating communication between them. During mediation of family disputes, the mediator creates an atmosphere of trust and security, bringing a mollifying influence and a spirit of meaningful communication in which estranged family members can somehow come to an agreement. These are values which every family should make their priority; mediation is a way of easing family conflicts.

The mediator leads mediatory discussions impartially with both parties, or their legal representatives present, or with each party separately. This ensures equal conditions for both sides and creates an atmosphere of trust. Together with all parties, i.e. estranged family members, the mediator then proposes an agreement. If s/he is negotiating with each side separately, s/he informs one party about what the previous party has agreed to. Both the family mediator and mediation have their limits, though. Mediation can be interrupted and terminated for legal reasons; after consulting different sides, the mediator may terminate mediation for psychological and ethical reasons. S/he will, of course, keep all details of the case gained during mediation confidential except if the law demands otherwise or if the opposing sides do not insist on confidentiality at the beginning of the case. The willingness of family members to cooperate with the mediator is a basic, albeit difficult requirement if the problem is to be solved through family mediation. Mediation remains, however, a civilized way of solving a conflict using a third party trained to accompany the family through a difficult period in their life and help them achieve their goal.

We should seek a family mediator when:

- there is a will to separate or divorce,
- the family dispute has become unbearable,
- communication between family members is breaking down,
- we want to alleviate the conflict,
- relations between family members are too tense to bear any longer,
- relations between parents, grandparents, children, grandchildren etc. have broken down completely,
- tension in the family is harming the children,
- arguments are leading to violence,
- siblings have fallen out about their inheritance or care of a grandparent,
- we have to make a very important family decision (Trélaun, 2005, p. 111).

Before we start legal proceedings, which can be very long and exhausting for all involved, we should always decide whether the conflict cannot be solved by mediation, an alternative approach to the traditional legal approach.

## **Conclusion**

From the above, we can see that mediation is an effective alternative, out-of-court means of conflict solving.

*Its key advantages are as follows:*

- Its speed of response, without time limitations, because mediation can start almost immediately.
- The opportunity it gives for opposing sides to agree on any kind of solution, i.e. find an optimal solution which suits both sides.
- Even when legal proceedings have begun, the chance it offers to make an agreement through mediation, stop the legal process and save money on court charges.
- Using a mediator enables estranged parties to look at a conflict from a different angle.
- People who have made an agreement through mediation often find their health improving and are able to start communicating again.

The topic of mediation and family conflict solving is a far-reaching one. We live in a period of great consumption, in a world of rapid progress and modern technology; we have more specialists and more knowledge but also more problems and conflicts. If we can substitute words like problem and conflict for words like challenge, test and opportunity, however, it will be easier for us to find solutions. Passivity solves nothing



and helps only to prolong and deepen our problems and conflicts and add to our mental discomfort. So we should think about the benefits and use of mediation in practice; it does not have to be used only in situations where the conflict has become bitter. Instead, if used properly, it can prevent such a situation ever arising.

In Slovakia, though, there remains a lack of awareness about this alternative method of conflict solving. Even though several years have passed since mediation was defined by law here (the relevant act has been in effect since 2004), most people embroiled in family disputes turn first – and only – to the courts and know nothing about mediation. Another handicap is that as yet no specialization in family mediation, where mediators would deal only with family law and undergo training, has yet been created.

Mediation is a time-saving means of conflict solving in which both sides mutually agree on a settlement. Mediating family conflicts is difficult if clients are uncooperative or do not want a third party to be involved. It is unquestionable however, that mediation is a valid alternative out-of-court method of dispute resolution, and in terms of preserving good family relations in the future, often the most suitable. We can affirm that mediation is an agent of change, experience having taught us that family members who know about the practice and choose to use it are able to come to a common agreement. Out-of-court dispute resolution leads participants, in this case family members, to take responsibility for their actions; conflicts can then be resolved without repercussions and without threatening the stability of the family.

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## **FAMILY MEDIATION IN POLAND: MECHANISMS, CHANCES, PERSPECTIVES**

Artur Łacina-Łanowski and Michał Szyszka

The social and political order based on liberal democracy guarantees to all subjects of social life, particularly individuals and families, the respect of certain rights along with many benefits resulting from the fact that within this system each citizen has a direct access to the basic consumption goods. Democracy, however, as any other system, cannot protect the subjects of the social reality of the negative effects of participating in collective life. It refers, in particular, to a family as it is the major social institution (Dyczewski, 1994, p. 7: the author identifies family with the “primary element of common good”). One thing that has remained common with families is they struggle with problems and have throughout modern history (see Korzeniowska & Szuścik, 2010). The conviction that scientific and technical progress (civilization changes) have influenced the condition of this primary upbringing group in a positive way, turned out to be a myth. Most of the problems families struggle with remain in the centre of interest for various institutions and services that are organized and supervised by the state. The state constantly searches for systemic solutions that would significantly improve the efficiency of activities undertaken for the benefit of a family. It is comforting that institutions of democratic state carry out redressing activities (through social intervention) within social policy, yet, their effects and results are disputable, as very often they solve the problem only partially.

On the grounds of pedagogical reflections on family in the social context, an assumption has been made that the most important social problem is the disintegration of family (Kawula, Brągiel & Janke, 2009). The weight of this issue and its complex nature requires a thorough analysis within a separate paper, therefore, we apply the thesis that the main reason for family disintegration are disturbed interpersonal relations between family members. Practice reveals that such situations are the most common reason for disunity, and in many cases the breakdown of families. In order to meet these problems, today’s state forms legislation that is not

only to prevent but also to resolve such matters (according to article 18 of The Constitution of the Republic of Poland of 2<sup>nd</sup> April 1997: “Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland”). However, the traditional method of resolving conflicts that has already been applied by the judiciary systems in Western-European countries and in the USA in the 60's and 70's of the 20th century is in crisis. There are opinions expressed that in 1950ies and 1960ies arouse a theoretical impulse to use mediation in conflict solving. That impulse was the development of social psychology, represented, among others, by Kurt Levin and Marshall B. Rosenberg (Doherty & Guyler, 2010, pp. 30-31). The similar crisis today can be observed in the Polish judiciary system. In the literature on the subject there are numerous critical analyses of Polish legal-social systems that are undertaken in this context (see Morawski, 1999, pp. 27-35, 151-196). Public opinion began to formulate following critical remarks: a) the procedures used by the courts are far too complicated; b) court trials have become too time-consuming; c) cases heard by the courts began to generate too high of costs. Thus, alternative methods of resolving problems have been sought. Since the end of the 90ies the model of Alternative Dispute Resolution (ADR) has been popularized. ADR includes mainly: mediation, negotiation and arbitration or conciliation. In the literature of the subject they are identified first of all with amicable and conciliatory methods of solving disputes (Kalisz & Zienkiewicz, 2009, p. 26). As Agnieszka Rękas writes (2010: 6), “ADR shortcuts have been introduced to common use by the Green Paper on alternative dispute resolution in civil and commercial law by the European Commission (19.04.2002)”. It is worth pointing out that mediation is an example of a method which has been often used by the representatives of various cultures since ancient times (Haeske, 2005, p. 13; Kordasiewicz, 2009, pp. 31-45).

Mediation is the focus point of this paper and through this prism the analysis of the Alternative Dispute Resolution is presented. There are various definitions of mediation. This is due to a different typology method of conflict solving. The three main variations of mediation are the following: evaluative, facilitative and transformative. The approach presented in this paper will expose facilitative mediation. This method of mediation is represented closest to the variation of mediation that has been presented by Christopher Moore who says mediation is “the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing par-

ties in voluntarily reaching their own mutually acceptable settlement of issues in dispute” (Moore, 2009, p. 30).

Roger Fisher and William Ury are considered to be the pioneers of the idea that shows the perspective to facilitative mediation. According to them a mediator should focus exclusively on initiating and sustaining the dialogue between the parties and in turn they should negotiate with one another. Which is why this concept is called “principled negotiation” or a “negotiation of merits”. In literature this type of negotiation is identified as the rational style of negotiation (Nęcki, 1991, p. 32). The above mentioned authors contributed this to the positional negotiation that is limited only to the defense of positions taken by the parties at the beginning of the negotiation process. Fisher and Ury base their concept on four principles: people, interests, solution options and criteria. They say the first thing that should be done is to separate the people from the problem, to disentangle emotions from what constitutes the problem in order to find a facet for settling the issues of the dispute. They suggest the strategy that parties should represent a soft approach towards one another however a hard style of negotiation can be presumed regarding the merit of the case. According to Fisher and Ury, in a case when one party wants to win the original position taken, this is one of the major obstacles during a negotiation. Resigning from such attitude guarantees openness to find new, creative solutions and allows the focus to be on searching and exploring other interests. As for the third principle, it is important that both parties have the possibility to select solution from many alternative scenarios for a final resolution of their dispute. The last principle regards the necessity to work out the objective criteria, that would transfer directly not only on quality of the achieved agreement but also make it lasting (Fisher, Ury, Patton, 1998, pp. 40-44). Due to the limited size of this paper, there is no possibility to focus on those matters further, therefore most of the problems are only sketched out. Similarly, while describing the forms of mediation we will only list them (the term mediation types is used in the literature, describing its dichotomic division to: direct – out-of-court mediation and *ad hoc*: indirect – court mediation (Kalisz & Zienkiewicz, 2009, p. 49). According to the law there are the following types of mediation: civil mediation, mediation in a juvenile case, family mediation, mediation in commercial disputes, workplace mediation, mediation in collective disputes, mediation in criminal cases, peer mediation and finally international mediation.

Despite the possibility to apply the methods provided by alternative dispute resolution since the 1990ies, experts conclude that ADRs are hardly known in Poland and rarely used (Zienkiewicz, 2007, p. 12). Even

though today's situation has improved (thanks to the amendments to the Polish Code of Civil Procedure since 2005 civil cases can be submitted to civil mediation), the situation is still not optimistic, e.g. Polish attorneys point out that the Polish law does not suit the effective mediation processes (Mediacja sądowa, 2011). Yet, this situation should not hinder the introduction and development of alternative dispute resolution methods in Poland. Therefore, there is a need to raise awareness among the Polish people, rationally speaking, mediation is the only alternative to an ineffective legal system, especially in family cases.

Due to the complexity of issues that mediators face during conducting family mediation (which is not only a divorce but also separation or post-divorce situation) two terms are found in literature on the subject: family mediation and divorce mediation. The authors of this paper use the first term as the scope of matters that this name covers is much wider than in just cases of divorce mediation.

Family mediation is applied mostly to the disputes of multithreaded characters, where both parties are strongly and emotionally engaged. Thus, a mediator must first of all concentrate on a professional and skillful approach to the parties. He should have the ability to initiate contact easily, to facilitate discussions, to create the right atmosphere and to present a high level of empathy.

In most cases a mediator, when beginning their work with a family, enters it on a certain level of the conflict in which the parties have already set their positions and continue to defend them regardless of costs. It is extremely important that a mediator, when initiating the mediation process, would determine the strategy and the right plan of action beforehand. Additionally, they should provide the parties with a certain level of support during the initiation of contact also security and protection of interests not only of adults but also of children involved in the situation should be addressed (see: Czayka-Chełmińska & Glegoła-Szczap, 2009, pp. 273-276).

Christopher Moore, the author of the exemplary mediation process model, assumed that mediation should consist of 12 phases (for more details, see: Moore, 2009, pp. 79-81). There are also propositions that focus only on certain elements of Moore's concept for example the model designed by Alison Taylor (more on this model by Halina Przybyła-Basista: Przybyła-Basista, 2006, pp. 30-31). As a reference point in this paper the model implemented by the Association of Family Mediators (Stowarzyszenie Mediatorów Rodziny - SMR) is taken, in this approach the mediation process is seen in categories of permanent conversation (this model is very close to the principles of facilitative mediation). Therefore

all six stages within this concept assume that a mediator should base the mediation process primarily on dialogue. The proposed scheme presents as follows:

- Initiation of contact, explaining the goals and rules of mediation (mediator's monologue).
- Accumulating information that can be used to help the parties in identifying the problem.
- Determining formal order during the following meetings and the range of issues that should be discussed by the parties.
- Presentation of interests and needs of each party, building the right atmosphere that enables mutual agreement.
- Supporting the parties in searching for potential solutions which should not only be acceptable to both parties but also give them a sense of satisfaction.
- Active support in forming mediation agreement, especially during its construction (see: *Mediacje rodzinne*, 2007).

It is worth looking at the examples of the models suggested by mediators themselves, regarding the successes they have gained in this field. One of such professionals is undoubtedly Manuela Plizga-Jonarska and her own scheme of family mediation:

- First contact with mediator on the phone.
- First informative and consulting session.
- Proper sessions.
- Finishing session (more in: *Plizga-Jonarska*, 2008).

Family mediation is the example of a very specific method, especially if we take into account the emotion potential involved. Thus, it is a great challenge for mediators, that results in the necessity to create certain theoretical and know-how databases. In order to be professional and effective, mediators need to improve their workshop constantly. The number of publications on this form of mediation is rather small in Poland. Therefore academic centers should contribute to creating more materials and a compendia about family mediation.

Apart from some obstacles (Hanna Przybyła-Basista, on the basis of her own research, presents in details and analyses the condition of family mediation in Poland: *Przybyła-Basista*, 2006, pp. 367-373), the great advantage of mediation is the fact that people who have used this form of ADR also have the chance to participate in solving the problem (conflict) and they get direct impact on the range, shape and quality of the achieved agreement. In family mediation the parties (spouses) can submit to discussions of their emotional, practical and even legal problems. This would be impossible in a courtroom. It is undoubtedly the advantage that

the judiciary system cannot grant. Therefore all initiatives leading to closer cooperation between the Ministry of Justice, judges and mediators regarding mediation should be supported. Raising awareness that mediation serves not only to achieve an agreement but also improves the relations between people can have a tangible impact on reducing conflicts which are a major cause for disintegration of families.

One of the important methods of supporting dialogue and conducting mediation is the method called Family Group Conference (FGC). It is even more widely introduced by family support, social assistance and integration institutions, both public (social assistance centers) and non-public (mainly foundations and associations). FGC is a method reaching directly for the resources of a family itself to resolve a dispute. What is special about this is that it uses the principles of empowerment that are a key factor in effective help, it is a practical realization of the subsidiary (auxiliary) principle which enables a family (natural environment) to cope with their problem by themselves. FGC enables gaining support within a family, so that a child, regardless of the kind and scale of the problem to be dealt with, could remain in the family. This is very often possible only due to engaging a wide family environment.

Growing with each year a tendency to place more children within the system of foster care in Poland reveals the need to introduce the Family Group Conference method. It is known that such interfering in a family like: the separation of a child and placing them in any form of foster care, has not only a very negative impact on their psychic, but also causes relationships problems and disorders (which are most often irreparable) contributing to the destruction of the family itself.

FGC method is presented and described in Poland as a pioneering activity, based on the conviction that family has an inner strength to overcome many problems without institutional interference from the outside (also help of the social workers). Yet, the Family Group Conference system is successfully used in many European countries. This model originated in New Zealand, and is grounded on the practice of decision making and resolving family disputes used by the Maori tribe. This community has worked out their own method of solving problems and conflicts - in the crisis situation the whole family gathers to discuss the reasons of the problem and its possible solutions. In New Zealand's legislation this method has been officially recognized in 1989, being part of the standard procedure in cases of domestic violence or neglect of children. Nowadays, there are about 5000 Family Group Conferences per month conducted in this country.



Family Group Conference is a type of mediation that refers to respect for the autonomy, dignity, tradition and strength of a family struggling with a problem. The Conference is often described not only as a method but as a wide or systemic view on the function of family in the social assistance and support system. The essence of the method are the meetings in which possibly biggest number of family members take part; it is *de facto* that the method of dialogue, giving the family members a chance to meet, to listen to each other, to reconcile and to assume their responsibility for the problem. Each time the aim of the conference is the mutual help and support: integration of common efforts in the attempt to deal with the problem. Such integration provides the persons involved in the matter (preferably all close and extended family, even people significant for the child who may not be family members) with the opportunity to receive help, counsel, to undertake their own initiative to resolve the problem and to provide safety for the child. In the Family Group Conference the family is treated as “the expert”, as its members are linked with one another by specific emotional bonds, they possess the proper information (not revealed to the persons from outside), they highly recognize the specific family structures, they identify with its inner dynamic and their way of making decisions. Thus, common activities allow family members to engage themselves in the diagnosis, designing, implementation and monitoring of the common plan – they provide a real chance to change the problematic situation in the family.

As it has been already mentioned, the Family Group Conference method is more widely used by public social assistance institutions, institutions of family and child help as well as by social support organizations (charities, NGOs, denominational organizations). What is important is that introducing this method is fostered by the EU financial mechanisms – subventions granted to the social assistance units and the poviats centers of family support (Powiatowe Centra Pomocy Rodzinie).

In this context it is worth mentioning the wider activities initiated and facilitated by the Ministry of Justice, which are aimed at the promotion and popularization of the alternative methods of resolving conflicts and disputes. The Ministry carries out the activities in two categories: informative, educational social campaigns and trainings on ADRs. Social campaigns for mediation have been carried out since 2010 and they use various media and communication channels. They are addressed to three groups of people:

- The widest: society as a whole (the goal is to raise awareness on out-of-court methods of conflicts and disputes resolution, the role of compromise, consensus, restorative justice etc.);

- The narrower group: parties in disputes or conflicts – court proceedings (in this case the aim is to make aware that mediation allows to achieve agreement by the parties themselves, that it does not need to be imposed by the judiciary body);
- The narrowest: group of professionals: judges, persecutors, mediators, police officers, probation officers and law corporations working directly with the institutionalized judiciary system. The aim of these activities is in this case “to increase the access to courts, encourage to resolve conflicts and disputes by using ADRs with the help of non-formal, out-of-court institutions” including social institutions, NGOs etc.

The activities pointed at the widest target group are worth commenting on. The Ministry’s first social campaign was realized under the title *You have a right to mediation* in 2010-2011. It involved activities of education-information character regarding ADR, publishing a handbook *Can only court handle a dispute? Mediation and amicable judiciary. I am a crime victim, what next?* With broad supportive actions: distribution of over 400 thousands leaflets, 3000 posters, TV and radio spots, distribution of over 2 millions informational brochures about mediation as well as activities for children and youth: organization of thematic contests, debates and meetings, and finally presentation of movies and documentaries. Most of the information and educational materials have been published on-line at the Ministry’s website (<http://ms.gov.pl>) and in professional services. A year after the campaign, in August 2012 another, one-month long, nation-wide outdoor campaign has been launched for further promotion of mediation. The creations of the campaigns were exposed on billboards, so called *citylights* and within the Internet and press advertisements. Simultaneously, the logo of mediation was designed, the graphic image of intertwined hands with a signature saying *You have a right to mediation*.

The above mentioned activities are accompanied by other initiatives: realized in local environments by courts and institutions, in cooperation with external subjects and organizations, practitioners and representatives of science, the Human Rights Defender, the Children Rights Defender, mediation coordinators, social organization representing the mediators including the Association of Family Mediators and the Polish Center for Mediation. We can conclude that social campaigns and activities carried out by the Ministry’s initiative, concurrently with promoting and financing the Family Group Conference method are visibly present in Polish public and media spaces. The activity of other units such as including social help and integration institutions, associations and social organizations

as well as mediators themselves. In the context of low levels of social awareness on mediation and lack of rooted traditions of introducing these methods to the process of resolving social disputes, they are very important, extremely needed activities that require further development. It is up to us to support them, observe and monitor how they correspond with the real introduction of good mediation practices.

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PART FOUR

COLLABORATIVE LAW IN EUROPE

## COLLABORATIVE LAW IN EUROPE: INTRODUCTION

Marco Calabrese

L'Istituto Italiano di Diritto Collaborativo (Italian Institute for Collaborative Law<sup>1</sup>), founded at the end of 2009 and formally constituted on 12 January 2010, is the natural development of a 15-year experience carried forward by a fairly homogeneous group of lawyers and other passionate supporters of Family Law and Mediation practising mainly in the Capital of Italy.

Among the prior activities, it is worthwhile mentioning the Courses for Family Mediators in the Legal Field, sponsored by the National Lawyers Association in the period 2001-2003, the work carried out at the Roman School for Family Therapy from around 1998 to 2005, the founding of the First Centre for Family Co-Mediation at the Academy of Family Psychotherapy which goes back to the middle of the last decade, the foundation of the National Association of Family Lawyers-Mediators and, last but not least, the experience of the Family Law Consortium: the first Professional Multidisciplinary Family Law Office in Italy founded in Rome, located in Piazza di Spagna, and operating from 2007 to 2010.

Among all these origins, however, it seems fair to mention one in particular: the greatest credit in the development of law-integrated Family Mediation must undoubtedly go to the Family Law Consortium in London, from which we imported the Co-Mediation Model and the Multi-

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<sup>1</sup> *Italian Institute of Collaborative Law* is a multidisciplinary community of professionals founded in late 2009 to promote this type of Alternative Dispute Resolution (ADR). Mediators, Lawyers, Psychologists and Financial Experts explore abreast newer ways to reduce Court Conflicts, especially in Family Matters. All the members of IICL who have contributed to this volume are experienced professionals; many of them are authors of publications and essays on ADR related matters. IICL provides its members with training throughout Italy. Currently the Italian Institute counts 150+ members, it promotes the Practice of Collaborative Law at all levels in Europe, with the assistance of IACP (International Academy of Collaborative Professionals) a not-for-profit international community of legal, mental health and financial professionals, working in concert to support the development and acceptance of Collaborative Practice as a conflict resolution option. IACP supports Collaborative Practice worldwide by establishing and upholding the essential elements, ethical and practice standards of Collaborative Practice.

disciplinary method in the late 1990s: immediately described in the Family Mediation Code.

In all of the above-mentioned professional and associated experiences, long before the coming into force of Law 154/2001 (which in art. 342 ter c.c. establishes that the judge may, when deemed necessary, also order the intervention of the social services or a family mediation centre) and of Law 54/2006 reforming art. 155 of the civil code (which establishes in art. 155 sexies: “The judge may, when deemed appropriate and after having consulted the parties concerned and obtained their consent, defer the adoption of provisions set out in article 155 in order to permit the spouses to attempt mediation with the support of experts in the field in order to reach an agreement, with a particular view to the protection of the moral and material interests of the offspring”) family mediation in Rome was moving within a multidisciplinary field and a sector of family mediation during proceedings, which to express it in words now most current was no longer the transformative family mediation of psycho-social derivation and not yet a collaborative method rooted in negotiation aimed at settling legal disputes.

In actual fact, if it is still worthwhile to recall the debate of the late 1990s, each of the two “weltanschauung” just described sought to pigeon-hole Family Mediation within its own world vision excluding the other from a sphere claimed as solely their own.

It comes as no surprise then that both psycho-social and negotiation-based Family Mediation co-existed sealed off from one another, and that the concept of multi-disciplinary Mediation had an existence fraught with difficulty.

Nevertheless, in Rome there had long been the awareness that without total trust and the participation without reserve of the lawyers in the proceedings no effective family mediation will be achieved, because it is the lawyers who are the true custodians of family law.

Fundamental to all the above-mentioned experiences, there was the idea that:

- a) Mediation starts with a written pledge to resolve the dispute without resorting to the Judge’s decision. This pledge is called Agreement to Mediate, and is undersigned by the parties concerned in the presence of their lawyers, should proceedings between them be pending.
- b) Mediation is by its nature inter-disciplinary and cannot be carried out effectively without reconciling the professional services of both a legal mediator and a mediator in the psychosocial field.

As we have seen, the above-mentioned ideas were developed a decade before their evolution in Italy, which at the time was still stuck in the con-



cept of mediation's absolute "freedom of purpose", abstractly parallel to or at any rate disconnected from the legal separation proceeding (and thus ultimately useless or of very limited impact, socially).

In November 2009, in order to drink at the fountain of new developments in Europe, a delegation from the Italian Institute for Collaborative Law travelled to London to examine local developments in Family Mediation and the brand new discipline called Collaborative Law or Collaborative Practice.

The version brought back to our country was slightly modified from the already existing model described above.

Not only is the consent of the lawyers necessary in order to begin the collaborative proceeding but necessary as well is the undersigning on their part of the same agreement signed by the parties: with however, a fundamental difference from mediation.

The difference arises from the clause requiring the lawyers to withdraw from the case in the event of a failure of the mediation process (the *rectus* of Collaborative Practice).

This proceeding, which is very similar to the Italian formulation of professionally balanced co-mediation, had already existed for many years in the United States and was just being introduced into Europe: it was called – as we said above - Collaborative Law (or Collaborative Practice) and could not/would not be relegated to the sphere of family law, being as it was a technique that could be applied in all civil disputes relating to human relationships in which it was foreseen that the relationship of the parties concerned would continue over time.

Thus, within the space of a few months from the end of 2009 the Institute was founded and associated to the International Academy for Collaborative Practice which started up courses and activities leading to awareness of collaborative law among hundreds of Italian lawyers.

Early studies and daily practice show differences – at times even important ones – between the Anglo-American model of collaborative practice and the continental type. In Anglo-American practice, in fact, the interpretation of marriage as a "partnership" to some extent conditions the collaborative proceeding, where a predominant part is established with the division of the family assets. Such problems exist only in part in Continental Europe, where the different juridical culture establishes more precise provisions for purchases *iure successionis* – and all purchases made by the spouses before and during the marriage in general.

There seems to be also a greater tendency to dissolve the matrimonial bond in Countries of a Protestant background, which makes the Continental approach to Collaborative Practice even more dissimilar.

It is still too early to say whether this will lead to an autonomous model of Collaborative Practice, or only to a variant of the same.

What is certain is that the new creature can already avail itself of tremendous national and international energies: and it is fitting that the description of the way Collaborative Law functions be entrusted to the efforts of those most involved in practising and promoting it.

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## COLLABORATIVE LAW

Marina Petrolo

In the 1990's in the United States a new trend started to develop, with the focus on an approach to law and law practice which was global, integrated, humane, comprehensive, healing and often therapeutic.

The *Comprehensive Law Movement*, as this new trend was called by American lawyer and academic Susan Daicoff, is the end result of several new disciplines that have rapidly gained visibility, consensus and acknowledgement and which represent new, emerging and alternative forms of law practice, conflicts resolution and crime justice.

The cornerstone and main vector of the new trend is *Collaborative Law*, which was started in 1990 by Minneapolis-based lawyer Stuart Webb and rapidly developed in the rest of the US, to the extent that, in several states, county courts nowadays apply only this form of law practice.

Canada followed suit and a recent report by the Canadian Department of Justice stated that the unrivalled spread of collaborative law represents one of the most relevant phenomena of the past twenty five years in family law.

Australia and New Zealand have also endorsed the movement and law schools at a number of Australian universities currently offer collaborative law courses.

It was the UK which first pioneered collaborative law in Europe. Sir Paul Coleridge, one of the most distinguished British High Court judges, in October 2007 stated that "it is time, if not late already, for a new concept like collaborative law, simply because collaborative law aims to take part in the revolution in family law over the last few years in order to change our culture and approach to family litigation".

According to Susan Daicoff, law practice "with a therapeutic twist" has great transformational potential. It can be a means to start facing the "tripartite crisis" of law practice in the US, due to

- loss of professional competence,
- public opinion's negative consideration of lawyers,

- high levels of stress amongst practitioners.

Collaborative law has the potential to turn the legal system into a more stimulating, humane and comfortable environment for clients, lawyers, judges and society as a whole.

The most important disciplines – the so-called “vectors” – that can merge into this Movement are:

***Collaborative Law***

According to the *Collaborative Law Institute of Minnesota* definition, it is a method that helps resolve divorce litigation and all related matters. In such a context, collaborative law helps reduce conflict (not without pain or consideration of disagreements), by trying to reach a settlement.

The two parties and their lawyers commit to work together, in good faith, to reach an agreement that works for everybody involved, not just in legal or financial terms but emotional as well, without conflict or appeal to the courts.

At the beginning of the process, the parties and their lawyers under-sign an agreement whereby they commit to:

- mutually exchange all pertinent financial information;
- treat the whole process as confidential, so that all parties can feel free to express their needs or worries;
- reach a written agreement on all key points without going to court, which the parties’ lawyers are nevertheless entitled to present to the judge as a preliminary agreement when filing for separation or divorce.

Collaborative lawyers sign an agreement with their clients which disqualifies them from representing them in court if the collaborative process breaks down. That means they are absolutely committed to helping clients seek the best solutions by agreement, rather than through conflict.

Other possible vectors are:

- *Creative Problem Solving*
- *Holistic Justice*
- *Preventive Law*
- *Problem Solving Courts*
- *Procedural Justice*
- *Restorative Justice*
- *Therapeutic Jurisprudence*
- *Transformative Mediation*

According to Susan Daicoff, all these “vectors” have two common factors, which allow them to merge into one single movement.

The first one is that they all acknowledge that law practice can trigger positive individual and interpersonal change and aim to positive outcomes

– such as healing, integrity, harmony and wellbeing – as part of the resolution of any legal matter. To avoid the emotional distress that typically comes with traditional divorce litigation, many of the “vectors” clearly pursue non-confrontational solutions to legal matters.

The second common factor among the Movement’s vectors is - again according to Susan Daicoff - that each vector attempts to integrate and enhance, within the law practice, non-judicial interests beyond standard rights and duties.

Such factors, defined by Pauline H. Tesler, co-founder of the Collaborative Law Institute, as “rights plus” include: needs, resources, goals, moral values, beliefs, emotional issues, wellbeing, personal development, interpersonal relations, community welfare. While a good “traditional” lawyer may, implicitly or subconsciously, consider all such factors when assisting his/her client, the Comprehensive Law Movement differs from the traditional law practice approach in that it explicitly values interpersonal, emotional and psychological aspects. It highlights these factors’ value within law and seeks to train law professionals to deal with them in the most appropriate way. The Movement’s revolutionary character, Daicoff claims, thus becomes evident.

Thus collaborative law responds to the need to reposition the family law practitioner so that he/she becomes to a real judicial partner within the family crisis. It enables lawyers to offer their clients a number of additional services that better respond to their expectations and needs. It also reminds them that dealing with family law and financial assets issues require particular skills, and that different fields of expertise are necessary when trying to bring about firm and definite solutions.

Collaborative law therefore suits those lawyers who are willing to change their professional behavior and adapt to a radical attitude change, by adopting peace-making intents within family conflicts in the awareness that in the future, as families become more multi-cultural, they will need global resolution proceedings to resolve transnational conflicts.

### **Explaining this development**

In order to respond to all legal issues after the liberalisation of divorce in the 1970s and to the resulting increase of proceedings, most countries initially applied the same resolution procedures used in civil law litigation. Nowadays, such measures have proved to be inappropriate, because of the great number of family litigation cases and because of the particular nature of family litigation.

Many countries are now reconsidering their approach towards these issues due to the general deadlock in family law in most judicial systems.

In particular, new forms of accessibility and understanding for the individuals are needed. Ultimately, the goal is to find effective and pragmatic ways that help decrease state intervention within the family remit.

According to a recent survey in the US, 80% of those who obtained a positive outcome to their family lawsuit, were nevertheless unhappy. And presumably 100% of those who lost their case were dissatisfied as well.

Such dissatisfaction, which often undermines the lawyer's image in public opinion, could be explained by the discrepancy between the way a lawyer traditionally perceives his/her own role in family law and what the legal implications of a divorce, and its own dynamics, actually entail.

The peculiarity of family law lies precisely in the fact that, regardless of the separation lawsuit results, the relationship between the two parties will most likely continue. As the senior French jurist Carbonnier used to say, the marital couple may be dissolved, but the parenting couple is indissoluble.

Assuming that typically clients require two years before accepting circumstances and being able to precisely establish their real assets, the initial instructions they give their lawyers are often at variance with their real wishes once the priority-setting process is complete.

"Win/Lose" types of situations and problems for clients in the priority-setting process, therefore, often explain why judicial solutions, including those stemming from an agreement, are not always conclusive and occasionally generate new legal disputes or the implementation of radically different resolutions.

It is therefore evident that the social and human cost of mismanaged separations is enormous.

Because of such observations, collaborative law is based on the wish of all parties involved to find a constructive and conclusive solution to all family arguments, together and with dignity.

### **The Collaborative Law Proceeding**

Collaborative law, as an out-of-court procedure for conflict settlement, is based upon a contractual commitment, through which all parties involved promise to respect all its key principles and guidelines.

In addition to a common code of conduct, collaborative law puts in place a particular resolution process whereby two individuals with opposite stands in a family dispute, each choose a collaborative law practitioner and together, during regular "two plus two" meetings, seek an appropriate solution to their disputes.

### *1) The client's commitment*

By undersigning the collaborative participation agreement, clients commit to respect its key principles:

- To seek a negotiated resolution without resorting to litigation, unless all parties agree to it. This crucial commitment means that, during negotiations, neither party can threaten to go to court to have their claims backed up. Through collaborative practice, even non -“judicially relevant” issues (e.g. in-laws, new partners, etc.) can be identified, discussed and negotiated so that a mutually acceptable solution can be endorsed and represented in the agreement.
- To seek a mutually beneficial solution which respects and enhances the interests of the children as well.

Negotiation rounds are not ruled by the parties' stances, rather by their interests, and they actively participate in the fulfillment of the solutions found.

Collaborative law practitioners will attempt to identify issues and interests to be resolved (negotiable arguments, discussion topics); they will ask their clients what really matters to them, what their preferences and priorities are, in order to gather all necessary information on the interests and issues to be tackled. They will also “adjust” such information, in order to help their clients to move from their stances towards their interests and focusing on a clear perspective of the debate's goals.

Once this process is finalised, clients need to drop their stances and reconsider the situation in terms of interests and negotiation points.

- To communicate with dignity and respect, avoiding derogatory, insulting or abusive speech or retrieving old arguments.

When feeling belittled or criticized, clients find it hard to accept a fair and equitable solution which requires them to make an extra effort to move away from their initial stances.

Collaborative law uses communication techniques, such as “rephrasing”, which allow those on the receiving end to confirm the information they receive with no negative connotation, therefore recreating a cooperative atmosphere.

Collaborative law is focused on the future and the search for solutions for the years to come.

- To avoid discrediting the other parent with children, and instead to foster cooperation between parents and children.

It is important to note that if the collaborative law process takes the children's interests into account, it will by no means permit them to participate in the negotiation rounds. It is exclusively the parents' task to co-

operate on all issues and properly handle their children's upbringing and well-being.

- To be honest and fair when disclosing all relevant information, including data of a financial nature, all information requested by the other party, along with any kind of information bound to be important in the future within the framework of the dispute settlement.

The parties commit to exchange all relevant financial information regarding their income and assets because an agreement based upon false information relating to assets will be considered defective.

Even within this kind of proceedings, collaborative law practitioners adopt measures to protect the client. For example, once a lawyer collects financial documents from his/her client, they are copied, numbered, sealed with a "collaborative law" stamp and filed. Such files are kept in the lawyer's practice and cannot be copied, nor disclosed unless all parties are present.

If both parties agree, it is also possible not to provide all documents, and simply state if, for example, one of the parties owns assets or investments overseas for a certain amount.

- To jointly provide the necessary instructions to other professionals involved in the proceeding (e.g., mediators, child psychologists, financial advisers etc.), with particular reference to those enabling them to work with a collaborative approach.

Thanks to its embedded flexibility, the proceeding allows for the support of experts who will be able to assist the parties involved in the collaborative negotiations. Such professionals receive the information at the same time, are experts in the collaborative proceeding and fully understand its principles and mechanisms.

## *2) The collaborative practitioner's commitment*

- The lawyers pledge to observe the principles that govern this methodology for conflict resolution.
- The lawyers declare that they are acting independently of one another while representing and advising their own client. They commit to cooperate and work with each other in the most transparent and constructive way possible.

It is worth remembering that, although based on the concept of team work, in this proceeding the lawyer's first priority remains to assist and advise his/her client. The lawyer's main responsibility lies with his/her client, but this mission is set within a framework where all the parties involved focus on seeking an agreement.



- The lawyers, as well as all other experts involved, commit to withdraw if the proceeding fails or if one of the parties resorts to a court proceeding or in case one of the clients does not act in good faith or manipulates the collaborative proceeding.

In such instances, clients will start a new court proceeding with new lawyers who will have no access to those confidential files developed during the collaborative proceeding.

It is likewise imperative that they communicate with transparency from the very beginning of the proceeding in order to guarantee its positive progression, firmly reminding their clients of such obligations. If, on the one hand, the collaborative proceeding is a flexible practice – insofar as it focuses on the parties’ needs – on the other, it is rather well-defined and governed by legal ethics which lawyers must safeguard.

Only through this essential commitment, can the trusting environment peculiar to collaborative law be created. Both lawyers and clients are aware that none of the disclosed information may be used in an eventual court proceeding.

And this provides an excellent incentive for all parties to pursue a creative resolution, which will allow them to keep, and even strengthen, what they have achieved.

### *3) Common pledge to privacy*

Should the collaborative proceeding fail, those files with the “collaborative law” stamp (documents, meetings minutes, experts’ reports), cannot be used in court.

During the proceeding, clients pledge not to disclose any information, unless otherwise agreed. This pledge safeguards the principle of leaving others (family and friends) outside the couple’s disputes.

### *4) Steps of the collaborative proceeding*

The collaborative law proceeding is based on meetings between the two clients and their lawyers taking place at regular intervals agreed by all parties.

Dates and agendas for such meetings are fixed according to the identified issues and established priorities. It is important to quickly find temporary solutions in order to ensure a positive atmosphere and help clients reach an agreement on other issues.

Between four and eight meetings are generally required. The meetings last an average of two hours, normally once or twice a month, with preparatory meetings between lawyer and client before.

This kind of proceeding allows a distinction to be made between collaborative practice and traditional negotiations, not only because standard negotiations are usually based on remote communication (fax, letters, phone calls and emails), occasionally requiring a final meeting, but also because with standard negotiations, the will to reach a settlement is often determined by a triggering factor (date of the final meeting, date of the hearing, etc.).

It is also different from mediation, although they share some common techniques (e.g. such as active listening), given that a mediator acts alone with the two parties.

In collaborative law, the support of a lawyer and the possibility of resorting to outside experts, reassure the clients and encourage them to work towards achieving a negotiated settlement, even if they fear the adversary party or feel psychologically and intellectually inferior.

Collaborative law does not aim at replacing existing methodologies for conflicts resolution which prove to be applicable to specific problems, for example the children's upbringing, or when litigation in courts has already started.

Collaborative law merely represents an alternative, independent practice which requires the necessary cooperation with judicial authorities.

The court environment will be more suitable to particular cases of family crises, for example involving domestic violence, or to that 10% of "high conflict" clients, for whom collaborative law cannot offer appropriate solutions.

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## THE LAWYER AND COLLABORATIVE LAW

Novella Telesca and Laura Nissolino

Collaborative Law has finally recognized the important role of the lawyer in the out-of-court settlement of disputes. Lawyers are the main protagonists of this new alternative dispute resolution procedure which gives the parties concerned the power to self-regulate their relations and assigns to their respective lawyers a central role in assisting them during negotiations aiming to find a consensual solution to separation or divorce or the modification of divorce or separation conditions or the regulation of relations between unmarried parents.

There is no doubt that through collaborative law, which foresees negotiation between the parties assisted by their respective attorneys, there is an enhancement both of the self-power of the parties in conflict and the negotiation and mediation role of their collaborative attorneys.

This is thus a context in which the role of the attorney and his/her negotiating function takes on particular significance. For attorneys, collaborative law constitutes an important utilization of the tool of family mediation in the negotiation process.

The lawyers play a central role in assisting their respective clients in the negotiation process aimed at reaching an agreement which, once achieved, must then receive Court approval. The procedure therefore by no means leads to the dismantling of the judicial system and rule of law, since it does not involve any process where Court jurisdiction is removed or lead to a lessening of the right to defense by a lawyer.

On the contrary, the process constitutes a broadening of the lawyer's role in protecting and defending the rights of persons.

The judge's powers with regard to the status of persons and the protection of inalienable rights thus remain intact. In cases of resolution of a dispute, in fact, the collaborative process concludes in a routine filing for consensual separation or divorce, or a joint filing pursuant to art. 317 bis c.c., or to art. 710 cpc, or to art. 9 Law 898/70. The respective attorneys will deposit the petition of divorce or separation in Court.

The judge's power of control over the separation or divorce agreement thus remains intact, and consequently the clauses relating to the relations between the couple are concerned solely with legitimacy (the free nature and serious intent of the agreement expressed by the couple, as well as their non-opposition to imperative rules and regulations, public order and decency). If there are children involved, the powers of the judge, as is well known, will be more forceful, by going more deeply into the merits of the conditions – that is, with regard to their conformity to the interests of the minors involved.

At present, formalization of an important value in the Rules of Conduct for the Legal Profession is lacking, that is the conciliatory function of the lawyer, which is fundamental for the lawyer who deals with family law disputes. Only on the formal plane in fact will the formal ratification of the duty of conciliation appear to be at variance with the defense mandate received from the client.

In fact, close consideration will show that defense also involves choosing the right and appropriate strategy. Furthermore, the Preamble to the Rules of Conduct for the Legal Profession states that the lawyer must keep watch over the compliance of the laws with the principles set out in the Constitution for the safeguarding of human rights and European Community regulations. And moreover, since the Constitution in Article 29, clause 2 specifically protects family unity, lawyers can also be considered to be the bearers of an important moral obligation in the negotiation and settlement of family disputes.

The lawyer who deals with the delicate and complex matter of family law in fact carries out a fundamental social function and, as Calamandrei affirmed, the greatest social utility lawyers can exercise is precisely that of listening to their clients. The hours spent in receiving clients are, according to Calamandrei (1950) hours spent above all in attending to human suffering.

It has unfortunately become all too evident that disputes following a separation are taking on ever more shrill and exasperated tones. Too often family disputes turn into tragedies. It will suffice to read the newspapers to verify the truth of this assertion.

Hence, the duty of lawyers to be constructive in their legal offices and to make their clients understand that disputes can be settled through dialogue and that consequently they must enter into a spirit of dialogue. This can indeed be difficult for the parties to do but it is absolutely necessary in order for them to be able to continue raising their children within a shared perspective, even when the respective choices relating to their personal lives are quite different. And the importance of this is also borne out

in light of the proven inadequacy of the litigation process in dealing with the delicate situations of separation and divorce, given the devastating effects – both on the economic and personal plane – of separation judgments which take longer and longer to reach and are often characterized by strong animosity and hostility, if not hatred, with the serious risk of becoming for one’s own children a model of behaviour based on hatred and revenge towards the other parent, with all the foreseeable consequences on the psychological plane as well.

But if collaborative law is a method for achieving a consensual separation (or consensual divorce or an agreement pursuant to article 317 bis c.c., or to art. 710 cpc or art. 9 Law 898/70), where ultimately is the novelty compared to the “consensual” procedure? What is the difference between a consensual separation and a “collaborative” separation?

Collaborative law is a more advanced process and its power resides precisely in the “formalization” of the collaborative process, in the regulation of the related procedure and in the specific rules which govern it. The formal definition of the collaborative process means that the process is carried out in accordance with precisely defined stages as well as precise rules of behaviour.

In a “consensual separation”, efforts to bring about an agreement between the separating couple are most of the time consigned to the good will of their lawyers who exchange letters, talk, meet, provide feedback to their respective clients and then exchange further correspondence via fax or email or certified email system (given the variety of ways in which we can transmit communication!). Negotiation between the lawyers is reduced for the most part to a continuous exchange of documents. Thus, the two spouses – who have shared a life together and often are still living under the same roof – talk to each other through their lawyers. Each will ask his/her lawyer for news about the reaction of the other concerning every proposal. And this system of communication often leads to misunderstandings and misinterpretations, thus putting resolution and agreement further and further out of reach.

The situation in the collaborative process is entirely different. Each spouse is assisted by his or her lawyer (thus the parties do not have direct discussions), but all of the parties concerned – spouses and lawyers – pledge to follow a ‘protocol’ which foresees a series of meetings in which both the lawyers and the two parties always take part.

Participation is in fact the element on which the collaborative process hinges: the spouses are never excluded from the “negotiating table”; in fact, it is they who conduct the negotiations, assisted by their respective

attorneys (in the role of consultants and guarantors of the rules of the collaborative setting).

The discussions must be transparent, and transparency fosters communication. There is no danger of misunderstanding.

In the “traditional” negotiating process some fundamental information is often “overlooked” – that is, it is not provided because the spouses refuse to do so (with a view to gaining an advantage over the other in court); there is no discovery with regard to the elements related to economic and financial assets which will only be revealed during litigation, when the other party asks the Judge to acquire evidence relating to the circumstances as set out in Law 183, VI clause 2.

In the collaborative procedure, on the other hand, each of the parties pledges to spontaneously furnish all the elements that can be of use to the other party and to provide information and documents which would in any case be acquired at the end of a long, painful and costly process.

During the entire collaborative process both parties, moreover, agree not to resort to judicial authority to resolve their dispute until they have reached an agreement, which will be approved by the Court.

Collaborative law is based on a commitment not to go before a Judge.

This commitment in turn requires a commitment on the part of the lawyers to immediately and irrevocably refuse to take the case should one of the parties decide to apply to the judicial authorities or even only threaten to resort to litigation.

Should there arise an impasse or a halt in the collaborative process, the commitment not to resort to the judicial authorities must prompt the parties and their lawyers to work together to seek the most appropriate solutions – including ones that are not usually considered – in order to preserve any points of agreement already achieved and to avoid nullifying work already carried out.

The collaborative lawyer must seek to help his/her client to compare his/her expectations with the relative laws and jurisprudential orientations, helping him/her to understand the position of the other party as well. He/she must explain to the client that the solution to be sought must be one which protects the interests of both clients and those of their children as well.

The tools used by the family collaborative lawyer must perforce be the following:

- a high level of competency in family law, acquired through appropriate specialized initial courses and in continuing education programmes, along with professional experience acquired “in the field”;

- Moreover, in addition to being enrolled in their professional association, the lawyers assisting the parties concerned in the extra-judicial procedure of collaborative law must have had specific training in collaborative law, acquired through participation in a training course in accordance with the international standards established by the IACP. Competence in the field, we would say, is the backbone of the collaborative law profession.

The requirements of competency and continued professional training established by the Rules of Conduct for the Legal Profession in articles 12 and 13 are fundamental for the practitioner of collaborative law.

The professional and technical qualifications of the lawyer must go hand in hand with the deontological requirements, as the decisive factor in successful practice. The collaborative lawyer is of course well-trained and competent on the technical-judicial plane, but he or she must also be strong in the ethical and deontological spheres.

To sum up briefly, the collaborative lawyer is neither a consultant, nor a negotiator, nor a mediator, nor the defense lawyer in the mediation, nor the defense lawyer in the consensual procedure, nor finally the defense lawyer in the judicial procedure. He or she rather assists his/her party in the collaborative process: by providing an initial consultation in order to explain the possible procedures (orientation); encouraging the parties to get to know each other better (listening, curiosity...); establishing the existence of conditions which exclude or make the collaborative procedure tool difficult (doubts regarding honesty, physical or psychological violence, drugs, alcohol, depression or other psychiatric pathologies, lack of empathy...); clarifying the importance of choice for the client and the different modalities/responsibilities which each procedure involves; helping the client to identify the aims and interests involved (the welfare of the children, the need to listen, costs, time involved...). The collaborative lawyer guides his/her client through the collaborative process, which is focused on the future, by helping him/her to identify goals and to generate creative solutions which protect all the members of the family, and by encouraging strategies which will give the best results (“active” listening; gathering of facts; identification of problems and urgent issues; conflict management; softening of positions of inflexibility; development of options and negotiation of solutions).

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## FROM SOFT LAW, TO MEDIATION, COLLABORATIVE LAW, AND PARTICIPATORY PROCESS WITH LEGAL SUPPORT

Marina Marino

To begin with, an analysis – albeit brief – is necessary of the changes that have occurred in the legal sphere since the second half of the 19th century. Over the years, the Law has lost its centrality coming to what Natalino Irti (1979) has called age of De-Codification, characterized by a proliferation of uncoordinated laws, by formulations that are increasingly vague, equivocal and ambiguous.

This crisis was made evident by the regulations of European Community Law, where the capacity was upheld of EU treaties to derogate from the constitutional system of legal sources, emphasizing the power and duty of national judges and public administration organs to “dis-apply” – that is, to consider inefficacious – domestic regulations at variance with directly applicable European Community law. A further element in the crisis of domestic law is private international law, and the so-called *lex mercatoria*.

In Italy, this framework of over-abundant legislation, modified without any comprehensive oversight, has left judges with a disconcerting level of discretionary power – at times even sheer inventiveness – to such an extent that Prof. Alessandro Giuliani (1981), affirmed that “judges in civil law systems today find themselves dealing with problems analogous to judge-made laws but without the cultural background of the common law countries”.

From this derives the current fragility of the principle of certainty of law and consequently the need to recover the fundamental principle according to which certainty is not only an element pertaining to the moment in which law is produced but also an aspect of its application. Doctrine has maintained that the solution must be sought in the role to be assigned to the Constitution, which would make it possible to bring a new unity to the system. Precisely because constitutional provisions are the parameters of legitimacy for ordinary legal provisions, as such they ought also to have the capacity to reduce uncertainty of law to a minimum, since



it is the constitutional provisions themselves which are the framework of reference to be kept in mind (Irti, 1979; Zagrebelsky, 1992).

Certainty of law is still the fundamental element of judicial systems in contemporary societies characterized by a legal system which manifests itself as a dynamic entity in continuous metamorphosis and thus by soft law, to follow Zagrebelsky's by now famous definition. The author believes that soft law is set apart by its possibility to achieve a legal solution in actual cases by means of an argumentative procedure which makes the solution adopted – albeit not in fact the only one possible – recognized as legitimate and not arbitrary, insofar as it is the one which can best be argued in light of and according to the principles upon which the law is founded.

The term “soft justice” has been frequently used in recent times, to indicate an aim – considered desirable by those who use this term – to which must tend not only the production of laws and regulations but judicial functions as well. In view of the delicate nature of the term, it will be useful to recall what soft law in effect comprehends.

The first practical application of the experience of “reparation” justice (alias “soft”) whose source is found in legislative decree 274/00 established the penal competences of the Justice of the Peace for a series of minor crimes related for the most part to the so-called private micro-conflict through on the one hand the conciliatory intervention of the Justice in the pre-trial stage, which for crimes liable to prosecution in a lawsuit aims at the settlement of opposing interests and avoidance of a trial; and on the other hand the recognition of the power of impulsion in the trial to the person offended by the crime, which has the purpose of making the person effectively a part of the trial process with reference to the resolution of the conflict as well.

This is thus an experience which is closely connected to a reflection within the penal justice system, to the function of punishment and the nature of the offences thus regulated. Since the above-mentioned reforms have been in effect for a long time it becomes necessary to take stock of not only how the reforms are functioning, but to establish at the same time whether the aim which the legislature had in mind in passing the laws was achieved.

Within the sphere of civil law, soft law criteria are resorted to in all the so-called conciliatory cases which essentially permit conflict resolution by resorting to a third party mediation figure without resorting to the intervention of a Judge. In Italy, mediation started to be mentioned in the 1980s as a tool to be used in the sphere of family law, on the basis of experiences being made abroad during those years, and debate was particu-

larly heated between family law practitioners and proponents of mediation as a tool for preventing the couple's separation dispute from causing harm to the children. Over time and with increased reciprocal familiarity family mediators became aware that they were intervening in a matter where both the emotional relationships of the family members and their individual rights were tightly interwoven. In our country, family mediation remains a tool that is little utilized, and this may be also due to the fact that such experiences have not proven to be particularly excellent, perhaps because in the persistence on the part of some in using this tool, it has been used too many times precisely in those cases which

Due to their particular characteristics should not have been the object of mediation. Finally, there is no doubt that since our country is extremely conservative when it comes to anything that intervenes to change an established system, this tool pays the price of the fact that it is of recent implementation.

As mentioned above, the first text in which soft law is mentioned is a book by Gustavo Zagrebelsky, "Il diritto Mite", published in 1992 in which the author asks questions such as: Do the rights of Man depend on laws? And what do the exigencies of Justice have to do with laws? The answer which the author gives is decidedly singular since he affirms that it cannot be found in constitutions, legal codes or decisions, which the author defines as a "Babel of tongues", but that on the contrary, a comparative analysis needs to be carried out of the general ideas and the pluralisms of the cultural, ethical, religious and political spheres which characterize and complicate present-day society. It thus seems evident that the author offers a peaceful and democratic proposal, but it must also be said that this conception is characterized by a good dose of utopianism as well. Above all, however, he does not take into consideration the fact that while it is true that laws can no longer be either the expression of individual interests or formulas for universal and immutable conceptions that someone imposes, it is at the same time undoubtedly true that the denial of justice, which characterized our country in all these years, can be attributed to a legal system which has not been capable of offering functioning judicial services to its citizens. If this is so, one cannot make such a dangerous and serious confusion between jurisdiction and the production of laws. There is in fact no doubt that it will be up to the legislator to make choices which achieve not so much a soft justice, but a justice which respects the pluralism of cultural, sexual, gender, political, religious and ethical differences which characterize our society. Thus, for law to be soft, it must first of all be just and consequently harmonize all the diversities for which equal rights must be recognized.

Finally and, from another standpoint, the expression “soft law” alludes to a theoretical view of law, according to which law must take on more fully the function of “a tool for co-existence among diverse people, rather than the coercion of the strong over the weak, a law of reasonableness and moderation” (Irti, 1979; Zagrebelsky, 1992).

If the criterion of soft law applied to jurisdiction is not supported by a law that constitutes its source, it is at risk of being very dangerous. The function of jurisdiction is in fact the resolution of disputes through (and with the obligation of) the application of the laws in effect, so that it would be unthinkable that a Judge could shirk the responsibility of judging that is proper to the role.

Equating soft law with soft justice must be condemned: such confusion leads to truly devastating consequences with regard to the fundamental principles and undermines the principle of the division of powers by confusing the legislative function with the judicial one.

A primary aim of the legislator ought to be to foster all those forms of definitions of conflict bringing about a non-intrusiveness of the State in decisions that relate to interpersonal relations and personal desires.

Within this sphere, the role of associations which work in the field of family law is fundamental both in terms of the proposals that can and must be formulated and the development and implementations of policy strategy. These associations have the task – not only at national but at European level as well – to represent the voices of their members who work with family and juvenile law and the greater their presence and participation the more evident will be the outcomes achieved in this sense. The more professional the workers in the field are, the stronger and more determined will be awareness of the relevance of tools such as mediation, collaborative law and participatory procedures with legal support, and of their importance in resolving family crises.

Associations in this sector should also set themselves “cultural objectives” and organize meetings which deal with new fields of intervention such as the ethical conduct of lawyers in family and juvenile cases, meetings on conflict management by lawyers, collaborative law, participatory procedures with legal support, and mediation.

Fundamental issues which the associations must deal with include access to the different professions, training and above all specialization. And here we cannot but take into consideration the experience in the field of other EU countries, for example with regard to the legal profession since it is not possible today to conceive the lawyer of the future if not within a European dimension since the way lawyers are trained today must be different to the past. It will suffice to recall that once at Temple

Inn (one of the Barristers' Chambers in London) in order to become a lawyer it was necessary to take part in 17 dinners with the members of the Chamber, a fact which underlines how at the time the exchange of ideas with the Barristers was considered to be suitable training considering how much the aspiring lawyer could learn on those occasions in debates and discussions with more experienced barristers.

If the outcomes of meetings among European lawyers are followed and the issue is studied it will be possible to discover that some principles which are important and characteristic of the way we practise as lawyers of the IICL are a heritage shared with others as well. In fact, it will suffice to consider the fact that Peter Kroves, of the Council of Bars and Law Societies of Europe, underlines that an important objective lawyers must learn is one he defines – by adapting the triple bottom line concept of corporate social responsibility – as “triple accountability” which in addition to profit has to do in a particular way with people and the planet. He means thus to clarify that it is important for lawyers to assume accountability to people and the world; and consequently in fulfilling this responsibility, the young lawyer must first understand what it means to be a lawyer today and must also appreciate that, in addition to considering the case at hand, he/she must at the same time always serve the public interest.

Training must be concerned with conflict management and the choice of defense strategy which must never neglect the obligation of responsibility towards people and society – in a word, the social responsibility of lawyers. It is therefore of fundamental importance to ensure the quality of service practitioners in the field must provide to citizens and thus the issues of access, of continuing education and specialization have become fundamental aspects on which to focus and it is in this direction that the CCBE is moving in order to develop a uniform code of conduct for all European lawyers.

It is necessary to make a common heritage of the work of the practitioners which urges everyone involved to reflect and discover the importance of establishing and enhancing one's own goals for the future in order to achieve a further new defensive function characterized not only by the defense of rights, but also by the capacity to encourage all parties concerned to build a future perspective.

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## A NEW ADR: COLLABORATIVE LAW

Desirée Giudetti

### **The birth of collaborative law**

The birth of collaborative law generally dates back to Stuart Webb, a Minneapolis-based lawyer, who, during the 90s, after a long career in matrimonial law, decided to find an “alternative” solution to the frustration and stress experienced by himself and his clients following court proceedings. He therefore stated that he would no longer appear in Court to represent his clients in cases of matrimonial law, that he would devote his best efforts to helping them to regulate their interests through negotiations, and that, should the parties not reach an agreement or should an agreement not appear possible, or where for other reasons, it would have been necessary to resort to litigation, he would terminate his power of attorney, abandon the trial and require the parties to appoint other lawyers to assist them in the court proceedings (as per the letter from Webb, S. to Hon, A.M. « Sandy » Keith, Judge on the Supreme Court of Minnesota, 14th February 1990). As a result of this idea, a group of lawyers was trained under the leadership of Mr. Webb, and the idea took shape of drawing up an agreement, in which the two spouses would accept to negotiate being assisted by their respective attorneys, as per the principle of good faith and provide for the withdrawal of the parties’ lawyers, if, upon failure of the attempt at negotiation, they should decide to refer the case to an ordinary judge (Shea & Clairmont, 2006). Since then, the idea of this new method for conflict resolution rapidly spread from the United States to Canada and reached Europe, where, in 2006, the first conference on collaborative law was organised in Austria, and then in England Sir Paul Coleridge (2007), High Court family law judge for England and Wales, stated, on that occasion, that “the collaborative right is a concept whose time has come, and actually this time should have come long ago, simply because the purpose of collaborative law is to take part in the revolution which already started few years ago in family law and to change the conditions and background of family disputes”.

It was in France, however, that collaborative law found its first and

true acknowledgement within national laws. The search for an improvement of the role of the lawyer, as regards the new requirements of society, led to the introduction of the so-called *participatory procedure of negotiation with legal support* (Law no. 2010-1609 of 22nd December 2010) and the recognition of the juridical effects of the “*acte sous signature juridique*”. The proposal “L’acte sous signature juridique” was made for the first time at the Conférence des Bâtonniers de France, on 25th September 2003, and was supported until the approval of law 2011-311 by the French National Assembly on 28th March 2011, by CNB (the National Council of French Bar Associations) and FBE (European Bars Federation), a private deed drawn up in the presence of one or more lawyers, signed by the parties and countersigned by the lawyers who had assisted them, involving the professional liability of the latter upon signing.

### **Collaborative law in Italy**

Collaborative law arrived in Italy in 2010, through the creation of two institutes: the Istituto Italiano di Diritto Collaborativo, IICL, (Italian Institute for Collaborative Law) with its offices in Rome, and the Associazione Italiana Avvocati di Diritto Collaborativo, AIADC (Italian Association of Collaborative Law Professionals) with its offices in Milan. Following the creation of these institutes, a number of meetings were organised on collaborative law, which led to training courses on the above-mentioned method with reference to separation and divorce. Among the last was “Corso Base di Diritto Collaborativo” (basic course on collaborative law) organised by the Italian Institute for Collaborative Law, 26th-27th-28th November, 2012 Rome. This was due to the fact that, unlike other countries, in Italy the major application and extension of collaborative law is found within family law.

But what is collaborative law? As briefly explained above, collaborative law is an alternative and out-of-court method for dispute resolution, which allows for avoiding litigation in court. Far from being imposed by any law provision, it is essentially based on a contractual engagement in the form of a *collaborative agreement*, in which all parties involved undertake to comply with the guidelines and essential principles of collaborative law (Briganti). Starting from these theoretical assumptions, a technique has been designed and improved over time, which aims at reaching the above goals through team work, necessarily involving at least the two parties and their respective lawyers and, if required, other professionals, such as an accountant or financial expert, or one or more experts in family relations. To use an English term, the so-called “coach” who may unblock difficult situations or more generally provide clear and professional ad-

vice to the parties on one or more matters concerning the negotiation (Blitz, Boudart, 2011, p. 408). All of the professionals involved receive an appointment that is limited to reaching the agreement, and none of them shall perform its professional activity in the litigation proceedings between the parties, which may follow the collaborative procedure, should it fail (Marcucci, 2011). It should be pointed out that in France, the withdrawal by lawyer occurs when a collaborative law agreement has been signed, but not in case a participating procedure is started; in this latter case, in fact, where the attempt to start this procedure should fail, the lawyers may assist the parties in court (Butruille-Cardew, 2013). This is the greatest difference of the French system as compared to the Italian one, where the defending counsel are required to withdraw in case of a proceedings, following the collaborative attempt (Marcucci, 2011). It should be pointed out that in France, the withdrawal by lawyer occurs when a collaborative law agreement has been signed, but not in case a participating procedure is started; in this latter case, in fact, where the attempt to start this procedure should fail, the lawyers may assist the parties in court (Butruille-Cardew, 2013). This is the greatest difference of the French system as compared to the Italian one, where the defending counsel are required to withdraw in case of a proceedings, following the collaborative attempt.

What distinguishes collaborative law from all other methods of alternative dispute resolutions is the role of the party's lawyer in this procedure. What distinguishes this innovative procedure is the fact that each party will face the collaborative proceedings, assisted by its own lawyer (Marcucci) who will act not only as counsel for protecting the party's interests, but also as a person devoted to confrontation and mediation with the adverse party and its counsel. As mentioned in the preamble of the code of conduct for lawyers, the lawyer shall monitor the compliance of the agreement with the laws and principles of the Constitution for the protection of human rights and the community organisation, but not limited thereto. Defending counsels shall have a further fiduciary duty aside from that provided for by art.88 of the code of criminal procedure, which implies an obligation of transparency requiring every party to disclose its position, without hiding behind the shield of the right to defence. Besides, the Constitutional Court already stated that exercising the legal profession in certain circumstances, that is, mainly before Juvenile Courts, in proceedings concerning adoption and parental authority, requires that professionals possess "such competences as are appropriate for the particular and delicate task to be performed" (Nissolino, 2012).

### **The main steps of collaborative law**

Collaborative law consists of many steps, which are limited to four for the sake of simplicity:

The first step concerns the initial meeting between lawyer and client, which implies the ethical duty of the professional to inform the client of the possibility of carrying out a collaborative procedure as an alternative method towards resolving the dispute with respect to ordinary jurisdiction. During this first step, the lawyer verifies that there are no conditions that may exclude or make particularly difficult and presumably unsuccessful or inadequate the use of the collaborative procedure: in particular, reference is generally made to cases in which there are reasonable doubts as to the honesty of the persons involved, or to cases in which there is a certainty, or even only justified suspicion, that episodes of physical or mental violence have occurred between the persons involved, or that the latter make use or abuse of drugs or alcohol or even that they are affected by depression or other mental disorders. More generally, and also in the absence of one of these typical hypotheses, the lawyers are to verify the existence of an underlying situation, which may allow to rely on the joint participation of the parties involved: an absolute lack of empathy between them basically represents an insurmountable obstacle to the application of a procedure that is ontologically based on the trust and cooperation of the parties involved (Nissolino, 2012). The collaborative practice does not provide for the granting of a power of attorney to a third person who may facilitate, if not achieve, the meeting of the differing wills of the parties for conciliation purposes: it is the party itself, who regains the need to define the terms of the disagreement, by initiating a series of steps, in which, in agreement with the adverse party, the subjects of discussion, points of friction to solve and the real procedures for dealing with them are identified.

The second step concerns the two parties' lawyers and their first contact (Rivoire) states that one of the most significant. Actually, in the cases resolved with this method, the contact between lawyers occurs by phone call, during which the case and possibility, if any, of starting up the collaborative practice is discussed. Since this new instrument that is alternative to civil litigation has not been recognised by Italian laws, the lawyers who have approached the collaborative law, have made the operating procedure less formal. (Now the question is, if a law would be approved, which expressly provides for a "proposal to be made by registered letter or equivalent" and whether the use of the telephone would be considered equivalent. The answer raises another question: in fact, if the use of the telephone should be admitted, there would be no legal security as provid-



ed by the exchange of letters, in compliance with the duty of transparency required since the beginning of the procedure). However, returning to lawyers, it should be noted that the lawyer chosen by the party will need to be trained on collaborative law [The list of lawyers who attended the training courses of AIADC and IICL is available on the web sites [www.diritto-collaborativo.it](http://www.diritto-collaborativo.it) e [www.iicl.it](http://www.iicl.it). Besides, in France, as well as Belgium, there is a training programme consisting of 14 hours that is indispensable for lawyers who wish to develop a collaborative practice, based on the guidelines of IACP (International Academy of Collaborative Professionals, [www.collaborativepractice.com](http://www.collaborativepractice.com)). In Italy, since there are only 200 of such lawyers, it is not always possible to form the necessary team for the procedure. In this connection, see Accettura (2012). In France, however, there are about 350 lawyers trained in collaborative law (Blitz, Boudart, 2011, p. 409). A number of articles have been published on this topic in French magazines (see Butruille-Cardew, 2007; Butruille-Cardew, 2007; Deflers, Butruille-Cardew, 2007; Lichtenberger, Letellier, 2007). This occurs by attending training courses, recognised in terms of credits by the National Bar Association and based on the Regulations on continuous professional training of 13 July 2007.

The third step is characterised by the first meeting of four people [The International Academy of Collaborative Professionals (IACP) believes that every plenary meeting should be followed, shortly thereafter, by a so-called debriefing with the client and the lawyer of the adverse party, with a view to improving the procedure and method and with the purpose of obtaining maximum wellbeing for the client and strengthening team work (Blitz, Boudart, 2011, p. 409) without any formality, in compliance with the guiding principle of the entire regulation, which favours the self-regulation by the persons involved in the procedure. In this step, the parties and their respective lawyers sign a cooperation agreement for the out-of-court resolution of family disputes, also establishing a schedule of meetings of the four people and identifying the needs and urgent matters to be dealt with PINI (2011, p. 118). Since the collaborative procedure is based on the free volition of the parties, the term for its conclusion should be stated by them. Starting from this fundamental consideration, the agreement indicatively sets a maximum of four meetings to complete the procedure. The certification of signature and the statement that the contents of the agreements corresponds to the will of the parties are made by and under the responsibility of the lawyers who participated in the practice regulated by the agreement, subject to the possibility of cancelling the agreement pursuant to articles 1966, paragraph 2, 1971, 1972, 1973, 1974 and 1975 of the civil code (PINI, 2011, p. 121). In any follow-up meet-

ings, if the parties and lawyers should so require, by mutual agreement, the participation of an expert can be requested (psychologist, financial expert, etc.), who may be called to aid the parties in reaching an agreement [Collaborative law proves to be an open practice. The action of a third party can thus take various forms. It can be psychological advice to obtain suggestions as to the custody of children, but also an analysis of the financial situation of the parties by an expert accountant, or even the opinion of a lawyer specialised in particular subjects (e.g., tax law, to learn the fiscal consequences of an option envisaged by the parties) (Blitz, Boudart, 2011, p. 408). The role of the psychologist [In Collaborative Law, the psychologist is obviously present in family conflicts, where there are minors involved and matters concerning their custody. For this reason, the psychologist is also referred to as a Divorce Coach, i.e., “a skilled professional, trained to manage a wide variety of emotions and issues that arise during divorce. Collaborative Divorce Coaches are all licensed mental health professionals (for example, psychologists, social workers, and marriage and family therapists). Each Coach is experienced in the area of divorce and each Coach receives specialised training in Collaborative Divorce and the Collaborative process. Divorce coaching is not legal advice and not therapy. Divorce coaching is not about placing blame, finding fault or dealing with the past” (www.collaborativepractice.com) is already standard in family mediation, in which there is an impartial third party who, by referring to the methods of problem solving, helps the persons involved in a dispute to continue a negotiation until a useful solution for both parties is found. More innovative and interesting within collaborative law is the possible participation of a new figure called a “*financial counsellor* (so defined by IACP), financial expert or accountant, who attends the meetings of the parties and helps them consider new possibilities of development, profit and liquidity, as well as the fiscal consequences of the various possible assets, and plan a schedule of expenses, helping them to understand the suitability of one alternative compared to another (as explained by Capilupi, 2012). Then, with particular reference to separation and divorce procedures, hereby considering the documents received and a draft of a monthly family budget, the accountant will draw up a balance sheet comparing the pre-separation and post-separation situations, pointing out the differences and trying to understand where any changes might be made, if necessary, to moderate the impact of the greater costs. It should be pointed out that, as regards the costs and operating procedures of experts, these will be explained at the first meeting with the parties, hereby remaining compliant with the principle of transparency that lies at the basis of this procedure.

Finally, the fourth and last step concerns the settlement of the proceedings. The possible closing of the participatory procedure involves two sets of hypotheses: if, the parties, assisted by their lawyers, should reach an agreement, following the collaborative procedure, they may decide to submit it for approval, by joint application, to the President of the Court having territorial jurisdiction, based on the provisions of the code of civil procedure and as provided in the cooperation agreement of IICL in item 4, where the action by the Judge shall be only intended to homologate the understandings reached in the agreement, which refer to non-disposable rights in order to make them legally effective. To confirm this, part of the doctrine stated that collaborative law, as a method for the resolution of matrimonial conflicts, cannot be considered as an arbitration, as it concerns not only disposable rights. Therefore, the decision to be taken by the expert may not be considered a binding arbitration award (Buzzi, 2010, p. 2963); if, instead, the collaborative practice should be unsuccessful and the parties should decide to resort to litigation, the initial agreement through which the lawyers of the parties had been committed to reach an agreement between the parties (*“Participation Agreement”* in Collaborative Law), this would imply the lawyers’ withdrawal from the case (Webb, Ousky, 2006; Tesler, 2001). This affects both lawyers and represents the distinguishing feature of the collaborative method with respect to other out-of-court methods of dispute resolution.

The withdrawal agreement also applies to experts who participated in the proceedings, who will irrevocably abandon the practice and may no longer take part in any way in the judicial resolution of the dispute. The withdrawal obligation also applies if one of the clients does not act in good faith or manipulates the proceedings (Butruille-Cardew, 2009).

### **The future of collaborative law: doubts and forecasts**

Collaborative practice represents a real challenge and a precious resource for Italy. On the one hand, in fact, in promoting this practice it will be necessary to overcome some resistance; on the other hand, the practice meets an undeniable need to solve the growing number of separations and divorces without resorting to litigation. In Italy, in less than forty years, from 1971 to 2008, the number of divorces and separations has increased considerably (Marcucci, 2010). The collaborative practice therefore represents a new way of separating, and, more generally, solving family disputes as an alternative to the litigation proceedings as well as to the traditional out-of-court negotiation aimed at reaching an agreement. This practice primarily aims at keeping good relationships among family members, even after a separation, in the interest of the children but also of the adults

involved, who, at the end of a successful collaborative procedure, based on mutual respect, will reach satisfactory agreements for both (Marcucci, 2011).

There are essentially two basic principles that characterise this procedure: the right to confidentiality, as provided by item 9 of the IICL agreement, which states that “*negotiations are confidential. No information exchanged during negotiations may be disclosed in court or out of court*” and the principle of transparency according to which, during the proceedings, the parties shall make available to each other all information and documents available to one another that may be useful towards reaching satisfactory solutions for both. The Italian doctrine, which has recently begun studying this new phenomenon, does not hide some well-founded doubts as to the absolute enforceability of this principle, due to the difficulty the lawyer may have in proving the existence of hidden assets during the litigation. Therefore, in order to convince clients to fulfil this obligation, the law should, in almost absolute terms, protect the privacy of any information supplied and received, hereby guaranteeing that, in the event of a failed attempt, such information cannot be produced in court by the adverse party.

In Italy, this right to the confidentiality of information during conciliation is not actually acknowledged; however, the disclosure is not extraneous to our legal system, in compliance with a more general obligation of cooperation between the parties in building up evidence in separation and divorce proceedings (Cass. 8 November 1996, n. 9756). In particular, with reference to judicial separation pursuant to art. 706, paragraph 3 of the code of criminal procedure, as reformed in 2005, the parties must (more correctly, are under obligation to) exhibit the last tax returns filed by their spouses jointly with the introductory petition and defence brief.

With reference to the relationship between “disclosure” and inquisitorial powers, it should be noted that, “if the judge, also where insufficient or contradictory documents have been produced, may perform further investigations, meaning that the exhibition is not an obligation but a burden “aimed at ascertaining the relevant facts for the purpose of the decision”. Its breach, thus, only produces consequences with respect to the inductive proof of income possessed by the person in breach (Ceccherini, 1996, p. 347). Without prejudice to the foregoing, the possible acknowledgement of collaborative law by Italian laws would undoubtedly contribute to solving the problems of the crisis of civil justice and modernisation of the “judicial service” in compliance with the values and principles, lying at the root of the legal state, and would probably allow for better protection of the citizens, by permitting them to reach a possible conscious agree-

ment with the technical assistance of a lawyer, to guarantee that this agreement does not jeopardise their rights, and benefits them in terms of costs, speed and flexibility compared to the traditional judicial means of dispute resolutions.

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## **COLLABORATIVE LAW PRACTICE: THE ROLE OF THE DIVORCE COACH**

Maria Rita Consegnati

The main characteristic differentiating Collaborative Practice from all other practices applied to the divorce process is its "interdisciplinary".

Although in principle the assistance by experts other than lawyers has to be agreed jointly by both parties, its mere existence makes of this procedure the most compliant way of addressing all those issues emerging from a typical divorce or separation.

More specifically, we could establish that the commitment of both experts and couples is to identify practical, realistic and shared solutions that can facilitate the family re-organisation, protecting the relationship between parents - so that they carry on cooperating for their children's welfare -, as well as that between parent and child, bonds that time will consolidate through new roles and functions. It suffices to say that today's parents will one day be grandparents to their children's offspring. The collaborative proceeding aims to support the divorce process in a context that respects the family history: it is based on the awareness that parenting functions change over time but that such change should not bring painful or irreparable rifts, which normally is at the heart of children's and adults discomfort alike.

The transformation of a family system due to the divorce process needs to take place gradually and with continuity: the present should be a distinctive phase between the past and the future and all family members should not perceive any detachment from their lives, because a couple's split up should never compromise a common parenting approach by bringing arguments or resentments. Children, by nature, represent the past that needs to be concretely transitioned into the future and parents' commitment ought to be carried out together because their relationship with their children is a truly lifetime one.

This theoretical framework is at the basis of the need for a team of divorce experts that are aware that divorce represents both change and continuity, split from a partner but also team work with such partner for the

benefit of their children, as well as the need to carry on investing on their children's future in a deeply changed family context.

Arguments and exacerbated conflicts are the most damaging aspects of a couple's separation, totally dysfunctional for the up-keeping of good relationships with children.

The divorce coach role is set within the psychological remit and must have professional skills in:

- a) Family system:
  - the relationship's dynamics and family life-cycle;
  - the divorce process and the difficulties in adapting to the new as-set of family relations.
- b) Communication:
  - Re-opening communication channels;
  - Conflict resolution strategies;
  - Negotiation skills;
- c) Feelings and emotions:
  - Acknowledgement and management of emotions related to the divorce process;
  - anger and stress management.
- d) Legal aspects of divorce and separation, i.e. the best possible solutions in terms of children, finance and property assets which are at the heart of the whole process.

Knowledge of these aspects allows the divorce coach to assist in the various negotiations, to support individuals in their requests and to solicit realistic solutions.

The activities of a divorce COACH may be described as "support to the whole system" because of his/her cooperation with:

- Other cooperative practitioners;
- Lawyers and other professionals;
- The couple and the two individuals, because of his/her work on communication, emotions management to do with the relationship
- The lawyer and his/her client.

The coach's primary objectives can be described as follows:

- To support clients during their divorce process within a proceeding that is respectful of individuals and their self-determination, honest and transparent in terms of the data and information provided and considerate of the time the individuals dedicate to it, jointly or separately;
- To support clients in identifying their personal objectives and help them overcoming any potential obstacles in pursuing them;



- To assist the individual in elaborating past experiences and focus on the present in order to invest in the future linked to their children;
- To foster and implement the necessary cooperation between the two parties and the rest of the divorce team;
- To set an example in terms of collaboration to their clients.

## **AN INTEGRATED COLLABORATIVE DIVORCE IS HELPFUL FOR DIVORCING COUPLES**

Adriana Galimberti-Rennie (Summers)

Collaborative law helps a couple divorce in ways that best manage the transition from being a couple towards creating a new foundation for each of them to build separate futures.

When couples marry they give little thought to the potential emotional, legal and financial consequences they need to deal with, should the marriage fail and they divorce. When collaborative law, provides an integrated team of legal, financial and emotional specialists, it is possible to recognise and deal with the concrete practical consequences of divorce. It also gives the couple a framework to understand the predictable responses to the loss of their relationship. It enables the couple to deal more effectively with the practical and emotional aspects of separation and divorce, whilst maintaining their parenting responsibilities.

Collaborative divorce systems represent a useful process for married couples, with or without children and also for unmarried couples who need to disentangle their lives, because the emotional and financial consequences of the end of a relationship exist, regardless as to whether a legal framework encompasses their relationship. However for the purposes of this paper we will consider married couples with children under the age of majority.

Psychological research and practice have provided us with a better understanding of how emotions interplay with thoughts and actions. This knowledge can help couples and children to be better supported as they deal with issues of attachment, cognition, family systems, social development etc., as well as the legal and financial processes necessary during a divorce.

So much has been written about the need for a speedy stable transition processes for children in divorce that we do not need to revisit that now. (For a comprehensive review of the literature please refer to The Roundtree Foundation's paper, below). We recognise the negative impact on children, of long drawn out high conflict separations or divorces and have

to provide a mechanism to assess whether a particular couple is 'at risk' of their divorce becoming acrimonious. If the risk is present it is important to recognise the genesis of this and the particular support needed to minimise this risk, so that the views of both the adults involved are fully communicated and registered within their divorce process.

One reason for integrating the collaborative team from the outset of the process is to do with the couple's informed consent to the collaborative divorce process. Fully informed consent can only come about by experiencing a meeting of the whole professional team. Another reason is it ensures the legal, financial and communication/emotional aspects of a divorce are shown to be normal facets of supporting a couple to make the decisions they need. Their role of partners may have ceased, but parenting is life long. Therefore to support this couple to make effective choices, we need to know something of their past communication styles; how they've dealt with challenges or conflict in the family and which common parenting goals they agree on. However, the personalities of each child will require different interactions during the divorce transition and with the new systems of parenting the children. A psychological assessment will include specific questions relating to the adults' relationship with their children and their own original family backgrounds. It also includes an assessment of the current communication patterns as a divorcing couple and as parents. This enables an active screening of possible risk factors during a divorce process, whilst highlighting any relevant childhood experience, which could influence the current situation (Linton, 2012).

The psychological interview provides a different assessment from the one a divorce lawyer offers clients. The legal and psychological interviews together, provide an understanding of underlying processes this helps the professional team to be alerted to particular sticking points in the couple's divorce process and help them navigate through these points.

The 'model' of the collaborative team is important to the couple, as it helps them to see that a group of people with different approaches can come together and take the best from each professional and each other, to create an integrated 'psychological container'. This enables the couple to listen to and gain from, the legal, financial and psych-social input they receive, in a way that enables the clients to feel they can reach decisions that best fit their family. The model seems to reflect the approach described by Winnicott and further developed within developmental psychology, that for a baby to feel secure in it's nurturing, the main care giver (often the mother) needs to feel secure that they are being taken care of, so that attention can be concentrated to ensure the safety and development of the vulnerable, growing child. The divorcing family is at a major tran-

sition point and the unspoken role of the multi disciplinary collaborative team appears to reflect the ‘safe place’ that parents would usually be able, to create for themselves and their children. This important aspect of the collaborative team supports the divorcing adults in their efforts to continue their role as parents while they discuss future parenting and other agreements. It is where it is possible to see how negotiations can lead to gains for all concerned.

Dispute resolution requires us to be creative and alert to the best mechanisms to help a family who go through a divorce process. From the 1960’s onwards, Bowlby and others talked extensively about the psychosocial issues of attachment, separation and loss. This together with the more recent findings of neuroplasticity and brain development, help us to recognise that a mechanism to support families, as they transition from one system to another, needs to have access to all factors that help build a secure base for the reconstructed family.

Some people will be comfortable with using mediation, others will benefit from an integrative collaborative approach. A few will be most supported by a shuttle type agreement and a small number will need some tribunal or court authority. We can see a continuum between those who are able to make effective decisions for their family’s interactions and those who are least resourced. However, research is needed to assess if a collaborative divorce process can safely and effectively move some couples along the continuum from the less able, towards being given the skills to enable them to plan and agree the direction for themselves and their children.

Here, we need to consider what an integrated team of collaborative professionals, represents to a divorcing couple, both at a societal level, a cognitive level and an intra psychological level. It is important to integrate the last twenty years understanding of the neurological functions of the brain and how it develops in it’s particular environment (Koutstaal, 2012), with the earlier observational work of Melanie Klein, Anna Freud, Alice Miller, David Winnicott and John Bowlby. Work on group dynamics by Bion and Yalom and on family dynamics by Judith Wallerstein and others provides a turning point, which enables us to help families, navigate the challenges, they may otherwise struggle with during their divorce transition and beyond.

The point at which a couple decide to begin a divorce process is also when they may feel most challenged. Starting a divorce is a public acknowledgement that their wedding vows are no longer valid for whatever reasons. This implies a point of failure, though of course it can be recognised as a point of growth at the same time. However, moving to-

wards a divorce concretises the dissatisfaction with the relationship and as a consequence, a natural grief process for the loss of hope in the relationship has already begun.

For some the signs of grief will manifest later than for others and this often creates discord. This can be managed in a collaborative divorce, by the divorce coach using their knowledge and specific skills to help the couple understand why they are in different places. The coach's ability to hold this process assists it to move more smoothly.

If we consider the different aspects of a natural grief cycle (Worden, Stroebe, etc), it becomes clear where individuals going through divorce are likely to experience difficulties. A brief summary of these ideas follows to give some indication of how to help adults communicate with each other, as well as with their children and wider family groups. This is particularly relevant in some European cultures where the cultural concept of 'family' is less 'boundaried' than in North America where collaborative law first developed. However while we have access to research on showing the negative affects of achromous divorce the research on the specific benefits of collaborative divorce to the children of divorced parents has not yet been published.

A person's initial reaction to grief closely resembles that of shock. There can be a form of denial, but this allows the person to begin the process of coming to terms with the changing event or circumstance. I call this the 'honeymoon period of a divorce' because it's the time when people are absorbing, what is about to happen in their lives and are trying to communicate or at least not fight. It typically unfolds over two to six weeks and forms the natural start of a collaborative divorce. During this time couples attempt to communicate with each other and it is possible to begin to discuss things in a moderate way. It is also a good time for a professional assessment of the couple's communication patterns to be made. This will help the collaborative divorce team to be alert to possible support requirements as the divorce process continues.

The next stage is often experienced as anger towards the situation and shows between a couple as an inability to maintain conversations, relating to anything that has emotional 'resonance' and 'value' between them. What is often hidden is the pain of the process of disengaging. What are shown are miscommunication, withdrawal and/or angry exchanges. The angry stage of the grief cycle links in to the more traditional family courts adversarial system. This frustrates the best efforts of many legal professionals to try and dissuade clients away from these conflicts.

Anger has many functions. When it continues and becomes a habitual response, it can be a defence, against acknowledging deeper levels of vul-

nerability felt by the adults in their situation. This illustrates, how couples can become stuck in high conflict situations, in an attempt to stave off the depth of feelings of powerlessness, they are likely to experience during their divorce. The function of anger as a defence in a divorcing couple has more chance of being successfully navigated when the professional team have agreed they will only work with the couple in a non-contentious setting. The commitment of the professional team towards helping a divorcing couple find non-contentious solutions, supports the couple so they do not unconsciously sabotage the progress. The temptation to do this can emerge when the couple find they are addressing issues differently from their previous experience together and glimpsing their new post separation future. I suggest

the commitment to a collaborative divorce may be compromised, if professionals agree to continue to work, after a collaborative process breaks down. This is often referred to as ‘collaborative lite’. However it means the strength of the ‘psychological container’ that the professional team creates around the divorcing couple is compromised and will be under pressure, from the couple who will test the strength of the process, when one or other comes to an un/conscious realisation that the level of communication they had lost in their adult relationship, can be drawn upon to assist their on-going joint parenting role. The adults attempt to flee from the pathos that this may bring, can become a test of the strength of the supporting ‘psychological container’ created by the divorcing couples’ professional team.

When it works well the ‘psychological container’ of a collaborative divorce team acts as a ‘model’ of how a couple can remove additional external conflicts. This challenging supportive structure enables the divorcing couple to have the experience of being more in control of their divorce and therefore reacting with greater flexibility. The couple can then hear each other and begin to consider how to achieve future goals for themselves as individuals and their children.

From practical experience, this process appears to minimise the likelihood of divorcing adults, experiencing significant feelings of depression, which is the next stage of the grief cycle. While it isn’t possible to ignore the facts of the end of hope in the adult relationship, the couple are better able, to create individual futures using respectful communications. This increasing self value results in confidence that a resolution can be created from the difficulties they had so far, not been able to overcome in their couple relationship. This new sense of hope takes us to the final stage of the grief cycle.

Acceptance and reintegration. When the divorcing adults are able to accept their changed identity and situation, they are able to consider new possibilities in their future. They re-engage more fully with the most resourced and emotionally ‘adult’ part of themselves and are therefore able to engage with others, in ways that are most beneficial for all concerned. This means the children, who are waiting for their parents to feel ok again, can see that their relationship with their parents is back to a level they can trust. It is this, which enables the children to continue their own development.

European Family Courts aim to uphold society’s obligations to those children whose emotional, social and cognitive development could be negatively impacted, if continual conflict is part of the parental divorce process. Therefore it seems that using the skills of an integrated collaborative law team, aims to minimise and manage the opportunities for conflict in divorce. This happens by addressing the needs of distressed parents and other close family members while supporting the voice of children. This occurs within an environment that continually assesses ‘risk’, to provide a greater emotional safety net and enables parents to return more quickly, to being emotionally available, to deal with their children’s queries and anxieties about any changes in their family life.

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PART FIVE

VICTIM-OFFENDER MEDIATION AS A CHALLENGE



## THE ROLE OF THE ACTIVE VICTIM IN SPECIAL CRIME PREVENTION: EXPERIENCES FROM THE PRACTICE OF VICTIM-OFFENDER MEDIATION

István Szikora

### Introduction

In 2010 I taught mediation in criminal matters in the University of Szent István in Békéscsaba. After the semester I was asked to write a publication to the volume of study of the faculty in Hungarian (Körös Tanulmányok - Szent István Egyetem Gazdasági Kara - 2010). Now, I am sharing this publication within this book with some necessary changes.

### 1 The nature of the mediation in criminal matters

According to the Hungarian act CXXIII of 2006 on Mediation in Criminal Cases the main aim of mediation is „to resolve conflicts resulting from a crime, in an attempt to find a negotiated solution – fixed in writing – between the victim and the author of the offence”. Mediation is an attempt to find conflict resolution, reparation for the victim and might steer the offender to abide by the law in the future.

According to Article 36 of the Criminal Code determining Voluntary Restitution expectation towards the offender is „to compensate the injured party for the damages caused by the criminal act, or to provide any other form of restitution by way of a meditation process”. The purpose of the law is clear: to predominate the interests of the victim and to restore the condition as it was before the offence. It is sometimes is not so easy to know/learn/hear for the mediator the interests of the victim. What he or she could feel, what kind of process could happen within the victim?

In victim-offender mediation the victim has a special role. If he or she is active during the negotiation by his/her plain speech, sharing views on his/her harms from the crime, he/she could get relief and the offender could get help to avoid committing a crime again/ reoffending.

I would like to share a case with you. It is quite instructive for me because of the behaviour of the victim and his mother. They were quite ac-

tive and it is worth to show their activity and its implications on the process in a case study.

It is a quite hard task for a mediator to deal with the victim's passivity. One of the key purpose of the mediation meeting is that the victim becomes empowered to be himself/herself, and can share his/her emotions, thoughts, can ask questions. This way the offender can face the real consequences of his/her deeds. The passive, not communicative victim could cause less impact on the offender.

In this case study I would like to show how the victim could have an impact on the offender and help in his/her prevention. I show what is the role of the victim during the mediation process, what are the parties' feelings at the beginning of the meeting and what could occur to them during the negotiation. What changed in the victim and what changed in the offender?

## **2 The case study**

Participants:

- Victim: József – 18 years old, simple, a bit angry young man
- The mother of the victim: Erzsébet – 40 years old, sad, worried and tired mother
- Offender: Márk, 19 years old, simple clothed, strong, big, grim look young adult.

The story as presented by the participants:

The whole conflict happened in a village disco. It was a situational conflict: the parties haven't even met before, they did not know each other. As Márk was drunk (he even did not really remember what had happened that night), he felt provoked by a gesture of József and he head-butted him then left. The victim's nose was broken by the attack, he was strongly bleeding and had to be taken to a hospital. The injury in fact was more serious than it seemed first. The doctor told to József that it was almost life threatening, and in case the hit was just a little bit stronger, it could have been easily fatal and might have caused his death. However, the victim got well totally from his injuries. The offender never had searched for the victim after the incident he seemed to be totally negligent.

The story was told mainly by the victim and his mother, the offender was silent in the first phase of the mediation. However, later on, during the discussion Márk has shared that he was very impressed, surprised and touched by the consequences his act caused to the victim: the several operations he had to go through, the pain he felt and the fears and humiliating situations he experienced during his healing process. The victim

shared these experiences in trepidity and seemed much more calm when he could share all these.

Márk was very speechless during the meeting he seemed to have difficulties to express himself. He tried to hide his feelings, but he wasn't always successful – sometimes he showed anger, sadness, hopelessness. At the end he acknowledged his responsibility and said sorry in a very silent voice.

After this point, the mother of the victim started to talk. Just like a well-experienced mediator, she addressed Márk and started to ask questions from him. First she expressed her anger towards him and blamed him for all the difficulties they had to go through. She explained again very detailed all the troubles they had to face. At this point Márk opened up a bit and expressed his honest sorry. In the meanwhile he reflected on his family circumstances. It turned out that he has a very bad relationship with his parents, he cannot bear to stay at home, in fact he always tries to escape from home. His family does not understand him, they always criticise and scold him. His parents don't support him financially as well, he has to live on his own income. He wishes to move out from his family. He explained that one of his way to escape from this very hard situation is to drink and getting drunk. He sees his life senseless and hopeless, he even considered suicide. This hopelessness generates his aggression. However it also turned out during the conversation that he has some strengths as well: he is a good mechanic and ready to work hard.

The victim's side was totally shocked. Although József has said before that he was willing to receive some material compensation, this discussion and what he learned about Márk made him change his mind. József was really touched by the circumstances of Márk and felt they were frightening as it was clearer and clearer for them after hearing the answers given to the questions of Erzsébet. The emotionally highest point in the mediation was when Erzsébet asked Márk: *what do you need to be able to change your life?* Márk couldn't give a concrete answer to this, but it was clear that he needs help. As Erzsébet formulated it, *'you need somebody behind you'*.

Summarising, Márk would need a real family and and a loving mother. Erzsébet mentioned that their house was always opened for such boys like Márk, József's friends spent a lot of time in their home, did their task together, had chats, they cooked together on an open fire during the summer evenings, „they even had one or two beers, of course only moderation”. She referred that Márk was invited to their home. Finally they did not include it formally to the agreement.

In the next phase of the conversation material compensation was not mentioned anymore, but it was about the opportunities for the help Márk needed.

In a short break the parties asked for information from an independent expert what kind of agreement could be done, what content could be part of an agreement which might be helpful for Márk: immaterial reparation, community compensation, taking on an obligation of education, participate in a program to visit children in hospital and read for them, taking on community work for the city he lives in, participating in a self-knowledge group or peer support training, party support programme<sup>1</sup>. After a while, Márk decided that he would attend a self-knowledge group for 6 sessions. This could be some help to increase his self-knowledge, to know his limits and could manage his anger.

They signed an agreement including the above described conditions. (As Márk went to school in an other county, we have referred the case there.)

### **3 Special features of the mediation in criminal matters concerning the case**

In this mediation session we could observe an example that the victim and his supporter expressed a strong demand of „saving” the offender, that he could organise his life and to get help not to commit crime again. It was formulated that this goal of victim is the interest of the offender as well. For the victim it was highly important that the offender who had a bad family background and problems with his behaviour, could get help to have a normal life and leave behind his deviant attitudes; solve his conflicts, manage his anger, set more realistic goals for himself. In my opinion this mediation meeting was quite effective because at least the above mentioned values and goals were openly stated.

Before sharing the experiences of the follow-up of the case, I examine the role of the crime victim in general in mediation.

#### *3.1 The role of the victim in victim-offender mediation*

Each victim goes through a loss procedure. What is that loss? What does the victim go through?

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<sup>1</sup> A program of the Mi-Értünk Egyesület (We For Us Association) for young people. This is a special peer support training, where young people get some skills to meet young ones in disco clubs and pubs and tell them the risks of this kind of amusements. [http://www.miertunk.hu/index.php?option=com\\_content&task=view&id=54&Itemid=9](http://www.miertunk.hu/index.php?option=com_content&task=view&id=54&Itemid=9)

John Bowlby distinguishes 4 phases in the loss process (these are applied for grief, but quite similar process may occur at any loss, just like losing our purse).

- *Shock & Numbness*: the stunned reaction to loss, including difficulty in concentration, impaired judgement and an inability to function normally.
- *Yearning & Searching*: this stage involves a wide range of feelings, including guilt and anger. Uncertain, aimless behaviour is typical at this stage.
- *Disorientation & Disorganization*: a phase marked by depression and is usually a time when the loss becomes a reality, while the current state of living seems unreal. The thoughts are busy with the lost person or object while an escape into activity is attempted.
- *Reorganization & Resolution*: an emergence out of the depression of the third stage, with increased energy and self-confidence and the ability to feel joy again.

There is a chance for distortion or continuance of the normal reactions to loss, as the individual is not being capable of coping with the loss (Komlósi, 1990). There also can be pathological symptoms displayed during this process:

- change in relations to friends and relatives;
- heavy hostility against certain people;
- repression of hostile feelings, which can lead to a mental state similar to schizophrenia;
- permanent loss of social life;
- activities which are harmful for both the social life as well as the economic situation of the griever;
- a physical illness that can be diagnosed.

### 3.2 *What might the victim go through? What could the victim get/gain?*

It might be crucial information for the mediator as for facilitating the session to know in what phase of the process of coping with the loss the victim actually finds him/herself, and whether he or she wouldn't react to certain situations pathologically.

There is only a small chance for the victim being in „the state of shock” at the time of the mediation, since from the crime there might have been months passed. There are also advantages of time elapsing. As the Bowlby „stages of grief” also show, the victim is most upset right after the crime has occurred, incapable of seeing his or her situation realistically. However after some time passed the victim is more and more capable of defining the type of restoration he or she is in need of. Thus, after a

while the victim is getting more ready to meet the offender and in case he or she is able to represent his or her needs towards the offender, the victim is given a kind of opportunity to overcome his or her fears and bad feelings.

It is not easy for a victim to undertake to meet the offender in person. At this time the victim might feel fear, uncertainty, anger, shame or even self-accusation. Even in the case of a crime against property there is a significant non-material damage suffered by the victim: fear of a next crime, mistrust in the justice system.

It can be more frequent that the victim meets the offender in the stage of yearning & searching or disorientation & disorganization. It is typical for this phase that the victim is more likely to become passionate and bombing the other party with questions. We can also experience vehement changes in feelings: anger, repentance and despair. The outburst of feelings might be unpleasant for some but at the same time this experience might be a significant help in both parties' „healing” process.

The victim might also be on the way of healing, having been able to deal with what happened.

Recalling from time to time still what happened, but without unbearable feelings. It helps if the parties can meet as soon as it is possible and are able to settle their conflict together.

Essentially this is what mediation is also about with the help of a third –independent- party.

A successful mediation also contributes to the „humanisation” of the offender in the eyes of the victim. As Barabás A. Tünde explains (2004.) “the offender isn't an abstract „monster” any more but a human being with his or her own issues” (p. 150). With such an alive, flesh and blood person it becomes for the victim a real opportunity to clarify the conflict. It is rightly expectable that first the offender takes responsibility, offers compensation and after all this happened forgiveness might follow from the victim's side.

This way all the advantages of a mediation process can be experienced: the victim can get a compensation according to his or her needs, can avoid to be dragged through the mire which can happen in course of the criminal procedure - to be a mere witness in his or her own case – and also released from the danger of second or third victimisation, in other words from experiencing the negative effects of the crime again due to the authorities or the inappropriate media proceeding.

### *3.3 The role of the offender in the mediation process*

A typical position for the offender is to deny or understate the responsibility, trying to bring up also other's (of the victim, society, third persons) contribution, impact and responsibility. The offender might be in fear of facing the victim, might feel that what happened was inevitable and might see his or her situation hopeless. Regret is likely to conceive in the offender first after the victim had personally exposed him or herself, which shows the extent of harm that has been caused. In the presence of the victim, the offender cannot be pretentious/dishonest, he or she must undertake what he or she did, cannot point to others.

In an optimal case, the offender is thinking of compensation / restitution as a natural consequence for what he or she did. Some offenders consider evident to have to restore what they did, to compensate the victim. There are offenders who offer their help right after the happening of the act (there is no need to remind them for that). The offender can experience that restitution is also a starting point of resocialisation: avoiding imprisonment also means avoiding the disruption of his or her family ties, and that he or she will not be stigmatized during the criminal procedure.

### *3.4 The effect of the successful VOM: general and special prevention*

The parties take part in a creative process of jointly deciding about the frames of the compensation. Both parties come out of changed, more mature and empowered from this process which has impact even on societal level.

In an ideal case the community affected by the act is also taking part in the discussion, actively contributing to the working out of the agreement. Even if there is communication only between the victim and the offender there is a chance to make an impact on the community (even on the society). In case the victim and the offender reconcile, that will serve as a good practice in their contact system, and news about the cost effective justice system can spread further, the aim to avoid side effects of the criminal procedure (stigmatization and the sentence of imprisonment) might also lessen recidivism, it can even lead to the ease of societal tensions (general prevention).

Still, what makes mediation really effective from the point of prevention? The key role is played again by the victim, he or she can credibly answer the question – raised by the mediator – what does the offender need to be able to avoid reoffending ?

The answer is usually: taking responsibility, regret, restitution, a special answer is: restitution on the community level.

The most ideal solution is when the offender undertakes beyond the restoration of the victim also the restoration of the effects of his or her act on the community level, in such a way, that he or she gets help for special prevention in the meantime. This is where both the victim's and the offender's interests might match.

### *3.5 The way of the victim in the presented case*

In the above presented case the victim was able to ventilate negative feelings about what happened, was able to talk about his feelings and to call to account.

At the same time was able to listen to the other party, and to realize that the offender has to struggle with even bigger problems. That made him able to let his own offence/wound go and to turn to the other. He found a new goal: stepped to the next stage of the grieving process, set forth the way of „healing“. The offender was rather withdrawn, had difficulties to communicate. As it turned out, once he blamed himself, once his family, occasionally his fate. He could not figure out what to do: how to put things right. He was ready to give both material and non-material compensation, but felt uncomfortable in the situation, so he would have preferred to escape, to decide quickly and leave the situation.

It was the victim's mother who realized that Márk himself is a victim too, and he needs help. His life is burdened with conflicts in such an extent, which both for him as well as for his environment is unsafe. For her the question was not how much Márk should pay for József but rather which way of help would be the most effective.

To be able to see this, firstly the victim (and his mother) had to pass the state of „shock“, overcome their anger and to step into a new stage of the healing process. They realised that Márk is in a bigger trouble than they are. In case they are unwilling to experience a similar case, if they would like to give a chance for Márk, they have to take care of him. He would need an impulse (a restorative tool<sup>2</sup>, community restitution or group therapy) that would take him to a new direction.

So they made a decision on that. They didn't have to take the decision of an outside expert or consultant, they could decide for themselves.

### *3.6. Fail or success? – Controlling the realisation of the agreement*

Unfortunately, the agreement has not been fulfilled. Márk went once to the session of the group therapy, where it became clear soon both for

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<sup>2</sup> Restorative tool: aiming to compensate the victim for the harm he or she suffered due to the criminal act and if possible to restore the conditions as they were before the crime happened.



him and for the group leaders, that his presence affects the group dynamics in a negative way. The group was already well settled, and as a newcomer, Márk could not open up and communicate with the others, which led to a conflict between him and members of the group. The group leaders offered Márk the possibility of individual therapy, what he accepted. In spite of this, he went to the sessions only twice and missed four meetings without giving any reasoning.

#### **4 Conclusions – Overall is this case a fail or success?**

I would not call this case a big success, but I do not see it as a clear fail either. In my opinion, this young man has already had contact with many professionals who tried to help him as much as they could to overcome his severe difficulties and get another chance. At this time, he got attention and a willingness to help not only from professionals, but also from his victims. He has got an impulse for further in his life. It was his decision not to go for this opportunity this time. However, he might make a use of this experience later in his life.

The victim boy also got an example from his mother to follow: how to be generous and forgiving in such a situation, and how to overcome feelings of anger and vengeance and even realise the other person may be in deeper need, maybe of a helping hand, sometimes the victim's hand.

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## THE SOCIO-CULTURAL CONDITIONS OF DOMESTIC VIOLENCE IN THE LIGHT OF THE LEGAL AND FAMILY SOCIOLOGY

Leon Szot

### **Introduction**

The use of the term "family violence" is a sort of misunderstanding, since the most severe incidents of violence occur in cohabitation relationships. The term "domestic violence" is more appropriate. A tendency to using the term "family violence" gives the impression that the family environment is, so to speak, by definition dangerous for its members and presents the family in a pejorative way. In Poland, the causes of domestic violence mainly include alcoholism and other pathologies, and this has nothing in common with European culture, which is characterized by exceptional respect towards women. While considering the analyzed issue in the light of the crisis of post-modern culture, we should highlight that the modern society, especially in Europe, has found itself in a situation of intensified pessimism and moral relativism. This situation has been dictated by a radical change in the socio-cultural context and concerns the shaping of ethical views, lifestyles, and methods of creating a values system. Pluralistic societies entering the post-modern stage of social development are characterized by the loss of the absolute importance of values and moral standards, including those which are the most important for a society – basic family values. This paper aims at presenting the social and cultural conditions of domestic violence against the paradigm of social change, selected aspects of the consumer society, and its axio-normative system. Moral relativism and pessimism are directly connected with the incidence of and the increase in this pathological phenomena in post-modern society. We will focus on domestic violence in this paper.

### **De-Socialization as a Symptom of the Crisis of Post-Modern Culture**

Modern sociological literature, when describing the condition of modern human being, highlights the fact that he or she appears to be a person devoid of tradition, putting his or her well-being above the existing stand-

ards, institutions, objective truths, morality and the law. Such an individual lives in a world that promises new, often contradictory and impossible to implement visions of an utopia and ideologically-understood tolerance. This leads to an apparent conflict concerning the objective reality and an individual's place on earth. This also entails that post-modern human being is inclined towards egoistic and cynical attitudes. There occurs a characteristic shallowness of interpersonal relationships, an inability to show empathy, indifference to other people's fates. Such a person lacks sensitivity to other people's needs, is unable to enter into cooperation, and is too deeply concentrated on him or herself and the world of his or her internal cravings (Drzewiecki, 2012; Kardis, 2011). Zygmunt Bauman describes the post-modern man as a human being deprived of his or her rightful, due to birth, place. They have to constantly develop their identity, since he or she has acquired a position of the demiurge of his or her own being. Each and every human being is highly-individualized, and thus everyone sees their place in the society in a different way. Different values are being prioritized, and he and she has autonomous goals in his or her life and needs stemming from their personal identity. Despite the great extent of freedom possessed by the post-modern person, its existence is characterized by ephemerality, elusiveness, temporariness and uncertainty. Thus, we could arrive at the conclusion that for such a person, the excessive freedom that they have acquired becomes an obstacle on the road to self-acceptance and happiness. He or she lacks solid foundations to form his or her personal being – the experience acquired today, it becomes obsolete tomorrow (Bauman, 1993; Trusowska, 2010).

Anthony Giddens, Scott Lash and Ulrich Beck presented this phenomenon as “late modernity,” since they believe that modernity has not yet passed. According to them, modernity is present now in a more pronounced form, which does not sever itself from the past, but is a continuation of old tendencies, which have just started to really develop (Sztompka, 2002, pp. 21-30; Pukała, 2010). “We do not enter some kind of a post-modern period, but rather an epoch where the consequences of modernity will become more radical and universal than before” (Giddens, 2000, p. 8).

While carrying on the above discussion on the consumer society and super-marketization of culture, we should state that the most serious threat posed by the above-mentioned ideology is the phenomenon of fetishism – treating culture as a commodity. Its goods, values, beliefs, standards, and ideas – not to mention its articles – are just products (Jaszewska, 2011, p. 22). We can observe this phenomenon in areas such as the conjugal and family life, in which an individual treats the other person as a

tool to fulfill their individual, selfish needs and he is less devoted to the other person; in the sphere of politics, whose primary objective becomes the achievement of one's particular, egoistic interests, and not the common good; in the sphere of religion, in which we are observing the phenomenon of religion and spirituality consumption through the increased movement of religious symbols outside the traditional contexts, and also the shaping of highly-diversified demands for religious goods. According to P. Berger, religious pluralism undermines the credibility of monopolistic religious institutions, relativizes universalistic demands, and decreases their exclusivity. Religious forms and institutions are becoming market entities, while religious traditions is now a commodity (Azria, 2002, pp. 2121-2129; Kardis, 2010).

Contemporary society is thus being defined in terms of fluent modernity, a consumptive society, in the era of emptiness and de-socialization. It's essential constitutive features include:

- Individualization – post-modern man appears to be a person devoid of tradition, putting his or her well-being above the existing standards, institutions, objective truths, morality and the law;
- Pluralism, relativism – meaning the decomposition of cultural hierarchies, the decentralization of culture-creating centers, and the super-marketization of culture. This is radical pluralism, tolerant of contradictory values and standards and giving the impression that everything is permitted;
- Consumerism – consumption becomes a value, a basis, and the primary objective of an individual's life;
- Crisis identity of an individual and a society.

The aforementioned processes lead to an attempt to reject all general moral standards, with consequences of quivering foundations of social life, a loss of orientation in societies or social groups, a state of anomie (Mariański, 2006, pp. 157-158).

The state of anomie begins, first of all, in culture (the decomposition of values and standards) and in social structures (the decomposition of bonds). From a sociological point of view, this term was popularized by E. Durkheim, who, by this term, depicted a potential lack of regulation concerning the development of modern society in the context of uncontrolled development of the division of labor, which is not accompanied by integration, but by specialization and differentiation, which often leads to chaos. Nowadays, labor is becoming more and more specialized and differentiated, mobilizing people to a collective effort. The demographic growth in modern societies requires constant diversification of labor, which causes a constant social transformation. On the one hand, solidarity

is conducive to intensification of social bonds, and on the other, the lack of these provoke that people to commit suicides (Piwowarski, 1993, p. 15; Kowalczyk, 1996, pp. 49–51). In this context, Durkheim uses the term *anomic suicide*, which stems from a decrease in the impact of social institutions, such as the Church, family, professional corporations, etc. on an individual. He depicts this kind of suicide as a reaction to the loss of any orientation due to a sudden and profound social change, e.g. during an economic crises. A threat to the system of adopted (accepted) values appears. An individual loses the support that ensured the reasonableness of actions, and is unable to harmonize their actions with actions of other people (Jacher, 1985; Kardis, 2009).

On the other hand, *anomie* means the decomposition of bonds between social actors. Robert Merton pointed at this aspect, according to whom anomie means a conflict among particular objectives of an individual's actions, between an actor and norms, by means of which he or she would achieve these objectives. In accordance with the latter, every culture defines particular objectives and expects from individuals that these objectives will be achieved in a particular manner. Simultaneously, there are measures accepted by the society by means of which these objectives are to be achieved.

The anomic behavior can be observed when such means are chosen that are not accepted by the society, and when the means are not selected properly. The state of anomie is a situation in which a disregard towards the current social system is based on a conviction that basic social norms have lost their significance and are no longer in force. Above all, anomie means an ambivalent attitude towards values and norms accepted by a society. This can lead to the formation of criminal groups, which thrive outside the legal system adopted by the society (Jacher, 1985; Kardis, 2009). On the basis of the conducted analysis, it appears that violence, as one of the forms of social pathology, is connected with a certain state of the moral and ethical condition of the post-modern society, and is described as a risk society. Living in such a world, it is not hard for an individual to lose their sense of identity and point of reference to constant, unalterable values, which we find more often lacking in present-day society. E. Fromm noticed the disappearance of the humanistic tradition, which encompasses love, compassion, or hope – they have stopped playing a vital role in interpersonal relationships. Instead, there appeared new values – possession, consumption, entertainment and the occupation of social positions. These values are not always accomplished; however, they condition an individual's behavior and shape interpersonal relationships (Fromm, 2000, p. 71).

The global, post-modern society is often defined as a “risk society,” because the future of an individual remains unknown in respect of the present. This risk stems from uncertainty, and uncertainty from pluralism, the lack of clearly defined rules and values, from ambivalence. These features influence the behavior of a community. This also includes a fast pace of changes, dynamism of life – and an individual has to learn to live with risk, making quick decisions. The individual knows that the risk should not be avoided, but later, he or she has to cope with its consequences. This not only concerns the professional sphere. Interpersonal relationships also become more and more risky. The influx of information, connected with globalization, plays an important role in the society as well. Due to a growing amount of information, an individual feels overwhelmed and he or she is unable to select information that is the most important (Geisler, 1999, pp. 156 – 157).

The cause of the development of the new type of society is individualization of an individual, as it is he or she who has to take care of their own safety and existence. The idea of the social state is on decline, as the state can less often provide its citizens with safety. The vision of the risky society was deepened by the aforementioned sociologist, Ulrich Beck (Walczak-Duraj, 2006, p. 273). This German sociologist draws our attention to the fact that the changes, resulting from broadly-defined development taking place in the modern world are irreversible (Beck, 2002, p. 372; Pukała, 2012).

Anthony Giddens, instead, highlights the consequences of these processes which are manifested in private lives of individuals. They reach individual homes, transforming personal lives of citizens. Under the influence of social change, a necessity appears to redefine the intimate and private aspects of human life, such as culture, gender, family, sexuality, personal identity, interactions with other people, and attitudes towards work. Due to deeper and deeper individualism, a human being shapes and influences their life on their own. A tremendous turn in person’s behavior takes place, and the value of tradition and the pursuit for the realization of values decrease together with an increase in interaction between local societies and a new global order. In the sphere of domestic life, indicators determining lives of individuals are disappearing. Ever-new identity patterns force a human being to be constantly responsible for the occurring changes (Giddens, 2004, pp. 83 – 85).

While summing up the discussion included in this part of the paper, we should state that post-modernity is the reflection and the state of the modern society, penetrating all the fields of human life, its foundations and ideology, the dominating patterns of thought and behavior. Leszek

Kolakowski points to the feeling of exile, a modern man or woman being detached from his or her roots. "The world we live in is not the world of those overflowing with satisfying certainty, consolidated in faith or disbelief. We rather live in the epoch of exiles, refugees, outlaws, endlessly-wandering creatures, who search for the lost – spiritual or physical – motherland. In this nomadic life, nothing is certain, guaranteed, conclusively established, nothing – aside the wandering itself – is given in a way that would be deprived of questions." He concludes his thought with "the only thing we are certain of is our own uncertainty." As a consequence, the human being resembles a nomad wandering the world without any specific goal and with no signposts. From *homo sapiens*, he has become *homo demens* (Giemza, 2010). In light of the above, social anomie and existential risk thus comprise immanent factors.

### **Post-modern Society – the Disintegration of Family – Domestic Violence**

The changes presented in the previous part of this paper are indeed radical and interconnected. Their consequences become visible in the context of conjugal and family life. Therefore, they cause a decrease in the number of babies being born, marriages entered into, and abortions performed, as well as they cause an increase in the number of divorces, the use of contraception (especially hormonal), and babies being born out of wedlock. The changes enumerated above are connected with the disintegration of family as an enduring marriage between a man and a woman, which (the family) comprises a basic social institution in the modern, democratic civil society (Matulník et al, 2003, p. 41).

The second fundamental part of this paper aims at presenting an institution of the family based on an enduring marriage between a man and a woman as the basic and natural unit of society (Berger and Berger, 1984, pp. 85-86). Its weakening due to a consumption society leads to an increase in socio-pathological phenomena in society. Thus, the disintegration of the family is a very important and a riveting issue for the modern society.

Family is a universal category, which means that irrespective of the stage of a civilization's development, cultural, social, or religious conditions, it was and still is the most basic social unit (a form of social organization). According to T. Szlendak (2010, p. 95), family is one of cultural universals. In every known social science we deal with some of its types. A family is thus a universal social institution – and thus it is the first, and, at the same time, the most prevalent way in which sociologists define it – meaning a ritualized group of human activities aimed at addressing needs

of its members (mainly sexual, procreative and social), consolidated in the traditions of all cultures. The definition of a family from the systemic perspective is also quite widespread, whereby by a system we mean a network of connections between the elements of a given whole. A family, from the systemic point of view, is thus an organized entity, which, though, composed of elements, is not their simple sum; the conjugal relationship of spouses, relationships between parents and children, and relationships between children are family subsystems. There exist an interaction between these family subsystems – they affect one another; and a change in whichever of them, if long-lasting and significant enough, entails a change in the remaining subsystems (Majkowski, 2010, p. 29). According to Z. Tyszka, a family is “a structuralized and functionally-connected set of individuals and specific substructures, as well as social micro-elements forming a micro-group and a social institution intrinsically connected by means of a marital, congenital, affinitive or adoptive bond, and, at the same time, performing a series of relevant, important, and integrated with one another functions towards individuals and the society based on regulators existing in behavioral culture” (Tyszka, 2001, p. 58).

The integral understanding of family is displayed in the social teaching of the Church, according to which a family comprises an absolutely fundamental form of the organization of social life, sanctioned not only by the norms created by human, but also by the Divine Law. In this context, a family is a primeval and basic social institution. Its existence preceded the creation of all other types of social organization and institutions. Family and marriage were created by no state, no law, and no institution – as, simply put, the family is older than all institutions, nations, and the state, older than the society itself. It is the state and its institutions – similarly to all the rules of social order – that owe their origin to the family, and not the other way around (Kocik, 2006, p. 61). From this perspective, the family is “a community of love and solidarity,” a place of the most profound personal contact, based on love and goodwill, on a profound and complementing relationship between a man and a woman and the generations who help one another out in the achievement of worldly wisdom. It creates a community of people, the most important form of a social life, a group that is fundamental to every society, a center for the transfer of life and the culture of life, of decisive importance in the shaping of an individual’s social personality (Dyczewski, 1995, p. 23).

Generally speaking, in sociological theory, a family is treated as (Klimczuk, 2008, pp 35-36):

1. A small social group (microstructure), whose members are connected by a marriage, bonds of kinship (sometimes adoption), a network of



mutual relationships and social relations, who run a common household, and play the important social roles of a mother, a father, a spouse, or a child.

2. A universal social institution, i.e. consolidated in the traditions of all cultures, ritualized group of human activities which is aimed at meeting certain needs of its members.
3. A primary group – characterized by relative durability, small size, multi-functionality, and a social bond. Within the framework of a family, basic socialization takes place.

Summing up the definitions of a family as a natural social institution, we can differentiate four basic approaches (Kocik, 2006, pp. 68-70):

1. The structural approach – highlights the composition and membership in the group. We can assume that a family is created by at least one parent and one child, who are biologically related and share the same household.
2. The functional approach – highlights the objectives and functions performed by a family in relation to its particular members and the whole society.
3. The inclusive approach – highlights the significance of relationships between members of a family group. It focuses on motivations and preferences of individuals involved in personal relationships. It diverges from the institutional definition of a family and sees it as a private, voluntary social group with unique relationships. Family is defined as a group of adults and children maintaining mutual relationships, leading to the arousal of emotions and family bonds, which, in turn, tie them to this group.
4. The universal approach – assumes that a family is a normatively-determined kinship group which aims at the fulfillment of procreative and socializing duties.

Moreover, contemporary reference books take into consideration the economic theories of a marriage and a family. As noted by K. Slany, from the economic point of view, a marriage is a voluntary partnership aimed at joint production and joint consumption, and as such can be compared with other economic organizations focusing on the maximization of private profits subject to market discipline. From this point of view, entering into matrimony, yields (or can yield) for spouses the following benefits (Slany, 2002, p. 57):

1. Having children – a family is a place of procreation and upbringing children. In a family, coordination of expenses for children, and the utilization of their talents (well-being and successes) is more efficient.

2. The division of labor – based on economic benefits (e.g. one of the partners pursues his or her career and the other stays at home).
3. Joint distribution/utilization of certain goods – refers to household expenses, joint consumption, costs connected with the quality of children, spending free time, and the flow of information.
4. Loans and investments – mutually beneficial internal transfers (e.g. one partner studies while the other works – expecting a share in the future profits from this investment; funding children's education by their parents in return for expected support in old age).
5. Risk protection – important at almost every stage of life (e.g. in a situation where one of the partners is working, and the other is ill or unemployed; accumulating savings that can be used by every family member).

In the context of the discussion above, we can more often observe the transformation of the family notion's aspects and assumptions. This transformation is constitutionally connected with the paradigm of social change discussed in the previous part of this paper. Many scientists, politicians, and social commentators, especially those of conservative convictions, state that nowadays we deal with a serious, multidimensional family crisis. Its causes and symptoms can be classified in several groups (Szlendak, 2010, p. 379):

1. Demographic causes – a decrease in the size of families, a decrease in the percentage of families in the pool of all types of households, the percentage of people living outside families (with someone unrelated, without children, alone, within the framework of an institution, for example in a residential home for the elderly) have been increasing for decades.
2. Institutional causes – we have three indicators of a family strength as an institution; first of all, its cohesion, meaning the strength that binds its members together; secondly, how good it is at fulfilling its functions; and thirdly, the amount of power a family holds, meaning its position in relation to other social institutions. The performance of the family is declining in all these spheres.
3. Cultural causes – Familocentrism has weakened for the sake of such values as self-improvement and egalitarianism. Faith in the family and a strong identification with the family have weakened. Loyalty towards the family and the mutual support between their members have weakened. Nowadays, we do not care for the continuity or maintenance of a family and do not subordinate our personalities and interests to the benefits of the family.

What is more predominant, in the sphere of cultural transformations, changes take place in the arrangement of the roles of men and women as well as the weakening of social rules and norms. We also observe an increase in the social acceptance of childlessness and alternative forms of marital and family life (Szlendak, 2010, p. 379). Sociological studies confirm intensification of a process of family disintegration, which is mostly determined by cultural and axiological factors. The genesis of the modern destruction of the family should be sought in the crisis of post-modern culture, in its various aspects, and the most serious symptom is the currently-observed phenomenon of de-socialization. The unfavorable social environment of a modern family is the basic element threatening family and marriage (Drzewiecki, 2012):

- undermining its sense of an enduring and basic community of human life,
- emancipation's efforts of women. They are connected with the feminist movement, which propagates equality, particularly gender equality in its most vocal forms, between a man and a woman, thus destroying and relativizing the existing order of social roles. Against such a background, we can better understand the socialist idea of a working woman, and the current model of an emancipated woman (from the burden of men),
- homosexual circles demanding an approval of new forms of partnerships.
- proliferation of abortion, contraception, pornography, prostitution, and the ease of access to them through the mass media, and through state and social institutions unfavorably-oriented towards family, which mock true love, chastity, and fidelity by propagating succumbing to temptations, indolence, and egoism (Van De Kaa, 1998, pp. 10-18).

Therefore, the problem is more serious and concerns the most fundamental values related to the moral condition of a human being, their attitudes and essential life orientations reflecting the ideas present in the modern culture. We can invoke many statistical data that describe the condition of a modern family in a more or less detailed fashion. The statistics show only numbers, but behind those numbers there are transformations in culture and social mentality. The demographic crisis is above all a crisis of values (Rokeach, 1973, pp. 3-25), the crisis of human being as a value; and the crisis of the family as a natural educative environment (Van De Kaa, 1987, p. 5).

The content included in the second part of this paper presents the family as the natural institution of social life. It stems from the community of life and marital love; it is a primary group, serving as the foundation /

prototype of social existence that underlies our lives (unit scale); it comprises the centre of social life – the first human community (group scale), and is built on marriage, a relationship between a man and a woman (John Paul II, No. 17). The modern society, under the influence of post-modern culture (the atrophy of moral bonds, a lack of trust syndrome, normative chaos, destruction of norms, anarchization of social and moral life, anomie, social and moral anomalies, cultural trauma) strives to undermine the aforementioned constitutive and natural features of the family (Kowalczyk, 1996, pp. 49–51). Numerous circles that try to break the family as an institution based on a relationship between a man and a woman see it as the genesis and source of domestic violence, discrimination, sexual stereotypes, etc. Sociological studies, however, show something completely different. A natural family is an institution that protects society against anomie, disintegration, social pathologies, and violence. The family is “a community of love and solidarity,” a place of most profound personal contact, based on love and goodwill, a profound and complementing relationship between a man and a woman, and the generations which help one another out in the achievement of worldly wisdom.

The family, as a basic social unit, performs very important and indispensable functions. It was and still is one of factors that determine and support modernization processes. It is also one of the most important sources of social capital, and the pillar guaranteeing and integrating the economic, political, moral and cultural order of civilization and Western culture. Thus, the family should be a first cure via wise cultural and social policies and should be protected against any axiological disorder. The weakening of the family as enduring basis of social life is definitely not conducive to the creation of social order. Any threats to the family are in fact threats to the human being, and, as a result, to the entire macrosociety. An axiological consensus of society is dependent on the level of moral socialization in families accentuated in the ethos of personalism, which is altruistic and community-oriented, simultaneously rejecting egocentrism, egoism, and relativism popular today due to its “post-modernity” of individualism and subjectivism (Mariański, 2006, pp. 26-27).

To sum up this paper, we should state firmly that the most effective protection of the family and society against violence is:

- The promotion of wise upbringing of the younger generation, based on basic values (Rokeach, 1973, pp. 3-17), not tolerance or democracy, but truth, love, and responsibility. Such upbringing should be promoted in schools, in the public media, and in all organizations and institutions on which the state has influence and which financially supports (<http://ekai.pl/diecezje/radomska/x28864/ks-dziewiecki-ustawa->

o-przeciwdziałaniu-przemocy-w-rodzinie-jest-wyjatkowo-szkodliwa-dla-rodziny/);

- The real prevention of violence requires standing against “political correctness,” which, in respect to family and marriage, is particularly prejudicial;
- The fight against the politically “correct” myth stating that the families breed more violence than family-like relationships. The optimal model of the man-woman relationship, based on love which is faithful and responsible, should be supported and promoted against political “correctness”.

Such initiatives and proposals provide an opportunity to effectively oppose political parties, the media, and circles which tend to ignore the subject matter of marriage and family, or suggest that marriages are the source of violence and pathologies though, as they say, violence and pathologies are the most present in cohabitations (Ustawa o przeciwdziałaniu..., 2010). We have the right to remind the public opinion that no institution will ever replace the family in performing important social functions like the preparation of the younger generation for a joyful life, honest professional work, and a wise social activity. We must remind others that families based on enduring and selfless love are the best providers for the least expensive kindergartens, schools, and residential homes for the elderly, the sick and lost. Happy families are also the best emergency response centers, as they have at their disposal the most effective therapy – a love therapy. A society that does not care about the family and marriage defeats its chance for a favorable future, because – as highlighted by the Blessed John Paul II on many occasions – “the future of humanity comes with the family” (Dziewiecki, 2012).

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## CONDITIONS OF VICTIM-OFFENDER MEDIATION IN CASES OF INTIMATE PARTNER VIOLENCE

Slávka Karkošková

### Introduction

Intimate partner violence (referred also as a *domestic violence*) is not a new phenomenon, rather than the one that existed during the whole history of a mankind. While for a long time it was perceived as rather common (perhaps even normal) part of behaviour and in any case a problem that should be dealt with in a private manner, last decades have brought a shift toward the criminalization of intimate partner violence. “Pro-arrest policies made arrest of abusive partners mandatory, and in some jurisdictions jail terms were also mandatory. Victims who filed charges were not allowed to drop them and sometimes forced to testify against their partners. All this was done for the victim’s protection and it seemed to make a lot of sense at the time. However, it took away from victims their decision-making power regarding how they dealt with the violence“ (Hayden & Van Wormer, 2013, p.123). They might not have wanted their partners arrested and perhaps had just wanted the violence to stop (Morris & Gelsthorpe, 2000; van Wormer, 2009).

Although intimate partner violence may be defined as a crime (within legislation of various states) and thus law enforcement is viewed as a primary way of responding to domestic violence cases (Satel, 1997), it does not mean that the problem will be magically solved. Frederick and Lizdas (2010) found in their study of victims of domestic violence that many of the women affected by family violence had little faith in the criminal justice system. Michalovová (2011) conducted a qualitative survey, in which she asked the representatives of organisations involved with domestic violence in Slovakia: *What do you think the problems in addressing domestic violence are at present?* She found that the enforceability of law in Slovakia is generally considered to be desperately insufficient. Moreover, professionals also think that criminal justice intervention



would fail to provide a complex solution anyway, as the majority of battering incidents are below the crime “intensity”.<sup>1</sup>

Although its nature does qualify domestic violence as a criminal offence, the problem remains unresolved; as a matter of fact, foreign studies indicate that battering victims do not see criminal justice procedures as an appropriate way of solving their “sensitive” problem (Tjaden & Thoennes, 2000). Given the fact that this kind of crime is characterised by a high level of latency, it might be the time, as Grauwiler and Mills (2004) argue, to expand our efforts to focus the needs of victims who avoid the criminal justice system. Community-based interventions that do not rely on criminal prosecution may be applied. Alternatively, such practices could become an additional process for justice available under the umbrella of the criminal justice system (Jülich, 2010).<sup>2</sup>

While the traditional criminal justice system relied on notion that through sentencing and imprisonment of crime perpetrators justice will be satisfied, the foundational postulate of restorative justice approach is that crime harms people and relationships and that justice requires the healing of the harm as much as possible (Zehr, 2002). Victim-offender mediation (VOM) is the most widespread model of restorative justice application. In addition to its standard (dyadic) type, VOM also exists in modified or extended versions, such as family conferences, or “sentencing circles” that involve, besides the victim and the offender, also the concerned community members. The meeting outputs usually include a written or oral apology from the offender to the victim, an agreement on compensation of damages, or on any other service delivered by the offender to the victim or to the community, and/or by the community to the victim and to the offender (Presser & Gaarder, 2000, pp. 181-182).

Applying of VOM in domestic violence cases is not a matter of course; rather it is viewed with controversy by professionals (Strang & Braithwaite, 2002). This study presents an overview of arguments of both opinion groups, as well as, examples of the best practise in the field of restorative justice implementation in cases of intimate partner violence.

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<sup>1</sup> Indeed, as a member of an international research team of the VICTIMS project (no. JLS/2008/DAP3/AG/1157, *Daphne III Programme*, 12/2009 – 12/2011), I could see for myself that a lot of domestic violence cases are classified by the police only as “a misdemeanour” (meaning that the offender is only punished with a fine, without criminal prosecution).

<sup>2</sup> In this regard, Fernandez (2011, p. 149) emphasizes that intimate partner violence is „too dangerous to be left without the “big stick” of the legal system“.

## Arguments against the application of VOM in domestic violence cases

If mediation is viewed as an encounter of two opposing parties, involving negotiation and an effort to come to a fair mutual agreement, the primary objection against the use of mediation between domestic violence victims and offenders would be an *imbalance of power*.<sup>3</sup> Some authors maintain that domestic violence (the substance of which is the controlling and intimidation of victims by offenders<sup>4</sup>) severely undermines the victims' strength to a point where they become unable to express their needs freely and make their own decisions. The victims might thus be unable to defend their lawful interests and during mediation may prefer solutions favourable to the offenders; as a result, mediation may be experienced as a secondary victimisation of the victims (Lerman, 1984; Viano, 1996; Zylstra, 2001). Their relationship with the offenders deprives victims of their freedom, making them live in fear, servitude and submission. Such a strategy, essential for the victim's survival, is deeply rooted. According to those who oppose the use of mediation in domestic violence cases, the mediation process cannot be immune to such power imbalance. Many think that such an effect can be brought about not only by the victim and the offender, but also by other VOM participants who either deliberately or unwittingly protect the offender at the expense of the victim. For a vic-

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<sup>3</sup> According to Nordhelle (2010), *power* itself is neutral and means an energy, strength, capacity or ability to act. It is only the way of wielding this power that makes it positive or negative. *Negative power* can be defined as deliberate control of other people intended to make them act against their own will to comply with the will of the power-wielder. The *instruments of power* and control include knowledge, resources, physical or mental strength, or fear (i.e. rather obvious ones) and manipulation (which usually remains hidden). *Manipulators* usually aim to make other people emotionally sensitive (e.g. through impressing, accusation, intimidation, playing the role of a victim, and targeting the sensitive spots of the others, such as their needs, interests, desires, fears or flaws). Over-sensitised people have a decreased capability of critical thinking and can be better manipulated. Presentation of false reality is a typical leverage used by manipulators to gain benefits.

<sup>4</sup> Fernandez (2011) stresses that power and control dynamics are typical features of intimate partner violence. One of the most frequent elements of this dynamics are coercion and threats, which „range from threats to harm the victim, to leave her, or to commit suicide, employed as a way to force her into doing his wishes. Sometimes, batterers use intimidation as a control tactic to frighten the victim through looks, gestures, smashing things or property, or displaying weapons. Another control tactic might be emotional abuse (putting the victim down, calling her names, making her think she is crazy or guilty, humiliating her), minimizing/denying the abuse (making light of the abuse), or blaming the victim for the abuse. Isolating the victim from contact (be it verbal or physical) with other family members and friends, and monitoring or limiting her movements is yet another power and control tactic. Batterers might also exert male privilege, including sexual abuse, and use children (using visitation as an opportunity to harass her or threaten to take the children away) as tactics to control the victim“ (Fernandez, 2011, p. 50).

tim it can take several years (following the end of the abusive relationship) to gather the internal strength necessary to get rid of the offender's manipulating influence (PATHS, 2000, pp. 3, 20-21). Some women's advocates argue that because of the inherent inequality that exists between victims and offenders, the traditional adversarial process of the criminal justice system could better serve victims of domestic violence (Hooper and Busch, 1996). Besides power imbalance, the balancing of power is also considered controversial by many authors. In their opinion, the fact that the victims and offenders are expected to engage in the offered negotiation as equals could imply that violence is not such a despicable offence and that the offender may avoid being held liable (Rimelspach, 2001).

Another reservation one can have about the VOM application in domestic violence cases is associated with the potential *threat to the woman's safety*. In the opinion of some authors women tend to be weakened to such an extent that their safety is in constant danger in the presence of the offenders (Grauwiler & Mills, 2004, p. 62). As well as manipulation and threats from the offender there is also another potential risk related to VOM – the danger that the offenders could use the negotiation contact to pursue their victims after the partners' separation to their new address which was supposed to remain undisclosed" (Cholenský, 2006). There are even cases where victims don't feel safe unless the batterer is in prison (PATHS, 2000, p. 19).

A concern that this form of mediation is too *focused on the needs of the offender at the expense of those of the victim* is also an argument against the use of VOM in domestic violence cases. There are restorative justice advocates who indeed consider the offender's rehabilitation to be the key benefit of VOM and who regard offenders as victims (of social milieu, abuse, circumstances etc.) needing therapy rather than punishment. This attitude, however, makes other experts worried that victimisation of offenders would eclipse their wrongdoing, relativise the arising needs and result in secondary victimisation of the victim (PATHS, 2000, p. 3).

Opponents of VOM in the domestic violence context believe that, as proven by statistics, robust legislation and uncompromising imprisonment of offenders is the best prevention of domestic violence. According to them not only does mediation *fail in abuse prevention*, but it also fails to address problems associated with the abusive relationship (Krieger, 2003).

Another argument against VOM in domestic violence cases is the assumption that if a woman has experienced very intimate forms of violence from her partner (sexual violence, for instance) *she will not be able to*

*freely share her suffering, fears and feelings* in mediation sessions. While such sharing is one of the fundamentals of restorative approaches, what badly victimised individuals usually need to confide in others is a strong feeling of safety and trust – something which is unlikely to occur face to face with a person who has brutally assailed the intimacy of a woman. Moreover, the humiliation and stigmatisation in sexual violence cases makes the sharing harder with respect to other VOM participants as well. VOM may then be hardly expected to assist in a battered woman's rehabilitation (PATHS, 2000, p. 21).

*Expectation of reconciliation* is another similar reservation one may have about VOM (along with expectation of the victim's rehabilitation). Positive results of restorative approaches include reconciliation, forgiveness, conclusion (of a problem) and restoration (of a relationship, for instance). Although according to restorative justice philosophy such outcomes are considered rehabilitating (for the VOM parties) and deserving support, there is a danger in creating expectation or promises of such results for participants of VOM in domestic violence cases. (Haslett & Edwards, 2002, p. 2-3)

Restorative justice philosophy accentuates (among other things) the role of the community, which may also bear a share of the responsibility for crime causes and consequences. The community of people around the victim and the offender should therefore also take part in solving the situation resulting from the crime. However, VOM opponents do not think the community's involvement is an outright positive action. They tend to regard *community as an abstract concept* rather than a cohesive group that could adequately address domestic violence without contributing (either overtly or in a subtle manner) to secondary victimisation of battered women (PATHS, 2000).

Last but not least it should also be noted that a lack of specially-trained mediators is the most criticised aspect associated with the application of VOM in domestic violence cases (Davis, 2007).

### **Arguments in favour of VOM application in domestic violence cases**

The advocates of VOM in domestic violence cases point out that, unlike in the classic-type mediation (used in disputes not qualified as criminal offences) mediation parties in restorative justice are differentiated as *a victim* and *an offender* (i.e. not as parties to a non-criminal dispute). VOM therefore does *recognise victims as persons*, stressing and upholding their need to reveal the truth, to be heard by others and to express their emotions (Braithwaite & Daly, 1994, p. 207). To recover, the victims need an opportunity to tell their story to people who allow them to open up and

who can acknowledge the reality of their experience. Public acknowledgement substantially contributes to final solution of the trauma (Herman, 1997, p. 70) and the victims need to hear that their injury was unfair.

In this respect the advocates of VOM usage in domestic violence cases believe that while the criminal justice model, as well as the classical-type mediation model deliver pre-determined outcomes (i.e. punishment and reconciliation), the restorative justice model is based on *creating conditions for the rehabilitation process* rather than on aiming to reach a specific result (Gaarder & Presser, 2000, p.184).

While some experts disqualify the VOM application in domestic violence cases due to the imbalance between the mediation parties, another opinion group points out that the (restorative) justice model provides an *opportunity for restoration of power on the side of victims* of domestic violence. The power restoration or empowering of victims is primarily spurred by their own decision on whether to take part in VOM, and if they opt to do so, they can choose their companions or representatives. The above-mentioned chance to tell their story and to express their emotions, as well as the acknowledgement of their suffering (if not from the offender, then at least from others) is also a source of strength (PATHS, 2000, p.21). According to Pranis (2002), the strengthening of previously unheard voices (i.e. victims) has an immensely significant value in the restorative justice philosophy; and it is our respectful listening to the victim's story that enables such a strengthening. Power restoration is also stimulated by the victims' opportunity to address questions to the offenders and to define the conditions for repair of injury and for contact with the offenders. The restoration justice process thus makes the victims actively participate in tackling their post-traumatic situation (Presser & Gaarder, 2000, p. 183).

VOM supporters believe that *power between victims and offenders can be re-balanced* in battering cases too, and they present various methods for power imbalance rectification (Steegh, 2003, pp. 186-188; Nordhelle, 2010). Cholenský (2006) extends this opinion by observing that the power imbalance is relative as both partners may have (or might have had) a different degree of influence in various areas of their shared life (such as child care or household management). Besides that, power imbalance is typical not only for domestic violence cases, but also occurs in other contexts in which mediation is successfully applied.<sup>5</sup>

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<sup>5</sup> In this respect Cholenský (2006) notes: "As shown by experience in international mediation used in confrontations between states (...), mediation is the most suitable technique for settling a dispute where a nation has a distinct advantage over its counterpart (e.g. by owning more weapons)."

The reservation based on the opinion that the female victim's safety is put at risk by VOM is opposed by the assertion that safety can in fact be ensured, with experts in the area listing a wide range of potential measures (Davis, 2007).

Another argument supporting the use of VOM in domestic violence cases is the community's promising potential. As Pranis, Stuart, and Wedge (2003) have argued, restorative justice—based programs can provide a legitimate forum for needed community intervention in family violence and counter the bystander community effect. The *community involvement* in addressing the post-traumatic and post-crime situation arising from domestic violence is *very important for prevention of re-offending*. They refer, for instance, to the *reintegrative shaming theory* (Braithwaite, 1989) derived from the family life model in which the family members who did something wrong aren't forgiven unless they express remorse. As relationships continue even where battering occurs, involvement of the family in the restorative process is perfectly appropriate. Relatives have a lot of possibilities to shame the offender whilst keeping him a member of the family, thus making prevention more efficient (Sherman, 2000; Presser & Gaarder, 2000, p. 184; Fagan, 1996, p. 26). Similar logic gives ground also to the *routine activity theory* (Cohen, Felson, 1979) according to which violence is a result of an opportunity – i.e. the presence of a suitable target and the absence of people capable of deterring the offender from his action. In restorative approach the family and community members keep an eye on offenders and encourage their positive behaviour. Due to the fact that they can perform unexpected visits and have access to intimate information, family members may play a significant role in domestic violence deterrence (Sherman, 2000). Relatives, friends or neighbours also contribute to prevention by supporting the victim, acknowledging that she has been harmed and offering any help they can (Presser & Gaarder, 2000, p. 183).

As suggested by observations presented in the previous paragraph, application of the restorative justice model encourages the offender to change. Domestic violence offenders have a tendency to get trapped in a “vicious circle” of shame and anger, compensating for their feeling of shame with rage and escalated violence (Braithwaite & Daly, 1994, p. 205). Stigmatisation of offenders alone is unlikely to bring about more than merely a defensive response (e.g. denial). If aggressors are to change, they also need, besides rebuke and supervision, some support that would prevent their exclusion from the community and would make them perceived as individuals capable of different behaviour (Presser & Gaarder, 2000, p. 185).

Perhaps the strongest argument in favour of the VOM application in domestic violence cases is the fact that *there are couples who wish to remain together*. For a woman her relationship may be important despite violence (Mills, 1996, p. 266). As many as fifty per cent of women are estimated to stay in an abusive relationship due to emotional, cultural or religious reasons (Griffing et al., 2002). While being an aggressor's partner, the battered woman is often also a mother, a lover, a friend, and a member of a family, a religious group, or a tradition; all these facts may have a very contradictory impact on the woman's decision about *whether to stay or go* (Grauwiler & Mills, 2004, p.55). Staying with the batterer is rarely seen as a decision of free choice, an expression of commitment, understanding of the assistance system limitations, and expression of self-determination or self-confidence (Lempert, 1996). Some authors (e.g. Mills, 2003; Grauwiler & Mills, 2004, p.55) think that the criminal justice system fails to address the victim's individual needs and ignores the fact that the victim and the offender used to share (usually over a period of time) their lives including child care. The restorative justice model, on the other hand, promotes the wishes of the victim, including requests that might seem rather irrational (such as a desire to repair the relationship) – in this respect Cholenský (2006) points out that “there are no grounds for depriving domestic violence victims of legal capacity and therefore the will of the victim should be respected.” In addition coercion of victims is inconsistent with the feminist movement's and social work's goal of *self-determination* (Presser & Gaarder, 2004). Victims' rights to determine their own needs and the means of attaining them are more likely to be protected within a less formal restorative justice setting than in a criminal justice jurisdiction on its own (Hayden & Van Wormer, 2013, p.123).

For couples who wish to end the violence but not the relationship, the restorative justice model presents *a chance to comprehend the dynamics of violence*. All intimate relationships, including abusive ones, have internal dynamics of their own that can shed light on the causes or stimuli of violence<sup>6</sup>. Putting the violence dynamics into perspective<sup>7</sup> is crucial for prevention of re-offending (Grauwiler & Mills, 2004, p. 55).

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<sup>6</sup> In this context experts believe that violent behaviour may be triggered by negative feelings which, according to men, can be ignited by woman's excessive complaining, irking or nagging (Dobash, & Dobash, 1998, p. 155; Eisikovits & Buchbinder, 2000). The violent behaviour of a man can also be fuelled by a man's feeling of having been abandoned by his wife (or if she has grown emotionally alienated). The perceived loss of the female produces panic and hysterical aggression in the man (Dutton, 1995, pp.60-68). Therefore it seems appropriate to seek the opinion of men and to examine the facts behind their grievances. Although a woman cannot be held accountable for battering, she should assume responsibility for the aggression forms that she induces in the relationship.

Restorative justice advocates maintain that these models *address the very roots of the domestic violence issue*, tackling social inequalities, sub-surface norms tolerating violence in intimate relationships, isolation of individuals or families and neutralisation of guilt (Presser & Gaarder, 2000, p. 188).

### **Conditions for VOM application in domestic violence cases**

Experts who are inclined to support the use of VOM in domestic violence cases do not assert that this option is suitable for all cases of this type. Having a realistic view of the issue and being aware of possible advantages as well as risks, they stress that case-specific consideration is imperative (Pence, 1999; Daly, 2002; Edwards, 2002; Davis, 2007).

There are some fundamental conditions for application of VOM in domestic violence cases. The baseline condition is the preparedness of the mediator and preparedness of the system on which the mediator depends. The central requirement is the appropriate disposition and attitude of the victim and the offender. And the complementary condition is the appropriate disposition of the community of persons associated with the victim and the offender which (even without their direct VOM participation) can have an indirect influence on the process. In the following paragraphs we are going to have a closer look at these conditions, starting with the disposition of a person most affected by a crime.

An essential prerequisite for mediation dialogue between domestic violence victims and offenders is the *disposition of the victim*; if the victim has the desire and strength to talk about her experience of violence with its consequences and to present her own needs<sup>8</sup> (Edwards & Haslett, 2002). To build up such strength the victim usually needs to spend some time away from the offender and to have a possibility to use professional legal or social counselling services, or to undergo psychotherapeutic treatment. Professional assistance can enable the victim to assess her experience and to make a free decision about accepting or refusing the VOM. The victim should be informed about her rights and about all the alternative ways of solving the situation in order to select the option that she sees as the most appropriate. Therefore, she should be aware of all the objective benefits and risks of VOM (PATHS, 2000, pp. 2, 21). As it is

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<sup>7</sup> An effort to reveal the individual components of the hidden dynamics of violence doesn't actually contradict with the principle that a victim shouldn't be blamed for the offender's behaviour (Grauwiler & Mills, 2004).

<sup>8</sup> According to Cholenský (2006) it is necessary to exclude from mediation such cases in which "the victim is not capable of putting her needs above those of her violent partner (or, at least, on an equal level)".



the victim who knows best all the circumstances of the case, the aggressor's character and the risk of further harm, the ultimate decision about solving the issue should reside within the victim herself (Davis, 2007). In no way can the victim be forced to take part in VOM and all the potential forms of pressure (from her partner, relatives or restorative justice staff) must be assessed and eliminated (Edwards & Haslett, 2002, p. 2; Presser & Gaarder, 2000, p. 187). The VOM application in domestic violence cases can only be regarded as an option if it is requested, after due consideration, by the victim herself.

Another prerequisite is the *openness of the offender* towards participation in the VOM. Such openness can be expected if the offender accepts responsibility for his actions<sup>9</sup>, shows remorse for his behaviour towards his spouse, expresses willingness to work on changing himself, and is open to hearing about the victim's experience and the impact his actions have had on her (Edwards & Haslett, 2002, p.2). The offender cannot be considered positively disposed towards meaningful participation in the VOM if he lacks a certain amount of empathy towards the victim and if he shows a strong inclination to continue to control and manipulate the victim (Presser & Lowenkamp, 1999, p.187; Davis, 2007; Zylstra, 2001, p. 256).

Any *signs of power imbalance* between the mediation participants must be carefully screened prior to VOM and continuously *monitored* throughout the mediation process (Davis, 2007). When detecting such signs, mediators should *adopt adequate methods to avert them and to eliminate any negative impact* on the victim. Batterers "use a range of tactics to gain advantage and power in mediation: they may assume the role of a sensitive parent, pin the blame for the violence on the victim, or arouse compassion for their housing situation. Through the use of threats or manipulation they strive to gain control over the partner's testimony" (Holá, 2010). Presence of violence may be indicated by the victim's non-verbal communication (signs of fear), attempts of the batterer to control

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<sup>9</sup> Experts on domestic violence stress that violence occurs both in conflictual situations and in situations where conflicts are absent; the use of violence against a partner is a strategy for gaining power and control in a relationship and is the result of the offender's choice rather than an uncontrollable impulse. Concerning the responsibility for violence, the experts highlight that there is a substantial difference between acknowledgement of violence occurring and assuming of responsibility for that violence. Responsibility includes recognizing that from a number of choices the offender opted for the wrong one and that he had no right to commit his actions. Without responsibility being taken by the offender, the VOM dialogue seriously risks causing further harm to the victim and is not likely to be conducive to positive changes in the offender's behaviour (Edwards & Haslett, 2002, pp. 2, 4).

the discussion, his use of offensive and humiliating remarks, breaking into the victim's speech, and disputing or twisting her statements (Davis, 2007; Presser & Gaarder, 2000, p. 187). Mediators must always bear in mind the risk of manipulation and intervene properly if it occurs. A mediator should help the manipulated person pass from merely feeling emotions to being able to make a sound analysis of the way she is being manipulated in order to transform her response from spontaneous emotional reaction to a consciously controlled one. Such a process may require interruption of the mediation and intervention through a separate session with the victim. Mediators can handle the manipulator by empathetic listening to his allegations and asking naive questions revealing his lies. Rather than direct confrontation with the manipulator, appealing to his positive traits is recommended (Nordhelle, 2010, pp. 147-148). Other *methods* that mediators can use to eliminate the power imbalance include, for instance, setting clearcut rules, setting a topic for discussion, allowing the parties to speak only with the mediator's permission, limiting their speaking time or stopping the discussion in the event of the victim being threatened, explaining the allegations of a participant to the other party, progressive transfer of power from the mediator to the parties if they seem to be able to wield it appropriately (Steegh, 2003, pp. 186-188), holding separated sessions, use of teleconferences, presence of an "attorney" to support the underrepresented or hesitant victim, employing two mediators (a male and a female) instead of one to conduct the mediation (Cholenský, 2006). Edwards and Haslett (2002, p.7) highlight that besides monitoring the power dynamics in the mediation room it is also necessary to keep an eye on what is going on between the couple outside the mediation sessions (e.g. whether the woman is not being punished by her partner for what she has said in the session and/or whether she is not being coerced to change her statements or requirements).

The essential conditions of VOM in domestic violence cases include *ensuring safety* (Fernandez, 2011, p. 151). Although application of the above-mentioned power imbalance elimination methods substantially contributes to making the victim feel safe, it is not the ultimate response to the issue. To maximise the victim's safety (both psychological and physical), the mediator should carefully examine all the causes of her concern and adopt adequate measures to reduce her further victimisation (Edwards & Haslett, 2002, p.5). The victim's safety can be ensured by measures such as separate entry of the two VOM parties into the session building, differently scheduled arrival and departure of the parties (the victim should leave the building earlier than the offender), separate waiting rooms for both parties, non-disclosure of the victim's address, escort-

ing the victim *from* and *to* her place of residence, and a possibility to call in a security service in case of a violent incident during the mediation (Davis, 2007; Cholenský, 2006). Moreover, during the mediation, the victim may also suggest an acceptable manner of contact with the offender outside the mediation session, e.g. phone, e-mails, or face-to-face meetings (Davis, 2007). If the threat posed by direct contact with the offender exceeds the victim's tolerable threshold and she still feels the need to communicate her emotions, feelings, perceived consequences of the abuse and compensation requirements to the offender, the mediator can offer her alternative forms of VOM in which there is no direct contact between the victim and the offender (Presser & Gaarder, 2000, p. 187; Davis, 2007) and communication is conducted by the mediator, a representative (spokesperson) of the victim, or with the use of audio and video recordings, or letters.

A core feature of the restorative justice theory is an assumption that the community knows best how to cope with crime and wrongdoing. However, our experience of domestic violence cases shows that the surrounding society often acts as an accomplice to the crime. This context gives rise to another rule that should be respected during domestic violence VOM: if *members of the society around* the victim or the offender are supposed to participate in the VOM (or in any other restorative justice model) they must possess *an appropriate disposition*. Restorative justice approach works only when the community unites in holding perpetrators accountable (Smith, 2009, p. 259). Thus mediators must examine whether these persons are not proponents of the folk-wisdom myths about domestic violence that may lead to putting blame on the victim, vindication of the offender or trivialising the situation (Edwards & Haslett, 2002, p.7; Presser, Gaarder, 2000, p.185). Where community members could obviously sabotage the VOM efforts rather than assist in its meaningful progress, it is better to hold private sessions (i.e. without involvement of friends, relatives, neighbours etc.) (Edwards & Haslett, 2002, p.7).

Concerning the conditions of VOM in domestic violence it is also necessary to highlight that a *message of zero tolerance of violence* should be stressed throughout the entire restorative justice process. No restorative justice model must be regarded as an easy way of coping with serious crimes and VOM cannot offer the batterers a sanctuary to avoid liability and criminal justice sanctions (PATHS, 2000, p.37).

Another aspect of equal significance is that there should be *no expectation of reconciliation, forgiveness and restoration*. That would be an ideal outcome requiring a strenuous process which, even after a long time, may not come to a successful end (see chapter 4) and it thus cannot be

viewed as a definite result of VOM. What mediators can do is to assist the participants in identifying their needs, expectations and options, and to support them in thoughtful and free decision-making in their issue (Llewellyn & Howse, 1999). In no way should the reconciliation attempted to maintain the relationship become an objective of VOM. Within the restorative justice movement there has actually been a shift in understanding of reconciliation – nowadays reconciliation is viewed as coming to terms with one's own past, and is associated with making offenders accountable and willing to provide certain compensation to their victims (Presser & Gaarder, 2000). In relation with the restoration concept it should be noted that the aim of VOM in domestic violence cases is not a restoration of the partnership in the shape existing prior to outbreak of the battering (as that would create conditions for renewal of abuse); instead, restoration can be characterised as establishment or re-establishment of relations of social equality (Llewellyn & Howse, 1999).

There is yet another condition arising from those mentioned above: mediators should reserve *sufficient time* for handling cases involving domestic violence. The build-up to a dialogue encounter may require several lengthy meetings over a period of time to carefully assess whether the victim, the offender and the community members are adequately prepared for VOM participation. The mediation process itself is equally likely to require more time than in other cases; experienced mediators say that there are very few single sessions and more frequently two to three sessions are held, whereas some dialogues may run from five to eight meetings (Edwards & Haslett, 2002, p. 6). Reservation of sufficient time for conducting a meaningful VOM in domestic violence cases greatly depends on the *preparedness of the system*. Even where mediators are greatly interested in the issue of domestic violence, the system providing the mediation framework (organisations or institutions) sometimes fails to create suitable conditions for the process.

Last but not least, the conditions required for a meaningful application of VOM in domestic violence cases include the *preparedness of mediators*. Required to be properly trained to handle such tasks, they should have theoretical and practical training focused on the specific features of domestic violence: on a range of myths, stereotypes and prejudices that are elements of patriarchal culture and may overtly or subtly encourage such crimes, on the ability to detect signs of violence, on the patterns and circumstances of battering behaviour, on an ability to detect the symptoms of victim's traumatisation, on the ability to detect the ways used by offenders to avoid accountability for their actions and to distort reality, on the ability to discern the dynamics of power, to minimize the power im-

balance between the mediation parties, and a capacity to intervene efficiently if the offender attempts to manipulate the victim (Presser & Gaarder, 2000, pp. 186-187; Kelly, 2001; Edwards & Haslett, 2002, p. 6; Zosky, 2003; Davis, 2007, p. 264; Fernandez, 2011, p. 151). Mediators in the area of domestic violence cases are recommended to undergo continuous training (Edwards & Haslett, 2002, p. 6) and to be supervised in their work (Presser & Gaarder, 2000, pp. 186-187).

In addition to all the conditions described above, it should be stressed that *evaluation* of whatever models based on restorative justice philosophy is highly desirable. In this regard Fernandez (2011, p. 153) recommends that follow-up with victims „should be provided for a reasonable period of time after the encounters“. She adds that each restorative justice programs “should be required to evaluate formally both their processes and outcomes, and disseminate the successes and challenges (...). The metrics for success of how restorative the program is will be decided with full input and consultation with the victim-survivor and, if relevant, the batterer“. Similarly, the set of basic principles of *Communities Against Rape and Abuse* (CARA) contains the following recommendation: „Prepare to be engaged in the process for the long haul. Accountability is a process, not a destination. It takes time, people will probably try to thwart your efforts, and even if the aggressor engages the process, there must be long-term follow-up with her or him“ (CARA, n.d.).

To remain realistic, let's add that it could take a long time until the stakeholders are sufficiently prepared to VOM. In this regard Hayden and Van Wormer (2013, p. 126) note that „one use for restorative justice, not considered in the literature, would be to have a gathering years later following the abuse that took place, perhaps once the former partners have gone on to lead other lives. This might be healing in situations where some form of resolution is desired, where the former batterer has turned his life around and wishes to make amends to his former victim, while his ex-partner wishes to describe the pain she has lived with in the years since the violence took place, to receive support and understanding from her family members, and finally to accept the apology and even to forgive. Consider that other restorative practices, for example, truth and reconciliation commissions and victim-offender dialogue, take place years after the crimes have taken place, and, in many ways, that is their strength.”

### **Best practice examples**

VOM has been used in domestic violence cases abroad for quite a long time. Cholenský (2006) observes that one of the renowned organisations active in this field is the Association of Family and Conciliation

Courts in Madison, Wisconsin, the USA.

As noted by Edwards and Haslett (2002, p. 1), since 1998 a VOM programme focused on domestic violence has also been conducted by the *Mediation and Restorative Justice Centre* in Edmonton, Alberta, Canada. Smith (2009, p. 258-259) remarks that restorative justice models „have been particularly well developed by many Native communities, especially in Canada, where sovereign status of Native nations allows them an opportunity to develop community-based justice programs: In one program for example, when a crime is reported, the working team that deals with (...) domestic violence talks to the perpetrator and gives him the option of participating in the program. The perpetrator must first confess his guilt and then follow a healing contract, or go to jail. The perpetrator is free to decline to participate in the program and go through normal routes in the criminal justice system. In the restorative justice model, everyone (victim, perpetrator, family, friends, and the working team) is involved in developing the healing contract. Everyone is also assigned an advocate through the process. Everyone also holds the perpetrator accountable to his contract.“

From a perpetrator's point of view, this approach is often more difficult than going to jail: First, one must deal with the shock and then the dismay on the neighbors' faces. One must live with the daily humiliation, and at the same time seek forgiveness not just from victims, but from the community as a whole. A prison sentence removes the offender from the daily accountability, and may not do anything towards rehabilitation, and for many may actually be an easier disposition than staying in the community (Ross, 1997, p. 218).

According to Smith (2009, p. 269) „some of the most well-developed community accountability models exist in queer communities of color, such as *Friends Are Reaching Out* (FAR Out) in Seattle. The premise of this model is that when people are abused, they become isolated. The domestic violence movement further isolates them through the shelter system, where they cannot tell their friends where they are. In addition, the domestic violence movement does not work with those people who could most likely hold perpetrators accountable – their friends. FAR Out's model is based on developing friendship groups that make regular commitments to stay in contact with each other. In addition, these groups develop processes to talk openly about relationships. One reason that abuse continues is that we tend to keep our sexual relationships private. By talking about them more openly, it is easier for friends to hold us accountable. In addition, if a person knows she / he is going to share the relationship dynamics openly, it is more likely that she/he will be accountable in the

relationship. This model works because it is based on preexisting friendship networks. As a result, it develops the capacity of a community to handle domestic violence.“

Stevens et al. (2007, pp. 37-38) refer to research conducted by the Austrian Institute of Sociology of Law and Criminology in Vienna, according to which restorative justice principles may be successfully applied in domestic violence cases too. The authors present a pilot project of VOM in domestic violence cases, implemented in Vienna: “The project is based on a method of mixed teams. Firstly, a male mediator holds a session with the male offender, while a female mediator talks with the female victim so that the two mediators may share both stories during the mediation. Both parties are then invited to a joint meeting to agree either on conditions to terminate their relationship or on ways of ensuring a violence-free co-existence in the future. The usual practice is that the mediators support the woman’s story and advance her right for a non-violent relationship. Besides the victim’s emancipation, mediation is often focused on identification of both parties’ needs. Rather than reintegration or re-socialisation of the offender, it is an improvement of victim-offender interaction which is the main objective of the mediation process.”

However, perhaps the most interesting approach is a cognitive-behavioral programme developed in the UK in partnership between Cheshire Probation Service and the National Society for the Prevention of Cruelty to Children. Incorporating a range of learning methods to maximise the influence on offenders, the programme normally runs for fifteen months and consists of two stages. Prior to the programme beginning, offenders are individually assessed by a male and a female member of the programme team. All the programme sessions are conducted by a male and a female mediator who represent the cooperating organisations. The first stage is focused on group dynamics screening and on tackling the tendencies to avoid responsibility, trivialise the violence and blame the victim. The aim of the effort is to make the perpetrators recognise their abusive behaviour as well as understand and begin the transformation process. The second stage of the programme is concentrated on examination of the broad range of ways used by men to abuse and exert power and control over their partners. The aim is to change the perpetrator’s violent behaviour and violence-inspiring attitudes, and to make him understand the equality in a relationship characterised by mutual respect, trust, support, honesty, fairness, a feeling of safety and welfare, responsibility for one’s own actions, and partnership in household management. The offender’s female partners or ex-partners and their children attend a parallel support programme led by a female programme worker representing child

protection organisations. This support programme is aimed to make the female victims understand the scope of the programme for males and the fact that there can be no guarantees of a permanent change in the offender. The women are also informed about the possibilities and resources available for ensuring their safety or the safety of their children. The project also helps them to understand the issue of violence and to prepare a reasonable safety plan. (Skyner & Waters, 1999) Such a programme aids in making offenders and victims better prepared for meaningful participation in VOM.

## **Conclusion**

Application of restorative justice programmes in domestic violence cases has a high potential of benefits as well as risks. Safety of VOM on the part of domestic violence victims requires a thorough analysis of risks and consideration of disposition of all the stakeholders.

While exclusive application of criminal justice procedures may not be (and usually is not) perceived by those immediately concerned as a fair and appropriate solution, restorative justice offers a more meaningful, albeit more demanding method of coping with the situation. Although restorative justice is not a cure-all for violence against women, nor an ultimate response to the crime, it can be a suitable complement to law enforcement in a broader context (PATHS, 2000, p. 37). According to Pranis (2002, p. 38) “restorative justice requires a partnership with government institutions. Daly and Stubbs (2006), Coker (2006), and others specifically argue against developing restorative justice models as an “alternative” to the criminal justice system. “This tendency to assume a collaboration with the state happens because many domestic violence advocates argue that alternative models only work if they are backed by the threat of incarceration should the perpetrator not act in good faith” (Smith, 2009, p. 266).

Developing restorative justice programmes that would fit the specifics of domestic violence cases can be seen as a current major challenge for European countries (Stevens et al, 2007, pp. 36-37). “The best way forward may be to see a justice practice as a starting point, a gateway to support, therapy, and economic resources, rather than as an endpoint. (...) The most powerful justice remedies (...) lie outside of the “justice room,” and the goal is to mobilize them for victims and offenders” (Ptacek, 2009, s. 283). Let us hope that our society will build up enough competence and courage to offer services of restorative justice models to victims of domestic abuse, clients who are usually (in advance) excluded from the lists of potential clients.



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## VICTIM-OFFENDER MEDIATION IN CASES OF CHILD SEXUAL ABUSE

Slávka Karkošková

### Introduction

The main aims of mediation between victims and criminal offenders (Victim-Offender Mediation, further only ‘VOM’) are to create space for the victims to express how the crime has affected them and to ask the offender questions which have so far gone unanswered; and to give the offender chance to show remorse for the crime committed and to take responsibility by actively atoning for it and compensating for the damage caused. VOM need not have a purely dyadic form and can involve other people who can help encourage this process of restorative justice. According to Marshall (1999, p. 5) the restorative justice process is “a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.” The parties with the stake in the offence are typically victims, offenders, and the affected community (Braithwaite, 1999, p. 6).

VOM is carried out on a voluntary basis and can be used with a range of different criminal offences. Legislation covering VOM varies from country to country however, for instance in having different levels of maximum severity of the criminal act which mediation can be used for as an alternative to criminal prosecution. In practice this means that with more serious crimes, VOM may be used in parallel with criminal prosecution.

Sometimes it is argued that VOM is not appropriate with serious criminal offences (especially acts of violence or crimes against human dignity) because their victims are too vulnerable (and may suffer secondary victimization during VOM) and the perpetrators are going to be severely punished anyway. Tabachnick and Klein (2011, p. 31) state, however, that despite people’s general supposition that victims of such serious crimes want their abusers to be severely punished, experience shows that if there are alternatives to this, victims often favour the restorative justice model because the traditional punitive approach by itself does not necessarily

bring victims the solution they themselves need. Gal (2011, p. vii) draws on her years of experience as a children's rights lawyer (working with abused children) and states that the penal process brings neither the victims nor their families the feeling that justice has been fully served. It is not retribution which they want as much as the opportunity to tell their story and make the offenders realize just how much damage they have caused.

Using the potential of VOM in cases of serious crime is justified not only because victims of crime are often secondarily traumatized by the criminal justice system but also because many 'unmentionable' criminal acts are never dealt with by the relevant legal organs. Because it intrudes upon a person's intimacy and creates in the victim strong feelings of shame, self-blame, fear and mistrust, the crime of self abuse is one known for its high level of latency, with up to 90 % of all cases going unreported (Cheit & Freyd, 2005, p. 8). Even in cases, however, when the crime is detected while the victim is still a child, VOM can present itself as an option. In her publication *Child Victims and Restorative Justice*, Gal (2011) admits that VOM can be used with children as young as 3<sup>1</sup>, though clearly states that such young victims of crime form a "special population that calls for special treatment in both the practice and theory of restorative justice" (Gal, 2011, p.12).

In this context it is apt to refer to the *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (United Nations, 2005) which provides that age should not be a barrier to a child's right to participate in the justice process; that children have a right to be protected from hardship during the justice process; and that reparation should be combined with any criminal, informal, or community justice procedure such as restorative justice. In another important document titled *Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (UNODC & UNICEF, 2009), it is stated that: "A child victim or witness shall have the right to express his or her views, opinions and beliefs freely, in his or her own words, and shall have the right to contribute to decisions affecting his or her life, including those taken in the course of the justice process" (Article 2(6)). In addition, Article 30 of the model law requires the child to be informed about available restorative justice programs and how to access them.

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<sup>1</sup> This threshold is based on findings showing that children aged about three are able to recognize that other people can have different viewpoints (Selman, 1980)

## The rights and psychological needs of child crime victims

If we want to try to ensure justice is served after a child has suffered the trauma of being a victim of crime, we have to take into account the rights of children as well as their psychological needs (Gal, 2011). The main international document which addresses the rights of children is the *Convention on the Rights of the Child* (UN, 1989). The general (guiding) **principles** of the Convention are:

- 1) **Equality** (Nondiscrimination): All child victims should have equal access to mechanisms of prevention and protection, reporting, investigation, and prosecuting, as well as rehabilitation and reintegration (Article 2).
- 2) **The best interest of the child:** In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration (Article 3 (1)).<sup>2</sup>
- 3) **Life, survival and development:** Every child has the inherent right to life and the survival and development of the child shall be ensured to the maximum extent possible (Article 6). Childhood victimization undoubtedly threatens these rights. States should strive to repair harm caused to children by crime in order to maximize their chances for positive development (Gal, 2011, p. 42).
- 4) **Participation:** “State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child“ (Article 12(1). “Surely, the criminal process that follows the child’s victimization is a “matter affecting the child” (...). Decisions regarding the nature of the process itself (should it be referred to court or to an alternative process?), the role that the child should take in it, and its

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<sup>2</sup> Gal (2011, p. 39) notes that the duty to give primacy to the interests of child victims during the process following their victimization is not without problems. Other interests might be paramount in these circumstances, such as the right of the offender to due process, the interest of the prosecution to efficiently and quickly handle cases, and the general public interest to prevent crime. The conflict may be even greater when the perpetrator is also a minor, and thus deserve a “best interest primacy” approach as well (Hodgkin & Newell, 2002, p.252). In addition, it is questionable who is to decide what the child’s best interest is and how such judgment should be made (Todres, 1998). “Decision makers may find themselves struggling to reach the right decision as to the best interests of the child, with several competing views. Often the child’s wishes are in conflict with what others regard as his or her best interests“ (Gal, 2011, p.39). Flekkøy and Kaufman (1997, p. 45) suggest that a decision should depend on the child’s current needs and stage of development and preferably take into account not only the immediate interests of the child but also the long-term interests of the future adult.

outcomes (what kind of punishment, or restitution, should be inflicted on the offender?) affect the child directly and, therefore, require adults to consider the child's views" (Gal, 2011, p. 45). The participation principle does not mean that children have a veto right or that their opinions should always be determinative in the decision-making process (Hodgkin & Newell, 2002; Ochaíta & Espinosa, 1997). According to Gal (2011, pp. 45-46) "it is possible to see the participation rights as granting children more than a right to be heard, but less than a right to independent decision making. (...) ... a gradual growth in autonomy through practice and guidance in the decision-making process until the child is ready for full autonomy is preferred."<sup>3</sup>

Several provisions of the Convention (especially Article 19, 34-37<sup>4</sup>) articulate the **right of children to be protected against the occurrence of victimization** (whether inflicted by caretakers or other persons). Article 39 then focuses on the **right to rehabilitation** of children who have already been victimized: "State parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim (...). Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child" (Article 39). As Gal (2011, pp. 51-52) stresses: "According to this provision, once victimization has occurred, an obligation is created toward the child to promote his or her emotional healing as well as their social reintegration. Therefore, punishing offenders is not enough; the responsibility of state members toward young victims continues until they are fully rehabilitated."

The children's rights concept "is, theoretically and practically, a valid instrument in evaluating current responses to childhood victimization, making the Convention an important international measurement for the achievements (and failures) in this field" (Gal, 2011, p. 54). Despite this, the concept of a child's rights cannot be considered a perfect instrument for assessing the reactions of society towards victimization of children; it

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<sup>3</sup> "Whatever the child's age is (...) adults should try to engage in dialogue with the child, to allow mutual exchanges of feelings and viewpoints" (Gal, 2011, p.46). Smith (2002, pp. 82-85) points out that even very young children are capable of understanding their experiences and expressing themselves. Her review of empirical research suggests that babies, infants, and preschoolers are active participants in their environments, and that when approached appropriately, even 3- and 4-year old children can communicate about their views, difficulties, and wishes. Thus, even very young children can participate in significant ways in decision making.

<sup>4</sup> Protection against abuse, neglect and violence inflicted by caretakers (Article 19), specific protection against sexual abuse (Article 34), trafficking (Article 35), other sorts of exploitation (Article 36), torture and other cruel, inhumane and degrading treatment or punishment (Article 37).



is also important to consider the psychological needs of child victims. Although the specific needs of each victimized child are individual and depend on many different factors, we should consider the set of needs which are almost universally present during the child's recovery process when we assess each child's particular needs. **The basis needs of child victims** can be summarized as follows:

- 1) **Empowerment and control:** A key step towards fulfilling this need is eliminating feelings of guilt and responsibility for the crime committed (Herman, 1992). Self-blame is not an effective coping strategy in such cases. Strengthening the child can be done by involving them appropriately in the decision-making process (Gal, 2011, p. 68).
- 2) **Procedural justice:** Victimology studies have found that crime victims want to feel that they are being treated fairly – namely, that they are given an opportunity to express their views and to be accorded respect and listened to (Strang, 2002, pp.13-15; Wemmers, 2009). Procedural fairness is linked to control over the process (ability to have a voice in the process) and control over the outcome (ability to influence the final decision) (Thibaut & Walker, 1975; Tyler, 1988). Children and adolescents perceive procedural justice as no less important than adults (Melton & Limber, 1992, p. 178). “Participation” of course, “is not a magic word that makes procedures fair in children’s minds, nor is it a concept familiar in practice for all children” (Gal, 2011, p.74). It is possible that children are not aware of their participation opportunities, or that child participation is unimportant as long as adults behave as they are expected to (Lawrence, 2003, p. 32, 35).
- 3) **Direct interaction with the perpetrator:** Confronting the offender “can be adversarial, hostile, and harmful from the victim’s perspective, but it can also be a healing experience” (Gal, 2011, p.74). Angel (2006) found that face-to-face restorative justice encounters were more effective in reducing traumatic symptoms among crime victims in comparison with court processes. Such confrontation provides an opportunity for the victims to receive restitution directly from the offender, based on his or her own actual wishes and financial needs (Shapland, 1984). Victims want to receive a sincere apology and to have an opportunity (without being pressured into it) to grant forgiveness<sup>5</sup> (Brook & Warshwsky-Brook, 2009; Strang & Sherman, 2003). Bibas and Bierschbach (2004, p.113) argue that apology and remorse are important remedial social rituals in which the offender acknowledges social norms and vindicates the victim’s harm, thus

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<sup>5</sup> Enright and Fitzgibbons (2000) claim that children as young as 4 are able to understand forgiveness if their parents model forgiveness, or if they are educated about forgiveness.

helping the victim heal. Apology also restores the moral balance as the offender takes responsibility, expresses remorse and demonstrates an intention to refrain from future crime (Taft, 2000). A genuine face-to-face apology by the offender helps victims correct erroneous, negative self-attributions (Petrucci, 2002).

- 4) **Reparation:** Although symbolic reparation, in the form of an apology or full acknowledgment of responsibility by the offender is far more important for crime victims, material reparation is yet another element in the victims' rehabilitation following crime (Strang, 2002; Strang & Sherman, 2003; Zehr, 1990). Of particular importance for victims is receiving restitution directly from the offender, because this reflects social and personal recognition of the offender's concrete responsibility for the act (Harris, Walgrave & Braithwaite, 2004; Shapland, 1984). With regard to children, Gal (2011, p. 82) points out that: "Children might have different preferences, and needs, from adult victims. First, although monetary payment can help fund the victimized child's needs, such as counselling, this might not have a significant meaning for the child. Therefore, specific means of reparation should be considered together with the child."
- 5) **Group discussion:** One of the most troublesome symptoms of crime victims – self blame – can be managed through a group discussion where shame is acknowledged and discharged, self-blame is resolved, and the victim's behavior validated (Gal, 2011, p.78). "When others can listen without ascribing blame, the survivor can accept her own failure to live up to ideal standards at the moment of extremity. Ultimately, she can come to a realistic judgment of her conduct and a fair attribution of responsibility" (Herman, 1992, p. 68). Group discussion can also be a tool to provide social acknowledgement and validation. Social acknowledgment is a victim's experience of positive reactions from his or her community that reflect appreciation of the victim's condition and difficulties (Maercker & Muller, 2004). Social validation (Ahmed et al., 2001) means "not only accepting the victim's story as reliable but supporting the victim's behaviour and moral stance as well" (Gal, 2011, p. 80). Supportive listeners also provide victims with the opportunity to mourn, which is another important element of the healing process (Herman, 1992, p. 70). The sense of loss is particularly central in childhood victimization, and therefore mourning is crucial in children's healing processes (Murray, 1999). Obviously, it is important to modify the form of group discussion according to the needs and capabilities of children of various ages.

- 6) **Support network:** Another significant need of victims in their healing process is to be supported by their families, friends, and others who are part of their communities (Caffo et al., 2005; Norris et al., 1997). The support of family members and in particular a strong relationship with the mother are protective factors for children exposed to domestic violence (Holt, Buckley & Whelan, 2008). Support networks can be a source of practical assistance for victims (Gal, 2011, p. 82).

According to Gal (2011) the restorative justice process fits more the above described rights and needs of child victims than the criminal justice process. "Perhaps the most obvious positive outcome arising from the criminal process from the victim's point of view is when the defendant is found guilty. A finding of guilt delivers a message of trust in the child's testimony, an acknowledgement of the wrong done to him or her, and a public message of denunciation" (Gal, 2011, p. 101). Indeed, there is evidence for the higher prevalence of mental health problems in adulthood for child victims whose cases ended without a finding of guilt (Malloy et al, 2006; Whitcomb, 2003). In regard to the delicate nature of CSA, we always have to keep in mind that cases are rarely revealed and perpetrators are rarely prosecuted (and convicted). However, there is some evidence that restorative justice can be an effective tool for managing these cases, whether the victims are still children or already adults.

### **Implementation of restorative justice in CSA cases: examples of good practice**

The potential of VOM is such that it can even be used with such serious crimes as CSA. Here are some examples of where it has worked well in practice:

The first positive experience of widely using the VOM model (with family and other interested parties present) is from **Canada**. Specialist literature describes a unique project which started in 1984 in the Hollow Water Indian community in the region of Manitoba, where research into the causes of problem behaviour led to the discovery in the local young population of a high number of CSA cases, passed down from one generation to the next, among the local young population. The project offered offenders out-of-court solutions if they admitted to their crimes and were willing to undergo therapy. The number of admissions of guilt was far higher than would have been probable going through the normal legal channels (Braithwaite, 1999, p. 16). Further only 5 of the 48 offenders who admitted to their crimes were not successful in completing their therapy (Ross, 1996, p. 36).

The 13 stages of the healing process it used (which typically takes 2 to 5 years), include: the initial disclosure of abuse, protecting the child, confronting the victimizer, assisting the (non-offending) spouse, assisting the families of all concerned, coordinating the team approach, assisting the victimizer to admit and accept responsibility, preparing the victim, victimizer and families for Special Gathering, guiding the Special Gathering through the creation of a Healing Contract, implementation of the Healing Contract and, finally, holding a Cleansing Ceremony designed, in other words, to mark “the completion of the Healing Contract, the restoration of balance to the victimizer, and a new beginning for all involved“ (Ross, 1996, pp. 32-33).

The Hollow Water experience is seen as an excellent example of the restorative approach lifting the taboos off CSA and helping to heal families and communities (Braithwaite, 2002).

In **Australia** a broader VOM has also been applied with very positive results. It has been especially useful in CSA cases where there was a prior relationship between the offender and victim and future contact between the two was expected, i.e. cases in which the offenders are family relatives (Doig & Wallace, 1999; Daly, 2002; Pennell & Burford, 2002; Daly & Stubbs, 2006).

When the victim was a child, preparations for a restorative justice process included discussions with the parents about possible ways to have the child’s viewpoints heard and considered at the conference, sometimes with an appointed counsellor to represent the child. Victims as young as 9 participated in conferences, and team members found that with adequate counselling and parental support, their participation often had a powerful role (Doig & Wallace, 1999): For example, a 9-year old girl whose brother had been forcing her to have sexual intercourse for several months, and who, when she had disclosed the abuse, had been accused by her father of “leading her brother on“, decided that she wanted to be at the family conference. She found it very satisfying to hear her brother admit to his abusive behaviour and was able to confront her father about how he had made her feel; and both her brother and her father apologized to her during the conference. Doig and Wallace (1999) add that when an offence had been committed by one family member against another, often parents (particularly mothers) were required to take sides during the criminal justice process. In conferences, they argue, as the offence was condemned independently from the offender, this was not needed. Parents could support both offenders and victims, while condemning the act at the same time.

An Australian study focussing on solution of CSA cases through the courts and the restorative model, where the offenders were juveniles, reached the conclusion that restorative conferences have the potential to offer victims a higher level of justice than courts. Widespread VOM models for the most part provide important public acknowledgement of damage suffered by the victim, apology for the harm caused and meaningful forms of compensation to the victim and the community. In contrast, half those victims who pursue justice via the courts experience disappointment and further embitterment when the long and demanding legal process fails and breaks down for some reason (Daly, 2003, p.20).

The above examples demonstrate that **VOM in CSA cases should not be automatically rejected** as an unsuitable alternative solution. In serious cases the offender can also be prosecuted and convicted in the traditional way (Daly, 2002). Punishment of an offender is not in conflict with the philosophy of restorative justice (Strang 2002, p. 204) so long as the punishment is not seen as being an end in itself (Zehr 1990, p. 210). VOM can be applied before the beginning of a trial, during a trial and after it. In every case, however, a basic condition for VOM is **agreement of both the victim and the offender together with thorough preparation**; underpreparation can lead to serious harm to the victim (Wellikoff, 2003; Gustafson, 2004, pp. 309-310). The following section elaborates on some of the conditions for application of VOM.

### **Conditions for application of VOM in CSA cases**

These conditions apply to parties involved in VOM and require willingness on the part of: (1) the mediator, (2) the offender, (3) the victim and (4) other parties involved in VOM (for example relatives, friends, therapists etc.).

In terms of the **mediator**, it is important to emphasize that mediators working with such a serious and sensitive issue as CSA must have higher levels of expertise and experience than the norm (Wellikoff, 2003; Gustafson, 2004, pp. 309-310). As part of their specialized training, mediators should gain knowledge above all about the dynamics of CSA and the means of manipulation which offenders use in order to control their victims. They should also know about trauma and post-traumatic symptoms (Gustafson, 2004, pp. 309-310) as well as about commonly occurring prejudices felt towards victims. At the same time, mediators should acquire the ability to recognize signs in the victim of secondary traumatization, the ability to detect the offender's tendency to deny his own responsibility or downplay the damage he has caused, the ability to notice the dynamics of power and to minimize difference in status between the par-

ticipants and intervene effectively should the offender try to manipulate the victim. Mediation practice should also involve supervision provided by CSA specialists. It is also recommended that other people are included who can contribute to a greater balancing of participant power and greater safety during the process, especially therapists, the victim's lawyer, and friends and relatives of the victim who can give support (Gustafson, 2004, pp. 309-310; Bazemore & Earle, 2002; Dalrymple, 2002; Wellikoff, 2003).

In terms of the **offender's suitability for VOM**, it is certainly not enough for him to simply to agree to the proposed meeting with the victim, even if he himself has initiated it. Given the risks associated with a CSA criminal, VOM should only be recommended if the offender is in an advanced stage of therapy and has clearly made good progress (in the eyes of the therapist). This change must be perceptible in his behaviour, thinking and convictions. If VOM is to be safe and useful, the offender must have developed *the ability to empathize* with the victim and not bring any kind of *manipulation* and *cognitive distortions* into the process (Salter, 1995).

As part of VOM the offender should admit his responsibility for what he has done, identify the separate stages in his criminal actions and express remorse for his behaviour and how he has harmed the victim. This stage can easily bring out manipulative tendencies and errors in thinking. The mediator must remember that CSA offenders are experts at manipulating people: often they apologize at the same time as transferring blame to other people. Sometimes they try to minimize the seriousness of their crime in order to salve their own feelings of guilt; or they express remorse while really regretting more the fact they were caught than that they harmed their victim. Often they feign contrition in order to gain forgiveness, have their punishment reduced or gain the compassion of family members etc. For victims the conflicting signals which an inadequately disposed offender can send out during VOM can be extremely dangerous, for instance by saying one moment that it was all his fault while another moment implying that the victim was also at fault. It is also undesirable during the VOM if the offender gives a detailed description of everything he has done to the victim; or if he uses a textbook approach when describing the possible effects of CSA on the victim; or if he uses manipulative methods to coax forgiveness out of the victim (e.g. by emphasizing that he needs it for the peace of his soul or that it is important for the healing and salvation of the victim herself); or if he has unrealistic expectations such as of some idyllic reconciliation with the victim once VOM is over) (Hindman, 1989, pp. 395-422; Eldridge & Still, 1995, pp. 131-158).

In this context it is important to establish the offender's *motivation* for taking part in VOM (Circles..., 2003, pp. 57-58). If the offender sees VOM as some kind of business transaction in which he gives something to the victim and gains forgiveness and reconciliation in return, his motivation is inappropriate and his badly formulated demands may cause the victim further trauma. In the preparatory phase of VOM, the mediator should invite a pastoral worker to come and properly explain the nature, conditions and limits of forgiveness and reconciliation (see chapter 4).

Part of the preparation of offenders for a potential meeting with their victim during VOM is consideration of the questions which the offender may have to face. The victim should probably be able to ask the following: *Why did you do it to me? Why me exactly? Are you willing to change? Have you changed? If you have changed, how can I tell? Why should I believe you? How can I know that you will never do it to anybody else? Have you ever thought about how you have hurt me and how I have suffered? Why should I even give you a chance? Can you imagine how angry I am? What can you do to make me feel safe and feel that other adults and children close to you are safe?* This is not a definitive list of all questions; focussed reflection and discussion can lead to many more (Circles..., 2003, pp.57-58). Together with the offender's therapist and other members of his support group, the mediator can check whether the offender has given due attention to these questions and whether his replies to them will not harm the victim and undermine the whole VOM process.

As part of preparation for potential VOM, the mediator together with other involved parties should focus attention on the offender and possible forms of compensation which can be offered to the victim and the community. These should be meaningful and realistic, though at the same time should call for effort and self-denial and sacrifice on the part of the offender. The philosophy of restorative justice considers the offender to be a moral agent who is responsible for his actions and their consequences and is capable of atoning for them. He can take on an active role in tackling a problem and assume the fair and moral duties of compensating for the damage he has caused and of avoiding acts of recidivism. VOM can greatly facilitate ways of fulfilling this duty. The extent or intensity of these compensatory acts should correspond to the severity of the damage caused. A voluntary acceptance of such duties by the offender can be seen as a sign of his regret and the sincerity of his apology. Although the offender cannot in any way negotiate some kind of reconciliation with the victim, specific acts of atonement are a key factor in healing badly damaged interpersonal relations.

It is clear from all this that preparation for VOM can take some time. Mediators should thus remember that hurried or half-hearted preparation for VOM can have negative effects on all parties.

For expanded forms of VOM (such as *family conferences*) **people providing support to the offender** must also be involved. If they lack the right training and insight, however, they may easily feed the offender's cognitive distortions and directly or indirectly apportion blame to the victim, pressure her into forgiveness or attack her in some other way. The mediator should therefore carefully check the **fitness and suitability** of these people, especially by ensuring they don't have attitudes which undermine the offender's need to atone and compensate for his actions. Such attitudes can greatly harm the victim.

In terms of the **victim**, the basic criteria determining their suitability for mediation are: (1) their willingness, (2) thorough preparation, and (3) strong social support. Let us try to explain how mediation may affect victims, whether they are still children or adults.

Given that prompt and effective mediation can alleviate some of the long-term traumatic effects of CSA, mediation (including its expanded conference form) has been shown to be beneficial even if the main participant is a **child**, i.e. a person not yet of a legal age but someone with the right to express their opinion and will. Before mediation begins, however, the child should first undergo intensive psychotherapeutic care. If after this, the purpose and essence of mediation is explained to the child in a way they can understand and the child chooses this approach, without being subject to pressure from adults, then one of the basic criteria is fulfilled.

The vulnerability of children and any possible secondary damage they may suffer as a result of inappropriate interventions mean that adults must be absolute thorough in their preparations. Part of these involve discussion with parents about ways of making sure the child's 'voice' (opinions, needs and interests, not just about damage sustained but also about ways of compensation) will be heard and taken into consideration during mediation. One tried and tested way is for the child to have a representative, or spokesperson, at the meeting, someone who might be a professional counsellor or lawyer (Doig & Wallace 1999; Bazemore & Earle, 2002) or other support person, ideally someone the child knows (Dalrymple, 2002, pp. 292–293). To reduce the *power imbalance*, the child may also have a whole support team at the mediation consisting of several people<sup>6</sup> who will try to protect the child from manipulation or aggression from the side

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<sup>6</sup> Such people could be, for example, family members, friends, the family doctor, teacher etc.



of the offender (Braithwaite & Daly, 1994). It is always essential to ask the child who they wish to invite to the mediation and who they do not wish to have there (Marsh & Crow 1998, p. 52). If the role of the child's representative is going to be taken by a non-professional, it is important that the mediator prepares them thoroughly for this role in advance.

Research has shown that if children have their own 'advocate' at the mediation meeting, they feel stronger in many ways: they have someone supporting them, speaking on their behalf in a way they cannot or would not dare to speak; they have greater control over the process, can contribute to it whenever they wish and decide when they would like to speak for themselves (Dalrymple, 2002).

For some victims, the need for mediation becomes apparent only in **adulthood**. A large number of CSA victims whose cases have never been satisfactorily resolved decide as adults that they would like to confront their assailant. In such cases, an experienced mediator as well as psycho-therapist can both be of great benefit; such mediation involving the offender can only be beneficial, however, if the victim has attended many sessions of therapy (Eldridge & Still, 1995) and the mediation is preceded by several months of thorough preparation (McGlynn et al, 2011).

It is especially important that the victim has worked through all the various forms of self-doubt that may have sprung from her traumatic experience (Eldridge & Still, 1995). These are a set of negative thought patterns which lead to self-blame, denial of the effects of the trauma and trivialization of one's own needs, all of which result from the manipulation the victim has been exposed to. The total manipulativeness of the offender<sup>7</sup> and his position of power over the child which defines her sense of reality (leaving her with no option to question or contradict it), causes the victim to internalize the offender's cognitive distortions. The basic message of the offender, who is constantly trying to guide the thoughts of the victim, can be expressed in the formulation: *You have no right to refuse me, no right to think or even exist if not according to my rules* (Bratton, 1998, p. 93).

Before a victim exposes herself to the risks of mediation, it is therefore essential that she learns to identify all the various forms of manipulation which the offender has used against her and may try to use again. She must be aware of the possibility of this happening and be prepared for it by developing a proven strategy during therapy which she can then use to rebuff any manipulative attacks (Eldridge & Still, 1995).

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<sup>7</sup> As well as people who through their own inadequate attitudes towards CSA are actually encouraging the offender.

During preparation the victim must prepare for all possible situations which may arise during mediation (McGlynn et al, 2011). She should also prepare a list of questions to ask the offender. Eldridge and Still (1995) propose that these questions should be sent to offenders in advance with a request for them to be answered either in writing or using an audio or video recording. The answers should then be analysed with the help of the therapist. The victim can monitor her own reactions to the replies of the offender and look for ways of strengthening herself psychologically. Her subsequent decision whether to go through mediation with the offender should depend on whether she has observed any change in him. If this change is minimal, the victim may decide that mediation would be a waste of time, or that it would be worth doing only so that she can express her own feelings, opinions and attitudes.

It is essential that during preparation for mediation, the victim deals with questions of forgiveness and reconciliation. One of the risks of mediation is that the victim may be manipulated, through external or internal pressure, into forgiving (Eldridge & Still, 1995). Victims may have very distorted notions about forgiveness, for instance understanding it as a condition for their own or their offender's healing or salvation, or as a means of guaranteeing family happiness. Using the question of forgiveness to manipulate can have very negative results for all parties involved, results which may be considered before mediation even begins. The assistance of an experienced pastoral counsellor may very useful in this process.

The victim's therapist can be actively involved in the mediation and should agree with the victim in advance about signals she can use to convey distress or her wish for her therapist to intervene. It is important that the victim feels strong enough to be able to terminate a session whenever she wishes to (Eldridge & Still, 1995).

If a face-to-face meeting seems too threatening for the victim to bear but she is still interested in communicating with the offender (about matters which should be the subject of mediation), it is possible to use other forms of mediation where the contact between victim and offender is not direct (Zehr 1990, p. 206). In this case the victim is represented at the mediation meeting by another person who is fully prepared, or may communicate through letters or audio and video recordings.

The aims of mediation should be to "publicize" the damage which the offender has caused the victim, to communicate ideas about compensation and conditions for any possible contact, and to give the offender chance to apologize and show remorse as well as to commit himself to carrying out agreed forms of compensation.

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PART SIX

TOWARD A CULTURE OF MEANINGFUL DISPUTE RESOLUTION



## PROPAGATING MEDIATION USING DIFFERENT MEDIA

Gabriel Paľa and Martina Poláková

### Introduction

A conflict is a factor which threatens or disrupts the balance or stability of a system. Conflicts tend to undermine a system's balance and cause changes (Plamínek, 2012, p.15).

We do not like the world of conflicts, avoid it and often prefer not to deal with it. And if we do try to solve conflicts, we often do it too impulsively and superficially.

The high speed of modern life leads to many problems, large and small, which need to be solved promptly and flexibly. In the past we dealt with problems more statically; now life forces us to be more creative in our approach to solving conflicts. Even if the conflict does not involve obvious violation of laws, it can disrupt relations and become, for various reasons, unmanageable (overwork, personal interests, different opinions, health reasons etc.) It is important to know how to handle unpleasant situations and preserve good relations in the family, in friendships, in the workplace and at school. In the past, it was the courts, or arbitration, which offered the last solution to conflicts; this was often a very time-consuming process, however. Life today requires more flexible mechanisms which enable us to handle problems more quickly, sensitively and inexpensively. Mediation offers just such a solution, its purpose being to solve conflicts to the satisfaction of all interested parties. It is an ideal option for those who wish to solve their problem themselves, quickly and effectively, and then continue to enjoy good private and working relationships with the people they were in dispute with.

Conflicts, problems and disagreements bring disquiet into people's lives. How we handle such matters reflects our ability to communicate and solve given situations. Knowledge and awareness of ways of solving any problem are a key part and basis towards doing so. In today's information society, in which information is a strategic phenomenon, the medialization and awareness-raising of such solutions can help create a more settled and peaceful society. One metaphor for this is the image of an el-

derly lady complaining at the post office counter about how we now have adverts for everything except for a person's (citizen's) important needs. Our theme closely ties in with this example of civic dissatisfaction.

Mediation as a means of conflict resolution, as an option waiting to be used, lacks sufficient support in the media, an area which has a profound influence on public awareness and opinion. This needs to be addressed.

### **Informing society about mediation through the media**

We think the media is an institution which we understand but because we are all different, we each have our own expectations of what it should provide. Some media sources have become so influential that for many people, they are the major providers of information and education. Given the potential of the media both to enlighten and to disorientate people, however, this fact should be carefully reflected upon. We can say that the media has both the power to harm people and to help them lead better and fuller lives. Hence the need to work more systematically in using the media, and information technology generally, in the field of mediation both to assist personnel working in this area and their clients.

The media has entered into all our lives in a very profound way and those people who have the power to influence it, either for financial or ideological purposes, often take full advantage of this opportunity. The mass media has always been an area infiltrated by propaganda and used by politicians, later artists and entertainers, in order to attract an audience. In doing so, it has created celebrities, great artists and politicians, and has been an information channel for many epoch-making events in our lives. It has also been a means of spreading culture, a source of information and a means for us of filling our spare time. In its way, it has also created a space for elite employment requiring specific skills, competence and a certain kind of innate temperament.

Through a change in society during the globalization process, the essence and content of the media have changed. Our lifestyle is influenced by media values and attitudes; everyday communication reflects what we live by, what we listen to and watch.

We are witness to various new kinds of communication fora being used to influence the social consciousness of individuals and whole communities, to shape public opinion and to defend the interests of groups managing politics and the economy. As it is clear that we cannot see many of the connections between these groups nor understand the whole complex process, it thus becomes necessary to strengthen ethical values, and respect human dignity, rights and freedom of speech, as well as our right to accurate, truthful and undistorted information.

Media such as the press, radio, television and film deliberately influence people's thinking, moods and feelings. The strength of this influence on public opinion, society and the individual, has earned the media the sobriquet 'the fourth power', after politics, economics and the army.

*"The media brings all kinds of different values to the hearts of people. The use of the media alone does not lead to personal development. It is however a very useful tool in the development of culture. The media should lead to human development, of course, but this very much depends on whether it is used properly."* (Spuchľák, 2001, p. 115)

### **Mediation in print media, television and radio**

Print media can propagate mediation mainly through:

- advertising flyers,
- articles in newspapers and magazines,
- information leaflets.

The services of mediators are not used sufficiently in Slovakia, thus the need to increase public awareness of this option in order to save them money and time. Print media can raise such awareness amongst the wider public.

In some commercial print media, the topic of mediation has been addressed, mainly in the form of interviews with mediators or news stories about a related event.

### **Television and radio**

In essence, television communicates interactively and expects the viewer to be actively involved in the viewing process. Television covers a very wide range of informational processes and can offer the following formats in its programme schedule:

- an introduction to mediation – educational programmes (a series about tackling problems in a methodical way),
- a discussion about mediation (viewers having opportunity to ask questions and get answers immediately),
- a programme in which qualified mediators solve a selection of real or fictitious cases,
- a short advertisement,
- news programmes about the successful solution of important cases using mediation,
- teletext information services,
- reality shows.

Radio and television are the most common sources of mass communication and have a powerful effect on people's public awareness. For this

reason, they are another way of putting the theory of mediation work into practice.

In April 2010, Slovak Television screened the premier of the programme *...a just!* (*dohoda možná*) (*...now more than ever (agreement possible)*). It is a programme which deals with mediation, its first instalment opening with the question: what is mediation? Its presenter, Rebecca Deák Justh, who owns the copyright, welcomed viewers and introduced them to this new genre. After footage of the episode's key characters: a divorced couple who were unable to agree on maintenance, the main part of the show took place in the studio with a studio audience. The guests were a mediator, who led the whole mediation process, and a lawyer, who at the end of the show expressed his opinion of the whole case. During the programme, the studio audience could ask questions which the expert guests would then answer. One advantage of the whole programme is that it can also be seen on the internet (<http://medialne.etrend.sk/televizia-spravy/jednotka-premierovala-talkshow-o-mediacii-a-just-dostala-ju%20zadarmo.html>, <http://www.stv.sk/relacieaz/jednotka/-a-just-%28dohoda-mozna%29/>).

In the media field, creativity is unlimited and there is space for other methods, for instance giving information about mediation centres on the television screen during advertising breaks. This can be done both on commercial and public television (STV).

Mediation services can also be advertised on the radio. Despite the lack of visual contact with the audience, the radio can use various formats in order to bring mediation to a wider audience. These include the following:

- discussion shows inviting expert guests and giving listeners chance to ask questions and have them answered immediately,
- informational programmes about the origin, function and work of professional mediators, study opportunities etc.,
- news programmes,
- advertisements etc.

It is important to add that the mass media has many different opportunities at its disposal. Presenting mediation, however, should above all be the task of public media. In Slovakia this is represented by the new RTVS (Slovak Radio and Television) united body.

RTVS as an independent national public informational, cultural and educational institution provides a service to the public in the area of radio and television broadcasting. The special status and role of RTVS require that its public broadcasting service covers the whole of the country, is richly varied in its format, uses qualified personnel to guarantee editorial

independence, is socially responsible, develops its viewers' and listeners' cultural awareness, provides space for current cultural and artistic activities, presents the cultural values of other countries and is financed mainly from public funds (RTVS, 2013). All this clearly reflects the fact that public television should prepare programmes about mediation; it is a topic which clearly fits in with the public role of RTVS.

The programme schedule of RTVS consists of news programmes, features, documentaries, drama and music, sport, entertainment and educational programmes, programmes for children and young people and other programmes which contribute to *“legal and ethical consciousness”*, programmes *“which create conditions for social consensus in public affairs and aim to strengthen mutual understanding, tolerance and encourage unity in a diverse society”* (RTVS, 2013).

### **IT in mediation**

Knowing enough about mediation is a prerequisite when deciding how best to solve a dispute. At present Slovak mediation services show all signs of being little known or completely unknown. As a means of conflict solving, mediation is new and has no tradition in our region, unlike in China, Greece and Rome, for instance. Thus our citizens, when involved in a conflict, generally have no personal experience or points of reference when it comes to mediations and mediators in the past. Having enough information is therefore the first requirement for people who are in a dispute and deciding whether to solve it through mediation or the courts.

In order to encourage practical use of mediation to the extent legislators wish, it is important to ensure the active and long-term propagation of information so that citizens become sufficiently aware of the advantages which mediation offers and start using it more.

Given society's dynamic changes in recent years and our ever-quickening lifestyle, the alternative method of conflict solving offered by mediation is equally dynamic, as well as effective, flexible, discreet and able to be implemented in the very place where the conflict arose. It does not prevent opposing parties from further communication or cooperation but instead works to create better relations between them (Team of authors, 2005, p. 120).

### **The internet and mediation**

The task of specialized webpages should be to present the phenomenon of mediation, explaining its meaning, activity and possible application, what kind of dispute it can be used for, how the whole process of mediation works, what the role of the mediator is, a list of all the media-

tors in Slovakia, a list and number of all the mediation processes undertaken here, the success rate of mediation as well as the correct procedure when arranging all administrative matters to achieve the desired result. One of the most reputable internet sites in Slovakia is: <http://www.amssk.sk/> - Asociácia mediátorov Slovenska (AMS) (Association of Slovak Mediators), which was founded through the professional experience of lawyers and mediators with an alternative approach to problem solving, especially through mediation. These professionals give preference to voluntary, overseen and neutral conflict solving using a third party, as opposed to authoritarian decision making, use of violence or a passive approach towards conflicts.

Another task of webpages is to provide feedback from all parties involved in the mediation process. These can be both from anonymous and named clients and will describe their experience of mediation, if they were satisfied with the course and result of mediation and if the mediator acted in a neutral manner. The page will give visitors the opportunity to ask questions and join in discussions. Such a method of communication can lead to more effective mediation processes and much quicker resolutions of individual disputes.

Improving communication between the client and mediator is another task which can be carried out using the internet in the mediation process. Users can gain contact details for mediators and the opportunity to write to a specific mediator, describe their problem, find out whether the dispute can be solved by mediation as well as other details, such as how long the whole process takes, what the terms and conditions are, the price of the mediation service etc. The mediator can also propose the best way of solving the problem. Mutual consultation about methodical approaches using both online and offline services ensures quicker and more effective solution of the business at hand.

A methodical approach to solving the problem should certainly include:

- description of the problem,
- verification of relevant rules and regulations,
- contact with the other conflictual party,
- proposal of a solution,
- clarification of individual solutions and their specific effect on all parties involved,
- a final solution (or its referral to higher legal bodies).

Another way of finding a solution is using an online discussion forum in which clients, who may or may not be anonymous, discuss their problems with an expert in a text, audio or audio-video format. This method

may be limited to just those parties involved or may, in some circumstances, be opened to the wider public on the assumption that confidentiality laws are abided by.

### **The European internet network of mediators**

There is a new internet service which can help Slovak citizens solve disputes in countries of the European Union. The arbitration chamber in Milan initiated the creation of an online mediation network for the whole of the EU in which mediators from 26 EU countries, including Slovakia, have come together. This is an interesting service because it enables consumers and businesses to solve their problems abroad without having to travel. These may be tourist problems, for example, or problems with transport or goods which have been bought. If, for instance, you buy an expensive camera in Germany and a few months later it breaks down but you do not want to have to go to Germany again to try to claim your money back, you can consult a mediator via the internet and use their help to try to reach an agreement. Services covered by the mediator are described in detail in the languages of all the countries taking part at the internet site: <http://www.risolvionline.com>. These services are intended both for consumers and businesses, and are not limited in any way by the nationalities involved in the disputes nor by their economic value. The service specializes in solving internet and electronic trade disputes. According to the price list given on the webpage, the charge for an agreement is low in comparison to the value of the dispute; for instance, with a dispute worth up to 500 €, the charge is 25 €, from 501 to 1 000 €, the charge is 40 €, and where it is from 25,001 to 50,000 €, the charge is 450 €. Efforts at conciliation are led through a chat room on internet pages specially created for this purpose. Discussion is led by a mediator – a peace broker or referee who is impartial and tries to bring both parties to an agreement without forcing decisions on them (the service chooses a suitable mediator from its list). Contacting the service with a request to solve a dispute can be done by filling in the electronic form on the [www.risolvionline.com](http://www.risolvionline.com) pages and then sending it via the internet. Mediators from the following countries are all involved in the online network: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Holland, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (24hod, 2009).

## **Online solution of conflicts**

Online solution of conflicts is the newest branch of conflict solution and uses the latest technology to enable solution of conflicts between opposing parties. It primarily uses negotiation, mediation and arbitration, or a combination of these three forms of solution.

In this respect, online conflict solving is seen as an equivalent to alternative conflict solutions and with application of these new approaches, the range of conflict solving possibilities is widened. Technology is needed when using online conflict solving; most commonly the internet is used as the most widely available and practical means of communication. Online conflict solving is often referred to by other names, all of which describe the same thing. These include:

- internet conflict solving,
- electronic conflict solving,
- electronic alternative solution of conflicts,
- online alternative solution of conflicts.

So far it is still not clear whether electronic conflict solving represents a new form of conflict solving or whether it is just a subgroup of alternative solutions (*Alternatívne spôsoby...*, 2009).

## **Design of a web server for mediation consultation**

The aim of this part is to propose a framework structure for a web portal for mediation consultation, the need for which has been shown by the experience of those working in the field. At present in Slovakia there are a number of servers or portals which focus on mediation consultation. These include the following:

- [www.mediacny-institut.sk](http://www.mediacny-institut.sk),
- [www.atna.sk](http://www.atna.sk),
- [www.mediatorka.sk](http://www.mediatorka.sk),
- [www.hr-people.sk](http://www.hr-people.sk).

It is certainly good that these portals exist. However, it is also clear that they do not use anything like all the possibilities which the internet offers. What they lack, above all, is interactivity: the opportunity to have online communication with experts from the area of methodical approaches to problem-solving; a question-and-answer service etc.

A framework design of a web portal for mediation consultation should therefore contain the following:

- *basic information about the process,*
- *a methodical approach to finding solutions,*
- *a mediation centre (a suite of other services),*



- *a training centre (offering courses in the area of communication and negotiation competence)*
- *a price list for services provided,*
- *online consultation,*
- *offline consultation (FAQ, questions and answers etc.),*
- *their success rate (resolved cases) expressed statistically,*
- *questionnaire system (feedback about quality of service),*
- *multimedia presentations,*
- *digest of basic legal provisions, regulations, norms and laws.*

When solving problems, personal contact with the client is of course essential, especially when having to resolve proposed and simulated situations. Internet technology, however, enables users to prepare solutions in advance. For this reason we are convinced that in the future, more and more institutions will opt to use the internet in order to provide better quality services with a higher level of effectiveness than that provided by traditional contact services.

### **Design of a leaflet advertising a mediation centre**

Informing the wider public about mediation questions can be done in various ways. One of these could be by designing an information leaflet or booklet which can be distributed as a supplement to print media. The booklet should be eye-catching and interesting and should contain all the following:

*The aim of the publication*, which is to inform readers about alternative ways of problem solving, the main focus being on mediation. Mediation can be used to solve conflicts arising between trading partners, in legal and civic relationships, in family relationships and at the workplace. It is also worth mentioning that mediation can also be used when dealing with minor violations of criminal law.

*The main aim* of the mediation process is to reach an agreement which satisfies both sides and which they will accept and be able to apply in future dealings together. The process should also prepare parties involved to accept the consequences of their decision and the consensual solution achieved with the help of the mediator should reduce anxiety and other negative effects brought about by the conflict. The mediator should serve as a bridge between the disputing parties; his/her task however is not to arbitrate between them but to help create and sustain throughout the dispute an atmosphere which enables the parties to communicate, try to understand each other and reach a mutually acceptable agreement. The agreement should be a written one and binding for all parties involved.

This can then serve, if necessary, as a basis for a legal suit or for filing bankruptcy.

*Mediation – a standard procedure.* The following seven steps describe a typical case in which mediation is used to resolve a dispute:

1. Contact with all parties – initiating and agreeing upon mediation,
2. Introduction – agreeing on rules and familiarizing both sides with mediation,
3. Conflict reconstruction – both sides describe their version of the conflict between them,
4. Defining the dispute – clarifying points of contention and interests of different sides,
5. Finding ways of conflict solving – suggesting negotiations and possible solutions,
6. Drawing up an agreement – finding the most exact formulation of the agreement and writing it down,
7. Conclusion – thanking both sides and encouraging them to fully abide by the agreement, offering further meetings in case of need.

*Arguments for mediation and its advantages* – here the reasons for and advantages of mediation can be stated. These include: the saving of time and money; prevention of worsening relations between the two sides in the dispute; the informality of mediation; its voluntary and confidential nature; its usefulness even after legal proceedings have begun and above all, its success rate in practice.

*Basic legislative provisions* – in this part, legislative provisions will be given, especially basic information from Law no. 420/2004 about mediation.

*Information about the mediation centre* – here the name and address of the mediation centre, its administrator, specific purpose and focus and, if relevant, organisational structure, will all be given.

*List of mediators* – here there will be a list of all the mediation centre's mediators, their addresses and contact details (telephone or email).

*Description of services* – here specific services offered will be listed such as mediation, counselling, lecturing in the field of mediation, consultancy, provision of legal proceedings, social work etc.

*Analysis of activity, statistics* – here the results of the centre's activities and the success rate of their mediation can be listed, together with statistics for resolved and unresolved cases. Reasons for the success and failure of different cases can also be given.

*Price list of services* – here the subject of dispute and its price should be given. For instance, if the case is a non-commercial one, the price can

be fixed according to an hourly rate whereas for a commercial dispute, the price can be based on a percentage of its financial value.

Other means of spreading information are through newspaper advertising or through distribution of separate advertising leaflets. Such leaflets should be clear and striking and not contain too much information which would spoil their immediacy. They should have no more than two different colours on a white background; or should have just black or dark blue lettering on a coloured background. Information about the separate points below should be given in just two or three sentences. Such a leaflet should be in A5 (or A6) format and contain the following:

- *What?* – what mediation is and what it can be used for,
- *Where?* – where to find a mediator,
- *When?* – when the mediator can be contacted,
- *Who?* – which mediator is available now,
- *How?* – how to make contact – telephone number, address, website address.

Leaflets and booklets should be distributed to mailboxes during the winter months and handed out to passers-by in urban areas with a high concentration of people during the summer months (at bus-stops, pedestrian zones and shopping centres).

### **Propagating mediation at schools**

In finishing we would like to direct attention to the need to inform secondary school and university students about what mediation is and to make them aware of the value of this method of conflict solving. In terms of creativity, there are really no limits to how this can be done. The school magazine, an internet magazine, posters in each classroom, leaflets, the school radio, special sketches written and enacted in class showing how conflicts can be solved by mediation, creating a mailboxes for mediation disputes – all of these can be used for the purpose of raising awareness of mediation. The main thing is to be creative and to use a range of the above possibilities, the task of the teacher being to encourage and help the students in whichever of the above activities they choose. We believe that the current school system provides space and opportunities for improving the overall atmosphere in schools as well as for teaching students about the benefits of solving disputes through mediation, whether the disputes are at school, between friends, at home or in their future workplaces.

The aim of school mediation is thus to arouse interest in this kind of work and to show students that it is an out-of-court process in which the

mediator (or student) helps warring parties to resolve their conflict and come to an agreement.

## **Conclusion**

The field of mediation and conflict resolving is a very far-reaching one; we live in a world of high consumption, rapid progress and cutting-edge technology. We have many experts and huge resources of knowledge; together with these, however, we seem to have ever more problems and conflicts. If we are able to replace the words ‘problem’ and ‘conflict’ with other words like ‘challenge’, ‘test’, ‘opportunity’ and ‘possibility’ though, we will find it easier to look for solutions. Passivity solves nothing and usually only prolongs and exacerbates the problems and conflicts which we have. This especially applies to family conflicts, bad relations with neighbours and disagreements at work, all of which force people to look for higher ways of righting the wrongs which they feel. Until recently, citizens invariably turned to the courts for such a purpose. Because of the large number of cases and endless administrative procedures, however, it was often a very lengthy process. Nowadays we have the chance to use a service for negotiating and resolving disputes in a much shorter time and for a lot less money, a service which looks for a compromise brokered by a mediator.

The expert opinion of professional mediators is that in Slovakia, there is a need for a long-term information campaign to raise public awareness about this option. Although mediation has been legally codified for several years now, the vast majority of people solving conflicts turn only to the law courts for help. Citizens are often simply unaware of the mediation alternative.

It is true that the content of media in this media age is very much determined by money and marketability: the choice of activities featured in the media are often those which are profit-making. This, at least, is the principle of commercial media. Other media, however, can still provide information about media to viewers or listeners in an interesting and stimulating way. The public RTVS is regulated by law and a place in its programme structure for the promotion of mediation should be found.

Doc. Vladimír Labáth, a leading figure amongst experts on mediation in Slovakia, is optimistic when he describes his attitude to its application and use in the country. However, he stresses that it will take another ten years before mediation becomes really established here. People tend not to trust other people but have respect for authorities, nor does the political climate help in supporting such trends as mediation. In recent times, however, we have come across the term ‘mediation’ more often than before.

Only with the help of the mass media, though, will people stop confusing the term with similar words such as meditation, medialization, even medication. Support for mediation from the media, which has, after all, so much power, space and possibilities, would greatly raise public awareness of this excellent means of conflict solving.

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## About the authors

### **Robin Brzobohatý**

is one of the most experienced mediators in the Czech Republic. In 2013 he spend more than 900 hours of mediating settlements. He is a trainer in mediation, communication techniques and conflict resolution skills and a creator of specialized trainings. He is the founder of the Mediation Centre Olomouc ([www.mcol.cz](http://www.mcol.cz)). He is one of the examiners of the Ministry of Justice for the mediators' exam under the Mediation Act. He is also the President of the Family and Children Division of the (ESI) European Institute for Reconciliation, Mediation and Arbitration. Robin Brzobohatý has a degree in social work and sociology. He has undergone trainings in mediation, negotiation and facilitation abroad. He has worked as a social worker for the Fund for Children in Need (Fond ohrožených dětí, [www.fod.cz](http://www.fod.cz)) for more than 7 years. He has articles on mediation and social work published regularly.

*Address correspondence to:*

Mgr. Robin Brzobohatý, Mediační centrum Olomouc, Kapucínská 16, 772 00 Olomouc, Czech Republic.

E-mail: <[robin.brzobohaty@gmail.com](mailto:robin.brzobohaty@gmail.com)>.

### **Marco Calabrese**

Avvocato, practicing since 1982, fully admitted June 1986. Defense Counsel before the Supreme Court since 1995. Formerly a Partner to an International Law Firm. Founder of Family Law Consortium. US List of Civil Attorneys in Italy. Author and Co-author of books and publications in Family Mediation and Psychology field, both in English and Italian. Trainer since 1998 to several Mediation and Co-Mediation Courses for Lawyers and Mental Health Professionals and more recently to CL trainings. Past Chair of the Legal Sector of Center for Co-Mediation of A.P.F. (2003-2009). Past V. President of ANAMeF (National Association of Family Mediation Lawyers). Member of the Conciliation Chambers of the Law Society in Rome. Co-Mediator in Family Mediation Matters and Conciliator in Civil Commercial Matters. Past President (2009-2013) of Italian Institute for Collaborative Law. Member of the Board of IICL.

*Address correspondence to:*

Avvocato Marco Calabrese, Via D. Chelini, 20, 00197 Roma, Italy.

E-mail: <[avv.marcocalabrese@libero.it](mailto:avv.marcocalabrese@libero.it)>, <[marcocalabrese@ordineavvocatiroma.it](mailto:marcocalabrese@ordineavvocatiroma.it)>.

### **Maria Rita Consegna**

Psychologist, Psychotherapist, Family Mediator IRMEF, Forensic Expert and Psychodiagnosis Court's Expert, Member of Scuola Romana Rorschach. Free lance licensed Psychotherapist since 1992, expert of psychodiagnostics since 1987, Court's expert since 1999, 2005, 2013. Family Mediator at the University La Sapienza Roma, Dept. of Development and Socialization Coach of Collaborative Law. Lecturer of Psychodynamics development and Family Relationships, Faculty of Psychology, University of Rome, Lecturer of Social and Family Psychology (AAYY 2004-2006). Author of books and essays on family related matters. Member of the Board of IICL.

*Address correspondence to:*

Dr. Maria Rita Consegna, Viale Somalia, 5, 00199 Roma, Italy.

E-mail: <[mariaritaconsegnati@virgilio.it](mailto:mariaritaconsegnati@virgilio.it)>.

### **Maria Francesca Corradi**

Avvocato, single practitioner in association with Corradis.r.l. Law Firm. Civil General Practice, tort law, medical liability, real estates, administrative law (with a particular focus on pharmaceutical law). Family expert: separation, divorce, co mediation, child protection, family restraining orders. Family co-mediator, civil and commercial co-mediator, speaker and panelist on family related matters (Women vs. Violence: Porto S. Stefano July 2008; S. Stefano July 2010) and other Conferences on Collaborative Law. Field of practice as a Mediator: real estates, will and successions, tort law, medical liability. First Secretary of IICL (2010-2013). Member of the Board of IICL.

*Address correspondence to:*

Avvocato Maria Francesca Corradi, Via Francesco Denza, 27, 00197 Roma, Italy.

E-mail: <studiolegalecorradi@gmail.com>.

### **Renáta Dolanská**

is a graduate of the Law Faculty of the University of Pavol Jozef Šafárik in Košice. Since 2004 she has been working as a lawyer and is registered on the list of advocates kept by the Slovak Chamber of Advocates. At present she runs her own legal practice, DOLANSKA & partners, with an office in Košice specializing mainly in commercial, civic and property law. Since 2006 she has been working as a mediator included in the register of mediators kept by the Slovak Ministry of Justice. Since 2007 she has been both founder and manager of the Mediation Centre for Out-of-Court Dispute Resolution in Košice, which, since 2011, has also served as an educational institution operating the accredited further education programme, Specialist Mediator Preparation, completion of which is a legal prerequisite for professional mediators in accordance with Act no. 429/2004 Coll. about Mediation. Since 2009 she has also been the deputy chair of the Slovak Association of Mediators, and a lecturer at the GTF of Prešov University, where she teaches students of the *Probation and Mediation Work* study programme. Since 2010, she has been deputy chair of EWLAS – the European Women Lawyers Association of Slovakia. In 2012 she was appointed member of a group charged with the task of changing Act no. 420/2004 Coll. about Mediation and convened by the Slovak Ministry of Justice.

*Address correspondence to:*

JUDr. Renáta Dolanská, Kováčska 69, 040 01 Košice, Slovak Republic

E-mail: <partners@dolanska.sk>.

### **Borbala Fellegi**

is a researcher, mediator and facilitator. Her PhD thesis was about the implementation of restorative justice in Hungary. From 2008 on, as founder and executive director of the Foresee Research Group she is in charge of Hungarian and EU programmes researching the potential application of mediation and peacemaking circles in community conflicts and in the prison settings as well as doing different community building, researching and training projects in Hungary related to conflict resolution. She has been working as consultant for the Council of Europe, the UNODC, the National Crime Prevention Board and the Office of Justice in Hungary. She gives trainings and lectures at five universities. Besides numerous articles and book chapters she is the author of the book 'Towards restoration and peace' (Napvilág, 2009), one of the first comprehensive studies on the implementation of restorative justice in Hungary. Her publications are available from: <http://foresee.hu/hu>

*Address correspondence to:*

Dr. Borbala Fellegi, Foresee Research Group, 1092 Budapest, Bakáts tér 3., Hungary

E-mail: <borbala.fellegi@foresee.hu>.

### **Adriana Galimberti Rennie**

Psychologist AsFBPS, HCPC, Collaborative Divorce & Family Coach Lecturer Trainer Writer BBC Expert-families & divorce. Chartered Psychologist Adriana Summers 1994 – Present; Committee member 2011 - Collaborative Law Manchester pod UK 2010 – 2011; Head of Masters in Counselling Studies, University of Manchester, September 2000 – August 2006; International Conference Speaker specialising on Work Stress University of Manchester. September 2001 – June 2006; Head of North West Regional Training Department in Family Planning and Womens Health/ Joint venture University of Manchester and National Health Service July 1990 – January 1997; Clinical Supervisor and Trainer Relate National, Counsellor Relate Manchester Relate UK December 1988 – October 1995 North West UK; British Psychological Society Associate Fellow of British Psychological Society. Member of the Italian Institute of Collaborative Law.

*Address correspondence to:*

Adriana Galimberti Rennie, Collaborative Resolution, 45 The Downs, Altrincham, WA14 2QG, UK

E-mail: <a.galimberti.rennie@btinternet.com>.

### **Desirée Giudetti**

University Alma Mater Studiorum, Bologna (Enr. AY 2007-2008); Erasmus Project's Participant (Université Catholique de Louvain-La Neuve, Belgique), took courses in Collaborative Law, Belgian Law and EU Law. 2012 Scholarship winner of the Italian Institute for Collaborative Law for the Basic Training held in Rome October 2012; participant along with the Italian delegation to the 9èmes Etats Généraux du Droit de La Famille in Paris (January 2013). 5 year Master in Law, March 2013 with a dissertation on "Collaborative Law and other ADR methods in civil proceedings". Post-graduate trainee at: Avvocato Liana Doro, Padua, start May 2013; devoted to International and National Family Law and Hague Convention Matters. Native Italian, nearly native French, good working knowledge of English Language. Member of IICL.

*Address correspondence to:*

Dott. in Giurisprudenza Desirée Giudetti, Via Francesco Zanardi 11, Bologna.

E-mail: <giudetti.desiree@gmail.com>.

### **Emília Halagová**

graduated from the Greek-Catholic Faculty of Prešov University, in the study field of *Probation and Mediation Work*. At present she is continuing in her study at the same faculty as an internal doctoral student. Her research activity is focused on the area of interpersonal communication during situations of great stress. She helps organize and attends specialised academic conferences, both in Slovakia and abroad, which deal with mediation as a means of conflict solving. Her publishing work concentrates on communication problems, barriers and devaluing elements in communication and how mediation can be used to tackle them.

*Address correspondence to:*

Mgr. Emília Halagová, Gréckokatolícka teologická fakulta PU v Prešove, ul. biskupa Gojdiča 2, 080 01 Prešov, Slovak Republic.

E-mail: <emilia.halagova@smail.unipo.sk>.

### **Lenka Holá**

studied special education at the Faculty of Palacky University in Olomouc. After graduating from high school, she worked 20 years in practice as a child behavioral, social worker, social therapist, since 1999 also as a mediator. She finished her PhD. in sociology in 2001. Since 2008 she has been a lecturer at Palacky University in Olomouc. Her research and pub-



lications are primarily devoted to the topic of mediation. She is a founding member of the Association of Mediators. First mediation experience she gained as an employee of the Probation and Mediation Service of the Czech Republic (2001-2006). In her mediation practice she now focuses on family, civil, criminal and consumer conflicts. She is a lecturer and supervisor of vocational training in mediation. She acts as a supervisor for teams of mediators. She actively participated in creation of the current version of the law on mediation and mediators' test preparation. She is a member and chair of examiners at Ministry of Justice for examination of mediators and family mediators.

*Address correspondence to:*

PhDr. Lenka Holá, Ph.D., Právnická fakulta Univerzity Palackého v Olomouci, tř. 17. listopadu 8, 771 11 Olomouc, Czech republic.  
E-mail: <lenka.hola@upol.cz>.

### **Kamil Kardis**

has a PhD. in the field of Sociology (2004) and habilitated in 2011 in the field of Religious Studies. He works as a university teacher at Cardinal Stefan Wyszyński University in Warsaw (Poland) and at Prešov University in Prešov (Slovakia). His research activity is focussed on modern sociological theories, the sociology of law and the family, cultural sociology and religious sociology.

*Address correspondence to:*

Prof. UKSW dr hab. Kamil Kardis, Instytut Socjologii, Wydział nauk historycznych i społecznych, UKSW w Warszawie, ul. Dewajtis 5, 01 - 815 Warszawa, Poland.  
E-mail: <kkardis@gmail.com>.

### **Mária Kardis**

She earned doctorate of Biblical Science at Institute of Biblical Science in Catholic university of John Paul II in Lublin and she got lectureship in 2012 at Religious study department in University of Presov in Presov. From 2006 she is working as university teacher at Greek Catholic Theological Faculty University of Presov in Presov. Her research in biblical science has been focusing on intertestamental literature of Judaism of Second Temple Period and Biblical Theology of New Testament. In the Religious studies research has been aiming on History of Religion, Judaism and Myths studies. In these areas also she is carrying out research project.

*Address correspondence to:*

doc. ThDr. Mária Kardis, PhD., Greek-Catholic Faculty of Theology, Prešov University, ul. biskupa Gojdiča 2, 080 01 Prešov, Slovak Republic.  
E-mail: <maria.kardis@unipo.sk>.

### **Slávka Karkošková**

has studied both Catholic Theology and Social Work (in which she obtained her lectureship). She has also completed four years of training in Gestalt psychotherapy and two years in psychotraumatology (EMDR). She works as a university lecturer and also leads courses in specialist training and further education for mediators. She is the founder and manager of the ASCEND, nongovernmental organization which offers counselling and education on the topic of child sexual abuse. She is an expert in the area of sexual abuse, its characteristics, long-term effects, therapeutic needs of victims, interventional strategies towards offenders, methods and difficulties of prevention. As a specialist in this field, she has appeared a number of times in discussion programmes on Slovak Television and Radio Lumen. One of her ambitions is to develop a system of forensic social work with victims and perpetrators of child sexual abuse in Slovakia.

*Address correspondence to:*

doc. ThDr. Mgr. Slávka Karkošková, PhD., ASCEND, Za kostolom 960/22, Veľký Šariš-Kanaš 082 21, Slovak Republic.

E-mail: <oz.ascend@gmail.com>.

### **Artur Łacina-Łanowski**

political scientist, pedagogue. Dean (Dziekan) of Humanistic and Economic Academy in Łódź, non-resident department in Wodzisław Śląski. Head (Kierownik) of academic department of Pedagogy of Family and Mediation in State Vocational University in Oświęcim. Mr Latina-Łanowski's main interests is education of adults, especially formation and development of social abilities of this part of students. His didactic and academic activities are: interpersonal communication, negotiations and mediations. He is also active in local communities by giving courses and lectures to the general public.

*Address correspondence to:*

Dr. Artur Łacina-Łanowski, Akademia Humanistyczno-Ekonomiczna w Łodzi, Państwowa Wyższa Szkoła Zawodowa w Oświęcimiu, Poland.

E-mail: <latinalanowski@gazeta.pl>.

### **Marina Marino**

Avvocato, admitted to representation before the Supreme Court (1992), Naming Partner (two associate lawyers). Lecturer of Civil Procedure: Post Graduate School of the University LUISS – Rome; Lecturer of Family Law, IPSOA School, AIAF School of Specialization on Family Matters, columnist of Sole24Ore, AIAF Review, Famiglia e Minori, speaker at Seminars and Conferences on the Family related topics organize by the National Magistrates' Body (Consiglio Nazionale della Magistratura). TV Host (30 episodes) for la Westdeutscher Rundfunk Köln and TV Host (30 Episodes) for RAI International. Member of EWLA – European Women Lawyer's Association. Member of the Board of IICL.

*Address correspondence to:*

Avvocato Marina Marino, Viale Mazzini n.11, 00195 Roma, Italy.

E-mail: <studiolegalemarino@gmail.com>.

### **Arkadiusz Modrzejewski**

is a political scientist and philosopher, he is assistant professor at University of Gdansk and Pomeranian University in Slupsk. He is occupied in political philosophy and ethics, cultural and European studies. He is especially interested in universalistic and integration conception. He is an author of three books, numerous articles and contributions published in Poland, Slovakia, Georgia, Germany, Hungary, Romania and Ukraine. He was guest lecturer at Polish and abroad universities, e.g. Pontifical University of John Paul II in Kraków, Tbilisi State University (Georgia) and Comenius University in Bratislava.

*Address correspondence to:*

Arkadiusz Modrzejewski, PhD., Dept. of Political Science University of Gdansk, ul. Bazyńskiego 4, 80-952 Gdańsk, Poland.

E-mail: <modrzejewski@ug.edu.pl>.

### **Laura Nissolino**

Avvocato since 1991, admitted to representation before the Supreme Court since 2003, Civil General Practice, Tort Law, Damage Law, Family Law, Consumer's Law. Founder and President of the legal network Avvocati&Avvocati. Trainer and Counsel for Commercial firms, Consumer's Associations. Civil and Commercial Mediator. Author of books, essays

and speaker upon Family Law and Consumer's Law matters. Lecturer of Civil Law for the largest financial newspaper of Italy (Sole24Ore). Member of the Board of IICL.

*Address correspondence to:*

Avvocato Laura Nissolino, Via Enrico Tazzoli 2, 00195 Roma, Italy.

E-mail: <lauranissolino@avvocatieavvocati.it, lauranissolino@ordineavvocatiroma.org>.

### **Grethe Nordhelle**

psychologist, lawyer, mediator and associate professor. She is academic responsible for a one year interdisciplinary education on mediation at Diakonhjemmet University College, Oslo, Norway. She has written two books on Mediation (2006; 2007), and one book on Manipulation (2009). The two books on Mediation has been translated and compromised into one book in Polish (published in May 2010).

*Address correspondence to:*

E-mail: <post@nordhelle.no>.

### **Gabriel Paľa**

graduated from the Mechanical Engineering Faculty at the Technical University in Košice and the Theological Institute of the Roman Catholic Faculty (located in Košice) of Comenius University, Bratislava. He then studied Media Studies at the University of St. Cyril and Method in Trnava. His studies focus on communication, mass media communication and media education. He is currently looking at the influence of communication in the media process and its media presentation.

*Address correspondence to:*

doc. ThDr. PaedDr. Ing. Gabriel Paľa, PhD., University of Prešov, Greek-Catholic Theological Faculty, Ul. biskupa Gojdiča 2, 080 01 Prešov, Slovakia.

E-mail: <gabriel.pala@unipo.sk>.

### **Lenka Pavlová**

is an arbitrator, mediator and mediation and communication trainer. She has a degree in law from Charles University in Prague and acquired her Ph.D. degree at the University of Economics in Prague (Vysoká škola ekonomická). She has worked in international business and has extensive experience in ADR. She is a member of the Czech Bar and has been an attorney-at-law since 2002. She has a wide litigation practice. She is an experienced litigator and practises law in the Czech Republic, as well as in Italy. She specialises in international business and family law. She was a directress of The Office for International Legal Protection of Children (Úřad pro mezinárodní ochranu dětí), a Czech Central Authority under the Hague Conventions on Protection of Children, www.umpod.cz. Lenka Pavlová initiated the establishment of the ESI in 2009, helped to develop it and since 2011 has been the ESI directress. She is a member of GEMME Europe, CIMJ and EWLA Czech branch - Czech Women Lawyers Association (Česká Asociace Právniček, o.s.), www.cap.cz.

*Address correspondence to:*

JUDr. Lenka Pavlová, Ph.D., 679 05 Křtiny 18, Czech Republic.

E-mail: <lenka.pavlova@esi-cz.eu>.

### **Sylwia Pelc**

Doctor in the humanities in the field of sociology, lecturer at WSI-E in Rzeszów, a mediator of the Polish Mediators Association, regular mediator at the District Court in Rzeszów.

*Address correspondence to:*

Dr. Sylwia Pelc, Wyższa Szkoła Inżynieryjno-Ekonomiczna z siedzibą w Rzeszowie, ul. Miłocińska 40, 35-232 Rzeszów.

E-mail: <info@wsie.edu.pl>.

### **Marina Petrolo**

Avvocato (1981) admitted to plead before the Supreme Court (1992), single practitioner devoted for 30 years to Family Law: Family Mediator (ANF APF), comediator trainer, speaker and panelist in Family related matters, Founding Member of ANAMeF (National Association of Family Mediators' Lawyers) and IICL – Italian Institute of Collaborative Law. Author of Essays and Columns on several Law Reviews, author of a Chapter of Trattato sulla Mediazione Familiare 2011 (UTET). President of IICL (2013-2016).

*Address correspondence to:*

Avvocato Marina Petrolo, Via Dardanelli, 46, 00195 Roma, Italy.

E-mail: <mpetrolo@tin.it, marinapetrolo@ordineavvocatiroma.org>.

### **Martina Poláková**

graduated from the Greek-Catholic Theological Faculty of the University of Prešov in the subject of Probation and Mediation Work. She has worked professionally in various media (radio stations, local periodicals) and now works in the field of mass media communication with communication disciplines in the field of Probation and Mediation Work.

*Address correspondence to:*

ThLic. Martina Poláková, PhD., University of Prešov, Greek-Catholic Theological Faculty, Ul. biskupa Gajdiča 2, 080 01 Prešov, Slovakia.

E-mail: <martina.polakova@smail.unipo.sk>.

### **Eszter Posch**

is an economist, trained mediator and the project coordinator of the Grundtvig project 'Resolving disputes in 21st Century' of the Foresee Research Group. Besides working as a trainee she has been working as a professional as well as financial assistant in the EU programmes ALTERNATIVE (RJ practice in intercultural settings), CIRCLE (application of peacemaking circles in criminal cases), KLÍMA + (positive climate – a programme for developing ADR awareness in vocational and secondary schools) by Foresee Research Group. Prior to that she was a risk analyst in project finance at MKB Bank 1998/2010. Her main interests in conflict resolution include the applicability of ADR in community building and in schools.

*Address correspondence to:*

Eszter Posch, Msc, 18 Bryanstone Road N8 8TN London.

E-mail: <eszter.posch@foresee.hu>.

### **Beata Swanová**

graduated from the Law Faculty of Comenius University in Bratislava and has been a lawyer and mediator since 2005. In her legal practice, she works mostly in the fields of civil and family law and as a mediator, has most experience of tackling family disputes over the legal rights and obligations of parents towards their children. As a member of the committee of the Slovak Association of Mediators, she is trying to develop and propagate mediation in Slovakia, actively participates at conferences and other educational activities dealing with mediation and as part of EWLAS' (the European Women Lawyers Association) activities in Slovakia, is trying to familiarize the legal public with the Collaborative Law system which, together with mediation, is one of the ADR (Alternative Dispute Resolution) methods. Since

2011 she has been working as an advisor in the area of the 'legal minimum' (basic legal experience) within the Expert Mediator Preparation accredited programme. Her publishing activity mostly focuses on the theoretical and legal aspects of mediation as defined by law and on questions about the relationship between mediation and legal counselling.

*Address correspondence to:*

JUDr. Beata Swanová, Jašíkova 2, 821 03 Bratislava, Slovakia.

E-mail: <swanova@swanova.sk>.

### **István Szikora**

has a methodist pastor degree. He has been working for more than 25 years in social and childcare areas. He was social worker in homeless shelters in Budapest and Békéscsaba, pedagogical assistant in SOS Children's Village Youth Flat in Békéscsaba. He has been probation officer for more than 10 years and mentor (group leader) mediator in victim-offender mediations in Békés county, Hungary from 2007. At presently he is a co-facilitator in an EU supported pilot project that is about „How to implement Peacemaking Circles in European justice systems?”. Hungarian partner is Foresee Research Group. He is a co-facilitator in another conflict resolving project concerning with prisoners and delinquents under probation. He is the president of the Hungarian YMCA. YMCA Hungary organises crime prevention programmes especially for high school students. He is married and has two adult daughters. He likes playing classical guitar, bass guitar and double bass.

*Address correspondence to:*

István Szikora, Justice Service of Government Office of Békés County, 2 Kossuth utca, H-5700 Gyula, Hungary.

E-mail: <szikoraistvan@gmail.com>.

### **Leon Szot**

has a PhD. in the field of Sociology (2004) and habilitated in 2011 in the field of Social Work. He works as a university teacher at Cardinal Stefan Wyszyński University in Warsaw. His research activity focusses on modern sociological theories, social work, social politics, the sociology of law and the family, social problems and pathologies.

*Address correspondence to:*

Prof. UKSW dr hab. Leon Szot, Instytut Socjologii, Wydział nauk historycznych i społecznych, UKSW in Warsaw, ul. Wóycickiego 1/3, 01-938 Warszawa bl. 23, Poland.

E-mail: <leon\_szot@poczta.onet.pl>.

### **Michał Szyszka**

adjunct at the Higher School of Administration in Bielsko-Biała, Poland. His interests revolve around social communication and functioning of assistance institutions, relations within the public spheres, social marketing and, first of all, the possibilities of using new media and technologies for the benefit of widely understood social help and integration. His didactic and scientific work include: social, information and educational campaigns and programs, and institutions' image.

*Address correspondence to:*

Dr Michał Szyszka, Wyższa Szkoła Administracji w Bielsku Białej, Poland.

E-mail: <szyszkathome@gmail.com>.

### **Novella Telesca**

Avvocato since 1995, admitted to representation before the Supreme Court since 2003, Partner to Studio LegaleParioli, Family Lawyer. Family Mediator (2-year training Center for Evolutional Age) Member of Italian Society of Family Mediation (SIMEF). Founding

Member of ANAMeF (National Association of Family Mediators' Lawyers) and IICL – Italian Institute of Collaborative Law. Counsel for Provincia di Roma, (Center for Preservation of Family Relationships) speaker, trainer on family matters. Member of the Board of IICL.

*Address correspondence to:*

Avvocato/Mediatore Familiare Novella Telesca, Viale Parioli 74, 00197 Roma, Italy.

E-mail: <n.telesca@studiodilegaleparioli.com>.

### **Eva Vaňková**

is a collaborative lawyer, arbitrator, mediator and coach. She is a lecturer and trainer in collaborative law and in mediation. She has a degree in law and since 2003 has been an independent attorney-at-law specialising in family, civil, business and criminal law. She also devotes herself to ADR, arbitration, commercial and civil negotiation and mediation. She is a member and trainer of the IACP (International Association of Collaborative Professionals, www.collaborativepractice.com). She is an external teacher at the University of Pardubice. Since 2010 she has been leading university courses called “ Introduction to Law ” and “Basics of Law”. She is a member of the Czech Bar Association. Since 2007 she has been an instructor of “ Out-of-court settlement courses – mediation, collaborative law/collaborative practice and arbitration“ organized by the Czech Bar Association. She is a member of the Board of Directors of the ESI, which she helped to establish. She presides at the ADR division of Czech Women Lawyers Association (Česká Asociace Právníček, o.s., www.cap.cz).

*Address correspondence to:*

JUDr. Eva Vaňková, Rokycanova 114, 566 01 Vysoké Mýto, Czech Republic.

E-mail: <eva.vankova@akvankova.cz>.

### **Lenka Westphalová**

has a PhD. in the field of Law (2004). She works as a university teacher at Palacky University, Faculty of Law (Czech republic). Her research activity is focussed on civil and family law, also mediation and its legal aspects.

*Address correspondence to:*

JUDr. Lenka Westphalová, Ph.D., Právnícká fakulta Univerzity Palackého v Olomouci, tř. 17. listopadu 8, 771 11 Olomouc, Czech republic.

E-mail: <lenka.westphalova@upol.cz>.

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