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3E –RJ-MODEL

The 3E Model for a Restorative Justice Strategy in Europe
Greece, United Kingdom, Bulgaria, Finland, Hungary, Poland, Spain
(including research also in Turkey, the Netherlands, Denmark, Germany)
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Restorative Justice Strategy in Hungary

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A. Introduction

The main source of material criminal law is *Act IV of 1978 on the Penal Code*, (*hereinafter referred to as: Penal Code*), the present character of which has been formed by over 50 acts – mostly passed after the change of political system (1989) - and several decisions of the Constitutional Court. Criminal law sanctions are set forth in the General part of the Penal Code. The legal definitions of the individual criminal offences can be found in the Special part of the Penal Code.

The main source of effective Hungarian criminal procedure is *Act XIX of 1998³ (hereinafter referred to as: Criminal Procedure Code)⁴*. In concrete cases, the objective of criminal procedure is the administration of justice, that is, the determination of criminal law liability. Only the court may make a decision on the issue of guilt or innocence⁵, and every stage of the procedure aims at the judge passing this decision in a well-founded manner.⁶

The effective *Hungarian criminal law sanction system* is of a dualistic structure⁷, making a distinction between punishments and measures. The Penal Code regulates the types of punishment of *imprisonment, work for the community, fine, prohibition from pursuing profession, prohibition from driving vehicles and expulsion⁸, and prohibition from public affairs and relegation as supplementary punishments⁹*. The group of measures¹⁰ includes the following sanctions: *admonition, probation, compulsory medical treatment, confiscation, confiscation of property, probation officer supervision, and measures applicable against legal*

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³ Effective as of 1 July, 2003.

⁴ For details see Farkas 2008, Grundzüge des neuen ungarischen Strafverfahrensrechts – insbesondere die Rechte des Beschuldigten und des Verteidiger, pp. 642-654.

⁵ Art. 3 s. 2 of the Criminal Procedure Code: 'Solely the court has the right to determine anyone's liability for a criminal offence and impose punishment for it.'

⁶ Farkas, Róth 2007, A büntetőeljárás (The criminal procedure), p. 49.

⁷ Jacsó 2007, A magyar hatályos szankciórendszer jellemzői (The features of the effective Hungarian sanction system), Chapter III section 2, pp. 342-344.

⁸ Art. 38 of the Penal Code

⁹ The nature of the currently effective system of sanctions was developed in Act LXXX of 2009 (Effective as of 1 May, 2010).

¹⁰ Art. 70 of the Penal Code

entities¹¹. The different sanctions are relatively defined, which means that the legislator stipulates the applicable type of punishment, and the lower and upper limit thereof. Punishment may only be imposed by the court but from among the measures, the public prosecutor also has the right to apply admonition and probation officer supervision.

The basic principles of criminal procedure are regulated, on the one hand, under the title Basic provisions in Chapter I of the Criminal Procedure Code and on the other hand, in the Constitution¹².

- *Distribution of procedural tasks*, according to which prosecution, defence and sentencing are separated from one another in the criminal procedure.¹³ In addition to the separation of these three functions, the Hungarian Criminal Procedure Code strives to ensure their balance, as well.¹⁴
- During sentencing, the basis of court procedure is the *legal indictment* (principle of boundedness to indictment).¹⁵
- Subject to the right to court procedure, *every person has the right to have a court to decide on the indictment raised against him/her*¹⁶ and in the administration of justice, *the right to legal redress* shall be ensured.¹⁷
- According to the *fundamental provision concerning the burden of proof*,¹⁸ it is the prosecutor who shall prove the indictment.¹⁹ It is the prosecutor's responsibility to clarify the state of affairs accurately and completely. Pursuant to the explicit provision of the Criminal Procedure Code,²⁰ the public prosecutor shall reveal and take into account not only the aggravating circumstances but also the extenuating and mitigating ones.²¹

¹¹ The rules concerning the measures applicable against legal entities were regulated in a separate act (Act CIV of 2001, on the criminal law measures applicable against legal entities).

¹² Act XX of 1949 on Constitution of Republic Hungary

¹³ Art. 1 of the Penal Code

¹⁴ The amendment to the Criminal Procedure Code, having become effective on 13 July, 2011 (Act LXXXIX of 2011), introduced specific rules for cases of key importance (e.g. if a mayor is suspected of committing a criminal offence against the purity of public life) so, for example, in the first 48 hours of arrest, contact between suspect and defence counsel may be prohibited subject to the public prosecutor's order according to the circumstances of the concrete case, against which no legal redress is provided by the Criminal Procedure Code (Art. 554/G of the Criminal Procedure Code). According to the criticisms raised against it, this new rule involves the weakening of defence counsel's rights (See Kiss, A Be. reformja, avagy a jogalkotó sohasem pihen? (The reform of the Act on the criminal procedure, or does the legislator never rest), pp. 18-20.)

¹⁵ Art. 1 s. 1 of the Criminal Procedure Code. The Criminal Procedure Code also defines the concept of legal accusation as follows: 'The accusation is legal if in the petition addressed to the court, the person entitled to accusation initiates court proceedings due to the act accurately circumscribed and violating the Penal Code of a specific person.'

¹⁶ Art. 3 s. 1 of the Criminal Procedure Code

¹⁷ Art. 3 s. 3-4 of the Criminal Procedure Code

¹⁸ Art. 4 of the Criminal Procedure Code

¹⁹ Art. 7 of the Criminal Procedure Code: 'Nobody shall be deemed guilty until his guilt is concluded in a final court ruling.'

²⁰ Art. 28 s. 1. of the Criminal Procedure Code

²¹ Bodor, T., Csák, Zs., Somogyi, G., Szepesi, E., Szokolai, G., Varga, Z. 2009, A büntetőeljárás törvény magyarázata 1 (The explication of the Act on criminal procedure Vol.1.), 4. § p. 41.

- In the court stage, the court shall determine the state of affairs on the basis of its conviction relying on the free assessment of evidence²² so if it does not consider any fact to have been undoubtedly proven, it may not assess it to the detriment of the accused (principle of *in dubio pro reo*²³).
- The *principle of the assumption of innocence* is a part of constitutional criminal law, which every person is entitled to even the one against whom a criminal procedure is started due to the well-founded suspicion of criminal offence, namely the accused, and in the court stage, the culprit.²⁴
- The rule concerning evidencing is supplemented by *the prohibition of the obligation of self-accusation*²⁵ This prohibition includes the freedom of making confessions and the right to refuse contribution to providing evidence not only for the accused but for other persons, as well (the witness).²⁶
- *The right to defence* is a basic principle of criminal procedure set forth in constitution²⁷. The accused is entitled to the right of defence, including the possibility of personal defence or exercising rights through a defence counsellor²⁸. In the cases specified by law, it is mandatory to involve a defence counsellor in the procedure.²⁹ The accused is also entitled to the right of defence at large.³⁰ The right to defence shall also prevail in the whole of the effective system of criminal procedure.³¹
- *The principle of proceeding ex officio* is a mandatory principle for every authority proceeding in a criminal case.³²
- Furthermore, the Criminal Procedure Code provides the right to the free use of mother tongue³³ and the obligation of the independent assessment of criminal liability.³⁴
- Basically, the Hungarian criminal procedure can be divided into three stages³⁵.

²² Art. 78 s. 3 of the Criminal Procedure Code

²³ Art. 4 s. 2 of the Criminal Procedure Code

²⁴ Bodor, T., Csák, Zs., Somogyi, G., Szepesi, E., Szokolai, G., Varga, Z. 2009, A büntetőeljárás törvény magyarázata 1. (The explication of the Act on criminal procedure Vol.1.), 7. § p. 52

²⁵ Art. 8 of the Criminal Procedure Code: 'Nobody may be obliged to make a confession accusing himself, or provide evidence against himself.'

²⁶ Ministerial Justification attached to 'Art.' 8 of the Criminal Procedure Code

²⁷ Art. 57 s. 3 of the Constitution

²⁸ Art. 5 s. 3 of the Criminal Procedure Code.

²⁹ For example, in a procedure against juvenile delinquents (Art. 450 of the Criminal Procedure Code).

³⁰ The right to freedom may only be taken away for a reason set forth and subject to a procedure specified in a legal statute (Art. 5 s. 2 of the Criminal Procedure Code).

³¹ This purpose is served, for example, by the principle *in dubio pro reo*, and the rule obliging public prosecutors to search for extenuating and mitigating circumstances, as well. Bodor, T., Csák, Zs., Somogyi, G., Szepesi, E., Szokolai, G., Varga, Z. 2009, A büntetőeljárás törvény magyarázata 1. (The explication of the Act on criminal procedure Vol.1.), 5. § p. 45

³² Art. 6 s. 1-2 of the Criminal Procedure Code

³³ Art. 9 of the Criminal Procedure Code

³⁴ Art. 10 of the Criminal Procedure Code

³⁵ Farkas, Róth, A büntetőeljárás (The criminal procedure) 2007, pp. 22-24, pp. 201-245.

First stage: the *investigation stage*, extending from the ordering of investigation to the presentation of documents.

Second stage: *prosecution stage*, when following the presentation of documents, the public prosecutor makes a decision on the issue of accusation.

Third stage: *court procedure*³⁶:

Investigation is done by general and specific investigating authorities.³⁷ The fundamental objective of the investigation is to inform prosecutor of the well-foundedness of accusation.³⁸

In the criminal procedure, the right of accusation is due to the *public prosecutor*, who also represents it. In Hungarian criminal procedure, the public prosecutor has no exclusive monopoly of accusation.³⁹

Unless the law provides otherwise,⁴⁰ in case of criminal offences with minor material weight, prosecution is represented⁴¹ by the *victim as private prosecutor*⁴² The central part of the criminal procedure is the court proceedings, starting with accusation by public prosecutor.

Basically, two types of legal redress can be distinguished. Against a ruling that has not yet become effective, ordinary legal redress may be used.⁴³ An effective ruling may exclusively be attacked by extraordinary legal redress.⁴⁴

From the point of view of criminal offences, the possibility of mediation basically depends on whether we are concerned with mediation accompanied by diversion or with it as a supplementary procedure parallel to or following sentencing.⁴⁵

In Hungary, criminal mediation is linked with diversion. The relationship between diversion and mediation can be characterised as a *part-whole* relationship. The part-whole relationship

³⁶ Procedures of the first, second and third instance and legal redress. See Farkas, Róth 2007, p. 329

³⁷ Pursuant to Art. 36 s. 1 of the Criminal Procedure Code, the police are the general investigating authority. Pursuant to the Criminal Procedure Code, however, besides the police, the public prosecutor may also cause investigation to be done or investigate in order to determine the conditions of accusation so in a wider sense, the public prosecutor may also be regarded as a general investigating authority.

³⁸ Farkas, Róth, A büntetőeljárás (The criminal procedure) 2007, p. 69

³⁹ Bodor, T., Csák, Zs., Somogyi, G., Szepesi, E., Szokolai, G., Varga, Z. 2009, A büntetőeljárás törvény magyarázata 1. (The explication of the Act on criminal procedure Vol.1.), 1. § p. 28

⁴⁰ For example, pursuant to section 2, Article 449 of the the Criminal Procedure Code, against a juvenile delinquent, criminal procedure may only be based on public accusation so that even in case of acts to be prosecuted on the basis of private accusation, the public prosecutor shall proceed.

⁴¹ In case of acts to be prosecuted on the basis of private accusation, the state waives the enforcement of its demand for punishment, conferring it on the offended. However, the public prosecutor may take over the representation of prosecution at any time, even without justification.

⁴² Pursuant to Art. 52 s. 1 of the the Criminal Procedure Code, these are: light bodily injury, violation of private secrets, violation of privacy of correspondence, libel, defamation and tribute violation.

⁴³ It is appeal.

⁴⁴ These are: new trial, revision and legal redress for the sake of legality.

⁴⁵ The European Forum for Restorative Justice distinguishes six types of case ranges for mediation: a.) independently from the criminal justice system; b.) diversionary model (when referred by the police or prosecutors at pre-court stage, or by the judge before the main hearing); c.) parallel to prosecution; d.) after conviction and before sentencing; e.) as part of and/or in addition to a non-custodial sentence; f.) in prison: post-sentence or pre-release (Aertsen, Mackay, Pelikan, Willemsens, Wright 2004, Rebuilding community connections - mediation and restorative justice in Europe., p.21.)

is reciprocal as diversion has other forms besides mediation in criminal cases (for example that of the postponement of accusation). Mediation is based on law in Hungary. Just as not every diversion represents mediation, it is also true that not every restorative justice (hereinafter to as: RJ) programme occurs within a process of diversion, i.e. through diversion from the criminal procedure, as there exist RJ processes supplementing criminal justice (based on different RJ projects and practices in prisons).

The institution of seeking a compromise is not new either in the history of Hungarian criminal justice or within the legal system.⁴⁶ It is to be underlined that the act on lawyers prescribes the promotion of compromise between opponent parties. Besides this example, there were other regulations promoting the application of criminal mediation to be introduced on both the victim's and offender's side. RJ in criminal cases was promoted by the taking into account of the victims' rights (interests) during the criminal procedure. In Hungary, the National Strategy for Community Crime Prevention (2003) underlined the role of RJ in crime prevention.⁴⁷ The compensation of damages caused by criminal offences by the state has existed since 1999⁴⁸. For the sake of this, an act was passed on the assistance of the victims of criminal offences and on the compensation of damage by the state in 2005⁴⁹.

Furthermore, the offender is urged to restore the state prior to the damage caused by the criminal offence by the widening range of regulations making more favourable judgement possible in the Penal Code, which create a reason for the elimination of punishability or make it possible to mitigate punishment without limits.

The Criminal Procedure Code also contains the predecessor of mediation. In case of private accusation, in the course of the personal hearing, the court attempts reconciliation of the denunciator and the denounced in order to bring peace between the offender and the

⁴⁶ The following acts contain an encouragement to the peaceful settlement of the legal dispute: the act on bankruptcy (Act. XLIV of 1991); the act on mining activities (Act XLVIII of 1993); the act on arbitration courts (Act LXXI of 1994); the act on the general regulations of environment protection (Act LIII of 1995); the act on consumer protection (Act CLV of 1997); for the sake of the solution of collective labour law disputes, the Labour Code refers to the possibility of mediation with the use of a third person reconciliator; the amended act on child protection has also introduced the employment of mediators; the act on health mediators, which came into effect in 2001, promotes the settlement of legal disputes arising within the service between the health care system and the patient outside the court (Act CXVI of 2000); a separate act was passed for the sake of the settlement of civil law disputes outside the court (Act LV of 2002, on mediating activities)

⁴⁷ National Strategy for Community Crime Prevention (115/2003 Hungarian Parliamentary decree) According to this: 'The possibility of recidivism decreases if the offender faces up to the consequences of the act he or she has committed, and has the opportunity to compensate the victim and appease the community'. p. 35.

⁴⁸ Government decree 1074/1999 (VII.7.) on legislation tasks and other measures to be performed for the protection of the victims of criminal offences and their relatives, and giving compensation or mitigating damage. The government decree making provisions for this set forth as an objective the investigation of how rules making a milder way of impeachment possible against the offender in case of giving compensation for the damage caused by the criminal offence might be incorporated among the provisions of The Penal Code. It was elaborated in a year when R99 (19) on mediation in criminal matters was passed.

⁴⁹ Act CXXXV of 2005 on the Support of Crime Victims and Compensation by the State

private accuser.⁵⁰ Although the adhesive process has existed for a long time, it is only since 2003 that there has been a possibility of seeking compromise during this process.

Victim-Offender Mediation with offences has existed in Hungary since 1 January, 2007. The relevant Hungarian regulations can partly be found in the amendments⁵¹ to the Penal Code⁵² and the Criminal Procedure Code⁵³ and partly in a separate act.⁵⁴

B. Legal Frame of Restorative Justice

The Criminal Procedure Code⁵⁵ specifies two *objectives of the mediation process*: a) 'giving compensation for the consequences of the criminal offence' and b) 'the encouragement of the future law-abiding conduct of the accused' so the secondary objective is to achieve a specific preventive impact. *In the mediation process, attempts shall be made to achieve an agreement between accused and victim constituting the basis for the active repentance of the accused.*⁵⁶

The mediation process officially starts at the prosecution stage, or at the request of defendant, lawyer and victim⁵⁷ prior to accusation, or exceptionally after accusation by the judge. In accordance with European practice, *the prosecutor will play a central role.*

The mediation process is applicable in case of voluntary contribution. The material law conditions of its ordering are regulated in the Penal Code while its procedural conditions by the Criminal Procedure Code.

Pursuant to the Criminal Procedure Code,⁵⁸ the mediation process may be ordered in case of criminal offences against a person,⁵⁹ traffic violations⁶⁰, or criminal offences against property⁶¹ with the maximum punishment of 5 years' imprisonment.

Pursuant to Article 36 section 1 of the Penal Code, *'The person who has confessed to the commitment of a misdemeanour offence against a person (titles I and III, Chapter XII), a traffic (Chapter XIII), a property (Chapter XVIII) or a felony offence with the maximum punishment of three years' imprisonment before accusation, and has remedied the harm*

⁵⁰ Art. 502 s. 4 of the Criminal Procedure Code

⁵¹ Act LI of 2006

⁵² Art. 36 and 107/A of the Penal Code

⁵³ Art. 221/A, s. 4, Art. 224, Art. 226, s. 1 d.) Art. 227, s. 4, Art. 263, s. 3 c), Art. 266 of the Criminal Procedure Code.

⁵⁴ Act CXXIII of 2006 on mediation in criminal cases.

⁵⁵ Art. 221/A. s. 2 of the Criminal Procedure Code

⁵⁶ Art. 221/A s. 2 of the Criminal Procedure Code

⁵⁷ Art. 221/A. s. 3 of the Criminal Procedure Code

⁵⁸ Art. 221/A. s. 1 of the Criminal Procedure Code

⁵⁹ Title 1 'Criminal offences against life, physical integrity and health'. and title III 'Criminal offences against freedom and human dignity', Chapter XIII of the Penal Code.

⁶⁰ Chapter XII of the Penal Code

⁶¹ Chapter XVIII of the Penal Code.

caused by such criminal offence within the framework of a mediation process in a manner and to an extent accepted by the injured person cannot be punished. Nor shall the offender be punished for the aggravated criminal offence pursuant to the second sentence in Article 221/A section 1 of the Criminal Procedure Code. According to Article 36, section 2: The punishment may be mitigated in an unlimited way if in case of the criminal offences specified in section 1, the offender has confessed to a criminal offence with the maximum punishment of five years' imprisonment before accusation, and has remedied the harm caused by such criminal offence within the framework of a mediation process in a manner and to an extent accepted by the injured person. The punishment may also be mitigated in an unlimited way in case of an aggravated criminal offence pursuant to the first sentence in Article 221/A section 1 of the Criminal Procedure Code.'

There are no grounds to apply the consequences of criminal material law if the offender is „a) a multiple or qualified recidivist, b) if he/she has committed the criminal offence in criminal organisation, c) if his/her criminal offence has caused death, d) if he/she has committed the intentional criminal offence on probation during the term of suspended imprisonment, after being sentenced to imprisonment to be executed or partially suspended for the commitment of an intentional criminal offence, prior to the completion of the execution of imprisonment or during the term of probation or the postponement of accusation e) due to his/her intentional criminal offence, he/she earlier participated in a mediation process, and as a result, of Article 36 section 1 or 2 was applied against him/her if two years did not pass between the becoming effective of the conclusive ruling and the commitment of the further deliberate criminal offence.⁶²

In the court stage, mediation is possible at the request of the defendant, lawyer or victim, which also involves the suspension of the procedure for maximum six months. In the interest of the successful conclusion of the mediation process, the trial can also be postponed.

The statements of the suspect and victim made during the mediation process cannot be used as a proof in formal criminal justice and the result of the mediation process cannot be used against the suspect, either. During the criminal procedure, referring of the case to a mediation process can only be applied once. The mediation process will be conducted by the separated and special circle of probation officers (2007)⁶³ and lawyers (2008)⁶⁴ acting as

⁶² Art. 36 s. 3 of the Criminal Procedure Code

⁶³ About 80 probation officers took part in a training of 2 x 30 hours provided by Partners Hungary Foundation.

⁶⁴ Art. 1 of decree 58/2007. (XII.23.) IRM: Mediation activities may only be performed by an attorney-at-law who a) attended a minimum 2x30 hours' training accredited in an examination system of further or special training or by an international organisation, or b) earned a mediator's qualification in a course in higher education in Hungary or abroad.

mediators. Together with the separate act including partial rules⁶⁵ the Hungarian solution complies with Recommendation R(99) 19 of the Council of Europe.

The mediation process⁶⁶ was introduced into Hungarian criminal law as a double-faced legal institution⁶⁷ was introduced into Hungarian criminal law as a double-faced legal institution on 1 January, 2007. The legal institution simultaneously belongs to both criminal material and criminal procedural law. The rules concerning the mediation process are included in the Penal Code, the Criminal Procedure Code and a separate act.⁶⁸ The mediation process itself cannot be regarded to be a part of traditional criminal procedure but has an 'autonomous'⁶⁹ character within it as it is conducted with the involvement of persons independent from the staff of justice administration – mediators.⁷⁰

The *initiation and consequences* of the mediation process were introduced embedded in criminal procedure. *The starting of the process is based* on the public prosecutor's ruling about the application of mediation process in the case or the ruling of the court suspending criminal procedure, passed for the sake of the conduction of the mediation process.⁷¹ As a main rule, it is possible to conduct the mediation process up to the period preceding accusation⁷² but the Criminal Procedure Code does not exclude its ordering during the court procedure. *The consequence* of the successful mediation process is the passing of a ruling based on active repentance regulated in criminal material law⁷³ (cause for eliminating punishability or unlimited mitigation of punishment) within the criminal procedure. The referring of the case to a mediation process during the criminal procedure is possible on only *one occasion*.⁷⁴ In case of the mediation process being unsuccessful, the case will be referred back to the traditional criminal procedure, that is, the public prosecutor makes the

⁶⁵ Act CXXIII of 2006

⁶⁶ Art. 221/A. of the Criminal Procedure Code

⁶⁷ For details see Jacsó 2010, Die Regelung und Praxis der Mediation in Strafsachen in Ungarn, pp. 189-204.

⁶⁸ Act CXXIII of 2006

⁶⁹ CD Jogtár Kommentár a Be. 221/A. §-ához ('CD' Legal Commentary to the Art. 221/A of Criminal Procedure Code) (<http://webjogtar.complex.hu/jr/sf/startfr.html>, downloaded on 17 September, 2011)

⁷⁰ The probation officer service has competence for the conducting of the mediation process. The public prosecutor gets no knowledge about the statements made by offended and offender during the mediation process, that is how the enforcement of the guarantee provision of the Criminal Procedure Code according to which 'no statement made by suspect and offended made during the mediation process and associated with the procedure may be used as a device of evidence.' Furthermore, pursuant to the explicit provision of the Criminal Procedure Code, 'the result of the mediation process may not be assessed against suspect' (Art. 221/A s. 5 of the Criminal Procedure Code).

⁷¹ Art. 6, Act CXXIII of 2006.

⁷² Ministerial justification to Art. 103, Act LI of 2006.

⁷³ Art. 36 of the Penal Code.

⁷⁴ Art. 221/A s. 2 of the Criminal Procedure Code

accusation and the court procedure continues pursuant to the general rules of the Criminal Procedure Code.

a) Restorative Justice at the police level

This solution does not exist in Hungary, but the investigating authority proceeding in the case shall inform the suspect and the victim of the possibility of the mediation process.⁷⁵

b) Restorative Justice at prosecution level

Pursuant to the Hungarian Criminal Procedure Code, the basic condition of the starting of criminal procedure, beginning with the investigation stage as a main rule,⁷⁶ is the existence of at least 'simple suspicion' related to the occurrence of criminal offence.⁷⁷ The public prosecutor or the investigation authority shall make a decision on ordering the investigation or on the rejection⁷⁸ or supplementation of impeachment within three days.⁷⁹ Pursuant to the general provision of the Criminal Procedure Code, the investigation shall be conducted within the shortest possible time.⁸⁰ In exceptional cases⁸¹, the Criminal Procedure Code entitles the public prosecutor to order the prolongation of investigation.⁸² During the period from the ordering of investigation to the accusation, only the public prosecutor has the right to order the mediation process. The referring of the case to a mediation process is possible parallel to the suspension of criminal procedure.

The public prosecutor shall suspend the procedure ex officio or at the request of the suspect, defence counsel or victim for a maximum period of six months and refer the case to a mediation process if the following conditions hold jointly: a) pursuant to the provision in the Penal Code concerning active repentance, there may be grounds for the cancellation of procedure or the unlimited mitigation of punishment, b) the suspect has admitted his/her offence before accusation, undertakes and is able to remedy the harm caused by the criminal offence in a manner and to an extent accepted by victim, c) both the suspect and

⁷⁵ Art. 62 of the Criminal Procedure Code

⁷⁶ Pursuant to the Criminal Procedure Code, in a general case, there is no investigation in procedures involving private accusation.

⁷⁷ The fundamental provisions of the Criminal Procedure Code include the rule according to which '*the starting of a criminal procedure is subject to the suspicion of a criminal offence, and may only be started against a person under the well-founded suspicion of criminal offence.*' (Section (2), Art. 6 of the Criminal Procedure Code) Bodor, T., Csák, Zs., Somogyi, G., Szepesi, E., Szokolai, G., Varga, Z. (2009), A büntetőeljárás törvény magyarázata 1. (The explication of the Act on criminal procedure Vol.1.), Budapest: Complex Kiadó, 170. § pp. 587-588.

⁷⁸ Art. 174 of the Criminal Procedure Code

⁷⁹ Art. 172/A of the Criminal Procedure Code

⁸⁰ Main rule: the investigation shall be finished within two months of the ordering thereof

⁸¹ . It is justified by the complicated nature of the case or an insurmountable obstacle.

⁸² Exceptional prolongations: Investigation may be prolonged by the public prosecutor for two months and by the attorney general for maximum a year following the start thereof, and after one year solely by the chief public prosecutor (Art. 176 of the Criminal Procedure Code)

victim have agreed to the conduction of the mediation process and t d) with regard to the nature of criminal offence, the manner of commitment and the person of suspect, the conduction of the court procedure can be avoided, and there are grounds to assume that during sentencing, the court will take active repentance into account.⁸³ It is important to underline that there is no legal redress against the ruling suspending procedure and ordering the mediation process.⁸⁴

After the conduction of the mediation process:

- if the mediation process/restitution is successful, and Article 36 section 1 of the Penal Code is to be applied (the criminal offence committed is a misdemeanour offence or a felony offence with a maximum punishment of three years), *the public prosecutor cancels procedure.*

- The public prosecutor *shall postpone accusation for a period from one to two years* if the suspect has started the performance of agreement but his/her punishability has not ceased yet provided that the criminal offence is to be punished with maximum three years' imprisonment.⁸⁵

- If the rule of active repentance making unlimited mitigation possible pursuant to Article 36 section 2 of the Penal Code is to be applied, *the public prosecutor will make the accusation*, and the court will apply the rule of unlimited mitigation of punishment during sentencing in case of the commitment of a criminal offence with a maximum punishment of five years so the case will return to the normal course of criminal procedure.

c) Restorative Justice at the court level

If for the sake of the conduction of mediation process, the public prosecutor does not order the mediation process, he/she makes the accusation and sends the indictment to the court. As during the criminal procedure, there may be a mediation process just once, in the indictment, the public prosecutor shall make a statement on whether a mediation process has been conducted or not, and if yes, with what result.⁸⁶ In the court stage, the Criminal Procedure Code makes it possible to refer the case to a mediation process during the whole term of the procedure of first instance. Unlike the ordering by public prosecutor, this may not occur ex officio.⁸⁷ Another difference from the prosecution stage is that the suspension

⁸³ Art. 221/A s. 3 of the Criminal Procedure Code

⁸⁴ Art. 221/A s. 4 of the Criminal Procedure Code

⁸⁵ Art. 221/A s. 7 of the Criminal Procedure Code

⁸⁶ Section VIII. 2. of opinion 3/2007. BKv. of the Criminal Department of the Supreme Court. In the judge stage, it is no obstacle to the mediation process that in the investigation stage, the public prosecutor rejected the petition to this effect. If, however, it was ordered but remained unsuccessful, this excludes ordering it again in the court stage.

⁸⁷ Section I. 4. of opinion 3/2007. BKv. of the Criminal Department of the Supreme Court.

ordered for the sake of the conducting of the mediation process or the ruling rejecting such a petition may be appealed⁸⁸ while this is impossible in the prosecution stage.

With the accusation, the criminal procedure reaches the court stage where the first and most important task is to decide whether the conditions of the continuation of procedure exist or not. This task is fulfilled by the chairman, who *within thirty days* of the receipt of the documents of the case by the court (preparation of trial) shall also investigate whether for the sake of the conduction of the mediation process, there are grounds for the suspension of procedure. During the preparation of trial, if the material and procedural conditions of the mediation process exist, and the public prosecutor has not suspended the procedure although there would have been grounds for it, upon the delivery of indictment,⁸⁹ the chairman shall inform culprit, defence counsel and victim of the possibility of proposing a mediation process and of the consequences thereof.⁹⁰ Referring to the mediation process is only a possibility, which can be ordered upon request or petition.⁹¹ Therefore, for this purpose, the criminal procedure may not be suspended ex officio.⁹² If within 15 days upon the presentation of indictment,⁹³ the culprit, defence counsel or victim has proposed conducting a mediation process, the court shall hold a preparatory session.⁹⁴ Such a preparatory session, which offers an opportunity to hear the public prosecutor, culprit and victim, shall be held within 30 days (that is, within 60 days upon receipt of case). If the legal conditions prevail, the court *may suspend* the procedure for the sake of the conducting of mediation process for a maximum *period of six months*.⁹⁵

- An important condition of the mediation process is the voluntary consent of both victim and accused, and if either withdraws it, the court of first instance shall continue the procedure.⁹⁶
- If on the basis of the mediator's report, the judge concludes that *the mediation process was successful, and active repentance was realised*, then in case of a petty offence or a criminal offence with a maximum punishment of three years' imprisonment,⁹⁷ with regard to the obstacle of punishability of active repentance, the court shall (*mandatorily*) *cancel the criminal procedure*, that is, it shall make a judgement on the merits of the case at

⁸⁸ It is not excluded by Art. 276 of the Criminal Procedure Code.

⁸⁹ It is not excluded, either, that this should occur after delivery of indictment. Section VIII. 1. of opinion 3/2007. BKv. of the Criminal Department of the Supreme Court.

⁹⁰ Art. 263 s. 4 of the Criminal Procedure Code.

⁹¹ Bodor., Csák, Somogyi, Szepesi, Szokolai, Varga 2009, A büntetőeljárás törvény magyarázata 1(The explication of the Act on criminal procedure Vol.1.), 263. § p. 904

⁹² Section I.1. of opinion 3/2007. BKv. of the Criminal Department of the Supreme Court.

⁹³ It is not a deadline involving loss of right.

⁹⁴ Art. 272 s. 2 b) of the Criminal Procedure Code.

⁹⁵ Art. 272 s. 3 c) of the Criminal Procedure Code.

⁹⁶ Section VIII. 7. of opinion 3/2007. BKv. of the Criminal Department of the Supreme Court.

⁹⁷ Art. 36 s. 1 of the Penal Code

the preparatory stage of trial.⁹⁸ However, in case of a criminal offence with maximum five years' punishment,⁹⁹ the *court procedure shall continue, the court shall schedule a trial*, and in the course of the passing of the judgement on the merits of the case, it may (optionally) take into account the unlimited mitigation of punishment.

- If there is no agreement concluded between victim and offender, the procedure shall be continued, and the court shall schedule a trial. The trial shall also be scheduled if the accused has started to perform agreement but has not finished it and the probation officer service has notified the court of this.¹⁰⁰

- In the trial stage, for the sake of the successful conducting of the mediation process, the court may adjourn the trial¹⁰¹ but at this time, no petition may be made for the suspension of procedure.

It is possible to suspend the criminal procedure for the sake of the conducting of the mediation process even after the preparatory stage following the completion of the preparation for the trial or the scheduling of trial,¹⁰² the start of trial¹⁰³, or the adjournment thereof¹⁰⁴, that is, up to the meeting held to pass the conclusive ruling of first instance. During the procedures of second or third instance, there is no opportunity to suspend procedure for this purpose.

Furthermore, it should be underlined that according to the guidelines of the Supreme Court, the following may generally be regarded as mitigating circumstances in the imposition of punishment in formal, traditional criminal procedure: a.) full or partial compensation for the damage caused by the criminal offence by offender; b.) with less weight, the remedying of damage in some other way; c.) the honest repentance of offender, the help given to victim; d.) and the fact that later, offender and victim reconciled so victim forgave offender. In accordance with the Hungarian criminal law application practice, 'the activity performed for the benefit of the public without any consideration (work done with a charitable purpose, present, donation, etc.) can also be assessed as a mitigating circumstance.'¹⁰⁵

There is an opportunity for a mediation process *in a procedure against juvenile delinquents*, as well.¹⁰⁶ As a main rule, the provisions concerning adults shall prevail. In comparison with adult offenders, the Penal Code contains a more favourable regulation concerning the *legal*

⁹⁸ Art. 267 s. 1 I) of the Criminal Procedure Code

⁹⁹ Case of active repentance as per Art. 36 s. 2 of the Penal Code

¹⁰⁰ Section VIII. 11. of opinion 3/2007. BKv. of the Criminal Department of the Supreme Court.

¹⁰¹ Art. 287 s. 1 of the Criminal Procedure Code

¹⁰² Art. 275 s 1 of the Criminal Procedure Code

¹⁰³ Art. 307 of the Criminal Procedure Code

¹⁰⁴ Art. 309 s. 1 of the Criminal Procedure Code

¹⁰⁵ Section II/5, II/11, III/4, III/9 of opinion 56 BKv. of the Criminal Department of the Supreme Court on Factors that may be assessed in the course of imposition of punishment.

¹⁰⁶ Art. 459 of the Criminal Procedure Code

consequence of active repentance as only the cause for eliminating punishability is associated with active repentance.¹⁰⁷ If the juvenile delinquent has fulfilled his/her obligation undertaken in agreement, the public prosecutor shall cancel the procedure against him/her, if he/she has just started performance, the public prosecutor shall postpone accusation for a period from one to two years.¹⁰⁸ A further difference in comparison with the provisions concerning adults is that it is mandatory for the legal representative to participate in the mediation process.¹⁰⁹

d) Restorative Justice at the correctional level

So far, restorative programmes have been applied at the correctional level in Hungary in an experimental way but in an ever increasing number. Since 2006, the National Committee for Crime Prevention has been advertising a tender for the setting up of a restorative/community prison.¹¹⁰ Through their work done for the local community as a symbolic restitution, inmates may promote the improvement of the relations between culprits, the correctional institute and the local community as well as their own reintegration.

C. Actual Situation of Restorative Justice

In Hungary, a gradual strengthening of the restorative approach may be experienced in the course of the execution of imprisonment.¹¹¹

The project entitled „Mediation and Restorative Justice in Prison Settings” (MEREPS)¹¹² is being implemented between 2009 and 2012 within the framework of the Criminal Justice programme of the European Union. It is a European project directed by an international

¹⁰⁷ Art. 107 of the Penal Code: 'The juvenile delinquent may not be punished if he/she has confessed to having committed a petty offence against a person (Titles I and III, Chapter XII), traffic violation (Chapter XIII), a petty offence against property (Chapter XVIII) or a criminal offence involving maximum punishment of five years' imprisonment, and has given compensation for the harm caused by the criminal offence in a manner and to an extent accepted by the offended in the frame of the mediation process.'

¹⁰⁸ Art. 459 s. 4 of the Criminal Procedure Code.

¹⁰⁹ Art. 459 s. 3 of the Criminal Procedure Code.

¹¹⁰ Gyökös 2010, „Helyreállító börtön” projektek Magyarországon (Community prison projects in Hungary), p. 246

¹¹¹ The exemplary restorative programmes of the Hungarian correctional institutes include the following: a) Within the framework of the restitution programme 'I regret, I would correct it', six inmates did work in the zoo, and as a continuation of the programme, Győr prison inmates helped in the child care home. b) During the implementation of the programme 'Prison for town', the inmates of the Heves county prison did cleaning and restoration jobs. c) The inmates of the Balassagyarmat prison participated several times earlier and are also participating at present in restitutional jobs done for the community. The history of these started in 2007 with the programme entitled 'Give me a chance to correct it'. Conflicts inside the cell have been resolved several times with the application of the mediation method.

¹¹² <http://mereps.foresee.hu/index.php?L=2> (25.09.2011)

consortium under Hungarian leadership.¹¹³ Training of prison staff and probation officers was organised. In 2010, a handbook was published on the applicability of mediation and RJ in prisons entitled 'Konfliktuskezelés elítéltekkel' ('Conflict management with inmates').¹¹⁴

There has been an opportunity to apply mediation in criminal cases since 1 January, 2007. From the beginning, there was a continuous increase in the cases referred to mediation.¹¹⁵

With regard to the fact that mediation in criminal cases shall be available in the different stages of criminal procedure,¹¹⁶ in Hungary, it may be ordered by both the ruling of the public prosecutor and the judge. The higher number of orders by public prosecutor may be accounted for by the fact that the offender shall make a confession up to accusation. They are included in the following table according to the ordering authorities.

<i>Number of cases on a national level</i>					
	Year 2007	Year 2008	Year 2009	Year 2010	Year 2011
Public prosecution offices	1,529	2,480	2,695	3,157	4,423
Courts	922	552	453	375	382
Total	2,451	3,032	3,148	3,532	4,805

It can be seen very well from the following table that mediation was applied to a much lower extent in case of juvenile delinquents. The reason for this is that in case of juvenile delinquents, law makes both the mediation process and the postponement of accusation possible in case of criminal offences punishable with maximum five years' imprisonment. The legal institution of postponement of accusation is considered more effective by those applying law with regard to the probation officer supervision, ordered mandatorily. The other problem is the performability of the agreement concerning material restitution by juvenile delinquents.

<i>Number of offenders on a national level</i>					
	Year 2007	Year 2008	Year 2009	Year 2010	Year 2011

¹¹³ Six research organisations of four countries cooperate: Foresee Research Group consortium leader (Hungary), The National Institute of Criminology as professional leader (Hungary) and the European Forum for Restorative Justice and furthermore the Independent Academic Research Studies (UK), University of Applied Sciences in Public Administration in Bremen (Germany), Victim-Offender Mediation Service in Bremen (Germany). The opportunity of the responsibility taking, victim assistance and reconciliation of convicts is implemented in an experimental programme in prison settings (Balassagyarmat prison and Tököl prison for juvenile delinquents)

¹¹⁴ Resolution of conflicts involving prisoners. Handbook on the applicability of mediation and restorative justice in prisons http://foresee.hu/uploads/media/Konfliktuskezeles_EN.pdf (downloaded on 3 October, 2011)

¹¹⁵ The publication of data are provided of Justice Service of Ministry of Public Administration and Justice, <http://www.kimisz.gov.hu/alaptev/partfogo/statisztika> (3.10.2011)

¹¹⁶ R 99(19) on Mediation in Criminal Matters, Council of Europe, point II/4.

Juvenile delinquents	<i>299</i>	<i>365</i>	<i>344</i>	<i>398</i>	<i>532</i>
Adult delinquents	<i>2,152</i>	<i>2,667</i>	<i>2,804</i>	<i>3,134</i>	<i>4,273</i>

As regards the range of criminal offences, the mediation process is conducted in the largest number due to criminal offences against property. Thus, for example, in the first year of criminal law mediation, in *2007*, there was a mediation process in case of 1,360 criminal offences against property, 695 traffic violations and 387 criminal offences against people.

Focusing on *2010* the following two tables show that Hungarian mediation process in criminal cases works with good results.

2011 data of mediation activity for adults			
	In process from the previous period	Received during period	Finished during period
Total	<i>1,060</i>	<i>4,273</i>	<i>3,784</i>

Cases finished in 2011 according to the manner of conclusion		
<i>Total:</i>		<i>3,784</i>
Of them:	Performance of agreement	<i>2,591</i>
	Completion of the check of performance with performed agreement	<i>190</i>
	Completion of the check of performance with non-performed agreement	<i>143</i>
	Accusation postponed	<i>55</i>
	Lack of voluntary participation of victim	<i>262</i>
	Lack of voluntary participation of accused	<i>103</i>
	Lack of voluntary participation of both parties	<i>94</i>
	Other cases	<i>346</i>

In case of the referring of the criminal case to a mediation process, the public prosecutor's office and the court may suspend criminal procedure for six months. The mediation process generally lasts three months. If mediation is successful, the judgement of the criminal offence is both quicker and cheaper than the formally conducted traditional criminal procedure. In criminal cases, the mediation process is a process free from duty. The costs of mediation proceedings shall not comprise a part of the costs of criminal proceedings, and shall be borne by the respondent unless there is an agreement to the contrary. The victim shall cover his own expenses (legal counsel, travel, etc.), unless the victim and the

respondent have agreed to the contrary. If the respondent was awarded exemption by the court or the public prosecutor before referring the case in question to mediation, the fees and the travel expenses of the appointed defense counsel shall be covered by the state.¹¹⁷

The attorney doing mediation in criminal cases is entitled to a procedural fee of the amount nine times the hourly fee of the appointed counsel as per mediation process.¹¹⁸

We agree with the statement that the cost-effectiveness of different restorative practices is difficult to calculate.¹¹⁹

The one-year experiences of the introduction of criminal law mediation as of 1 January, 2007, were analysed in two volumes as a result of a research project organised on the ministerial level.¹²⁰

Concerning relevant surveys in Hungary, it is notable that in 1993, one study looked into the possible use of mediation in connection with crimes and the attitudes of inmates and their victims¹²¹ (in one prison¹²², in 147 cases). In 1993, only 3 of the 147 inmates gave the answer 'No' to the question if he/she would be willing to give compensation for the damage if he/she could fully or partly avoid imprisonment. In 2003, the results were confirmed by a repeated study (194 cases, in three prisons¹²³, 194 cases). The willingness to give restitution was similarly high with 96%.¹²⁴

- From the 1990s, there was an increasing urge in professional literature. In addition to, several monographs¹²⁵ and academic articles were published.

¹¹⁷ Art. 17, Act CXXIII of 2006 on Mediation in Criminal Cases

¹¹⁸ Art. 2 s. 1 of decree 58/2005 (XII. 23.) IRM on the qualification requirements, remuneration and document handling of the attorney doing mediation in criminal cases.

¹¹⁹ Fellegi 2005, Meeting the challenges of introducing victim-offender mediation in Central and Eastern European countries, p. 4. <http://www.euforumrj.org/readingroom/FinalAGIS2publication.pdf> (5.10.2011)

¹²⁰ Iványi, K. (ed.) (2008), A büntető ügyekben alkalmazható közvetítói tevékenység bevezetésének tapasztalatai Magyarországon. I. (The experiences of the introduction of mediation in criminal cases in Hungary. Volume I.), Kertész, T. (2008), A büntetőügyekben alkalmazható közvetítói tevékenység gyakorlata és módszertani kérdései. Válogatott esettanulmányok. II. (The practice of the mediation in criminal cases and methodological questions Selected Cases. Volume II.)

¹²¹ Barabás, Windt 2009, „Mediation and Restorative Justice in Hungary”, http://mereps.foresee.hu/uploads/media/00063-RJ_in_prison_HU_London_091112.ppt (25.09.2011)

¹²² Prison in Baracska

¹²³ Prisons in Baracska, Tököl and Szirmabesenyő.

¹²⁴ Barabás 2004, Börtön helyett egyezség? Mediáció és más alternatív szankciók Európában (Agreement instead of prison? Mediation and other alternative sanctions in Europe), p 163.

¹²⁵ In chronological order: Barabás 2004, Börtön helyett egyezség Mediáció és más alternatív szankciók Európában (Agreement instead of prison? Mediation and other alternative sanctions in Europe), Görgényi 2006, Kárjótétel a büntetőjogban mediáció a büntetőügyekben (Restoration in criminal law, mediation in criminal cases), Kerezsi 2006, Kontroll vagy támogatás: az alternatív szankciók dilemmája (Control or support: dilemma concerning alternative sanctions), Fellegi 2009, Út a megbékéléshez. A helyreállító igazságszolgáltatás intézményesülése Magyarországon (Way of reconciliation. The establishment of the restorative justice in Hungary).

All these urges and research results supported the necessity of the introduction of mediation in criminal cases in Hungary in line with the expectations of the European Union¹²⁶. Two acts were elaborated concerning criminal mediation in 2006¹²⁷ and public opinion and the assessment of experts about RJ were published in the same year.¹²⁸ The opinion of the Hungarian judges and public prosecutors concerning criminal law mediation was surveyed and published in 2008.¹²⁹

- Also in 2008, the results of the interviews made with 45 public prosecutors and judges with the application of the qualitative method became public. In the course of this, the attitudes in the application of law concerning criminal law mediation were investigated.¹³⁰

- The empirical research entitled 'Students of law on crime and RJ', covering five semesters, was completed in 2009.¹³¹

- Relevant international conferences organised in Hungary recently.¹³²

- The Faculty of Law of the University of Miskolc was the first in the country to get a *programme training 'General and justice mediators'* accredited in the form of a *specialised further training course*.¹³³

- The Faculty of Law of the University of Miskolc is committed to the dissemination of alternative techniques of conflict management. It was the first to advertise the *subject and training entitled 'Alternative conflict management'* for students of law. The faculty of law has organised a professional conference and a methodological presentation on the subject of mediation every year since 2008. Furthermore, with regard to restorative criminal law, the optional subject entitled '*Restitution and mediation in criminal matters'* has been advertised for a decade.

- Within the framework of *TÁMOP 5.6.2 key project 'For the methodological support of crime prevention and reintegration programmes strengthening social cohesion'*¹³⁴ the

¹²⁶ 2001/220/JHA on the standing of victims in criminal proceedings, deadline of execution: 22 March, 2006.

¹²⁷ Act LI of 2006 and Act CXXIII of 2006

¹²⁸ Kerezi 2006, A közvélemény és a hazai szakemberek a helyreállító igazságszolgáltatásról (Public opinion and domestic experts on the restorative justice), pp. 33-90

¹²⁹ Beck, Wagner 2008, Attitűdvizsgálat – Kérdőíves felmérés büntető bírók és ügyészek körében (Attitude research – Questionnaire of criminal judges and public prosecutors) pp. 155-198

¹³⁰ Fellegi 2009, Út a megbékéléshez. A helyreállító igazságszolgáltatás intézményesülése Magyarországon, Way of reconciliation. The establishment of the restorative justice in Hungary, pp. 215-305

¹³¹ Barabás, Joghallgatók a bűnözésről és a resztoratív igazságszolgáltatásról (Law students about crime and restorative justice. Empirical research) (manuscript)

¹³² a) Restorative Justice in Europe: Where are we heading, European Forum for Restorative Justice, Budapest 2004., b) Multidimensional restorative justice for everyone, EU AGIS programme, Budapest 2008, c) European good practices in restorative justice in criminal procedure, Budapest, 2009; d) Good practices in the management of community conflicts, Budapest, 2011.

¹³³ The course consists of two semesters with the theoretical and practical classes/trainings amounting to altogether 250 hours. This year, the sixth student group is attending the course. Major subjects are the following: 'Legal framework of mediation', 'Communication', 'Conflict management', 'Getting to know customers (personality and social psychology)', trainings, vocational practice.

lecturers of the Faculty of Law of the University of Miskolc as a consortium partner are involved in the training of practical experts and volunteers. The subject called *The theory and methods of restitutive justice* is part of this programme.¹³⁵

D. Informal Referrals and Informal Initiatives

In the reintegration of the convict and in the restoration of community and family relations, family group decision-making may be of great help. This has already been introduced in some prisons (for example, Budapest, Balassagyarmat). It may have a key role during prison probation prior to the expected time of release and in the after care following it.¹³⁶ Probation officers play a central role in the reintegration of inmates in the frame of prison probation and after-care. For this purpose, in 2008 and 2009, sixty probation officers received special training to learn the method of family group decision-making and to apply it in an experimental way.¹³⁷ The method was transferred by the Community Service Foundation.¹³⁸ As the supporting institutions of the Probation Officer Service, two community activity centres were organised: a) „Jóvá – Tett – Hely” (Community Day Centre) in Budapest, from 2004; b) „Zöldpont” (Green Point) in Miskolc, from 2006. Their task is to ensure the implementation of probation service (and other community sanctions) as well as restorative methods and programmes.

With regard to the fact that the organisation and implementation of criminal law mediation is the primary responsibility of probation officers, this generally promotes methodological developments in the work of probation officers (for example, group case treatment techniques). It is also a novelty in Hungary to perform community work in a group, too. In Hungary, it is the task of probation officers¹³⁹ to organise work for the public, forming a part

¹³⁴ http://tamop.irm.gov.hu/TEtt_program (25.09.2011)

¹³⁵ <http://www.felnottkepzes.uni-miskolc.hu/kepzes/2010%20-%20Bunmegelozesikepzesek.html> (25.09.2011)

¹³⁶ Fábíánné, Negrea, Velez 2010, A családi döntéshozó csoportkonferencia alkalmazása a börtönpártfogás, illetve az utógondozás során. pp. 260-263.

¹³⁷ Negrea 2009, „Probation officers working with FGDM/FGC. Community Service Foundation of Hungary”, http://bunmegelozes.bm.hu/data/dok/20090427_eloadasok/negrea.pdf (25.09.2011)

¹³⁸ The Community Service Foundation was established in 2002 as a civil non-profit organisation applying restorative methods in school, family and community conflicts. As the partner organisation of the International Institute for Restorative Justice (IIRP) In the years 2008-2009, altogether 20 family group decision making conferences were organised in prisons. FGDM experiences acquired during the after-care of released inmates with an addictological risk are integrated into the methodology of probation officers.

¹³⁹ TÁMOP 5.6.2. key project on the 'Methodological support for crime prevention and reintegration programmes strengthening social cohesion' http://tamop.irm.gov.hu/TEtt_program (5.10.2011)

of symbolic forms of restitution/compensation.¹⁴⁰ In 2003¹⁴¹, the Hungarian Probation Service was renewed.¹⁴²

The restorative approach is reflected in the conduct rules for probation officers, as well. Pursuant to the Penal Code, both the public prosecutor and the judge may prescribe conduct rules in case of the ordering of probation, with special regard, for example, to the type of criminal offence, the damage caused and the chances of the offender integrating into society.¹⁴³

Furthermore, in the range of the conduct rules of probation, associated with the postponement of accusation, the public prosecutor may order that the suspect should a.) pay full or partial compensation to the victim for the damage caused; b.) ensure restitution for the victim in some other way; c.) pay material consideration for a specific purpose or do work for the community (restitution for the public).¹⁴⁴

In the scope of probation officer supervision applied by the Hungarian court and accompanying probation, suspension of imprisonment, conditional release and postponement of accusation, it may be prescribed as a separate rule of conduct that the offender shall report at the local council for community work.¹⁴⁵

In 2006, the 'Mission of Probation Officers' Service' was formulated by the Prime Minister and the Minister of Justice in the following solemn way: 'The Probation Officers' Service operates on the basis of the principle of RJ. Its objective is that the offender should face the consequences of his/her offence and that the damage caused by the offence should be mitigated through the mediation between victim, the community offended and the offender.'¹⁴⁶

E. The Key-Practitioners of Restorative Justice

- In the stage of the criminal procedure up to the accusation, the existence of the conditions of referral to the mediation process shall be investigated ex officio. The criminal justice authorities (court, prosecutor and investigating authority) during the process shall

¹⁴⁰ Görgényi 2007, A közérdekű munka mint szimbolikus jóvátétel (Community service as symbolic restitution) pp.370-371.

¹⁴¹ In this year the following book was published: Herczog (ed.) 2003, Megbékélés és jóvátétel. Kézikönyv a helyreállító igazságszolgáltatásról (Reconciliation and restoration. Handbook on the restorative justice).

¹⁴² Decree 17/2003 (VI.24.) This relevant legal rules contain that in the pre-sentence report, probation officers should a) indicate whether the offender is willing to compensate the victim partly or fully for the damages caused by the criminal act, or to provide any other form of restitution; b) indicate whether the victim will give consent to the proposed restitution; c) demonstrate whether the offender will give material provisions for a specific purpose, or work for the community (restitution for the public).

¹⁴³ Art. 82 s. 6 of the Penal Code.

¹⁴⁴ Art. 225 s. 2 a)-c) of the Criminal Procedure Code

¹⁴⁵ Art. 82 s. 5 f) of the Penal Code

¹⁴⁶ Pártfogók (Probation officer) Issue 25. http://www.maposz.hu/regiek/pf_lap_2006_25sz.htm#misszio (downloaded on 3 October, 2011)

inform the suspect and the victim of their rights¹⁴⁷, including the possibility of the mediation. Among public prosecutors, the amendment of the Criminal Procedure Code in 2010¹⁴⁸ may contribute to the popularisation of mediation as contrary to former regulations, it only stipulates the hearing of the suspect as an option prior to referring the case to mediation process.

- The court has no possibility to officially suspend procedure to conduct the mediation process, which may only be ordered at a request to this effect but the judge shall call attention to the statutory option parallel with the posting of indictment.

- In Hungary, mediators are key participants in the 'popularisation' of criminal law mediation. The court proceeding in the case, the probation officer of the service competent according to the seat of public prosecutor's office or the attorney-at-law in contractual relationship with the service is entitled to conduct the mediation process.¹⁴⁹ Impartial and conscientious mediators with appropriate professional knowledge may ensure its success. The greater the number of the mediation processes in which a written agreement between victim and offender is successfully concluded, the more willing the participants in the administration of justice will be to do without the traditional devices of criminal justice for the sake of the mediation process.

- The Internet may be an important medium in the popularisation of mediation. The official website of the probation officer service may be accessed from the website of the Justice Service of the Ministry of Public Administration and Justice.¹⁵⁰ In addition to the short description of the mediation process, the website includes a large amount of information (e.g. statistics, case studies)

- The National Mediation Association should also be mentioned. It is the professional organisation of experts on the organisation of alternative discussions, and of mediators in particular, committed to the introduction, dissemination and quality assurance of high level mediation activity. The Association represents the profession towards state authorities, participates in the preliminary evaluation of related regulations, in the analysis of experience and elaboration of impact studies, and regards as its task the registration and future accreditation of trainings and trainers, and in the long run, the registration of people involved in this activity, the organisation of their further training and the putting up of their services for sale.¹⁵¹

¹⁴⁷ Art. 62 of the Criminal Procedure Code

¹⁴⁸ Act CLXXXIII of 2010

¹⁴⁹ Art. 3, Act CXXIII of 2006

¹⁵⁰ <http://www.kih.gov.hu/alaptev/partfogo> (downloaded on 18 September, 2011)

¹⁵¹ <http://www.mediacio.hu/index.html> (downloaded on 18 September, 2011)

F. Case Study

Case: In July 2008, Gergő (20) and some of his friends damaged a giant poster and a gas box with graffiti. The others fled leaving Gergő alone on the spot. He was the only one to be taken to the police station. He took the responsibility alone. The amount of damage caused by the act was 204,000 Ft (700 Euro).¹⁵²

In details table for illustration can be found in the annex (Annex 1).

G. Current Reforms

- The original provisions of the Penal Code concerning criminal mediation (as of 1 January, 2007) regarded as primary the compensation of the 'damage caused for the injured person' and assigned secondary role to 'restitution in any other way of the harmful consequences' of the criminal act.¹⁵³ In about two third of the cases referred to a mediation process, material compensation was of decisive importance. The legislator recognized that due to the early stage of regulation, several options of restitution remained unexploited, for example, the expression of repentance on the part of the offender or the appeasement of the offended/victim. Therefore, Act LXXX of 2009 gave a wider scope to the taking into account of the interests of the injured person. Pursuant to this amendment, the guilt of the offender showing repentance ceases to exist if, among others, the offender restitutes the *harm* caused by his/her criminal offence in a way and to an extent accepted by the offended.¹⁵⁴ The background of this modification was prepared by the legal practice¹⁵⁵. Thus, the use of the word 'harm' instead of 'damage' also serves to extend the scope of non-material forms of restitution. It is not always necessary to give material compensation. Symbolic restitution is as important as the former but at the same time, it is harder, too.

- The amendment of the Criminal Procedure Code introduced by Act CLXXXIII of 2010 should also be highlighted. Pursuant to it, since 1 March, 2011, the public prosecutor has no longer been obliged to hear suspect and offended personally (it has remained only an option)¹⁵⁶ In police investigations, it was unnecessary and unjustified to hear suspect and

¹⁵² Piroska Bíró Lakatos (Budapest Metropolitan Office of Justice): Restitution for a criminal act of graffiti, mediation case description (http://www.kimisz.gov.hu/data/cms19497/Birone_Lakatos_Piroska_Graffiti_buncselekmeny_jovatetele_mediacio.pdf downloaded on 18 September, 2011)

¹⁵³ Art. 36 s. 1 of Criminal Code: 'to compensate the injured party for the damages caused by the criminal act, or to provide any other form of restitution'

¹⁵⁴ Section II, justification of Act LXXX of 2009

¹⁵⁵ Opinion 67/2008. BKv of the Criminal Department of the Supreme Court

¹⁵⁶ Art. 224 s. 4 of the Criminal Procedure Code

injured person repeatedly by the public prosecutor, which prevented the fastest possible completion of procedures and was a factor hindering the spread of mediation by increasing the work of the public prosecutor's office.

- Pursuant to the 2011 amendment of the Criminal Procedure Code, it is no longer an obstacle to the referral of the case to a mediation process if suspect has voluntarily, fully or partially compensated for the damage caused by the criminal offence. The legislator recognised that earlier, it had been unjustified that the regulation had excluded from the mediation process and thus from the exemption from criminal prosecution or from the possibility of the unlimited mitigation of punishment the offender starting restitution without a mediator.¹⁵⁷

H. Evaluation and Recommendations

- Pursuant to the 2011 amendment of the Criminal Procedure Code,¹⁵⁸ if the accused has also committed another criminal offence together with the criminal offence in question, the mediation process may only be applied if the criminal offence in question is of decisive importance in the perpetration.¹⁵⁹

- Pursuant to the amendment, if the accused has also committed another criminal offence together with the criminal offence in question, the mediation process may also be applied if the criminal offence in question is of decisive importance in the perpetration.¹⁶⁰

- Is it justified to restrict the scope of application of active repentance to the three chapters of the Penal Code specified, or would it be enough to set as a general condition the penalty of imprisonment for three or five years?

- There is an unjustified discrepancy between the regulation of active repentance in the law on petty offences and in material criminal law.¹⁶¹ The currently effective act on petty

¹⁵⁷ Justification for Art. 9, Act LXXXIX of 2011.

¹⁵⁸ Art. 9, Act LXXXIX of 2011 on the amendments of other acts concerning procedure and justice (Effective as of 13 August, 2011)

¹⁵⁹ Art. 221/A of the Criminal Procedure Code (e.g. fraud accompanied by the criminal offence of forging of private deeds)

¹⁶⁰ It is a question what criteria law enforcement practice applies in the decision on 'decisive importance'. The justification given for the amendment does not give clear guidance for law enforcers, either, which involves the risk of divergent interpretations of the law. The problem is illustrated by the following case: A mother gets her 15 and 17-year-old children to take away objects of minor value from the yard of another person. The children fulfil the mother's request and take away the valuables together, with the intention to steal. In addition to theft committed as a co-offender, with her conduct, the mother also commits the criminal offence of endangerment of infants (criminal offence regulated in Chapter XIV of the Penal Code), where the law does not provide the opportunity of a mediation process. It is a question whether in such a case, the new rule of the application of the mediation process ('criminal offence of decisive nature') holds or not.

¹⁶¹ A criticism in this respect was aired by Dr Beáta Fekets department head (Department of Petty Offences, Pest Central District Court) in her presentation entitled 'Legal practice at the court in case of petty offences' at the conference on 'Public Order and Society'(30 September, 2011).

offences¹⁶² makes it possible to apply active repentance in a narrower scope. Furthermore, the legal consequences to be applied have also been defined in a different way. It is unjustified to exclude the possibility of exemption from punishability in case of petty offences of the criminal type, involving minor risks for society, and handle the offender's active repentance only as a circumstance to be assessed in the imposition of punishment. Pursuant to the Act on petty offences, *'With the exception of damage caused by a traffic violation, in case of the application of imprisonment and a fine, the upper limit of the imposable penalty shall be reduced to half if the person involved in the procedure has compensated the damage caused to the offended by the criminal offence before the relevant authority or the court of first instance passing its ruling'*¹⁶³ According to criminal law regulation, active repentance covers the scope of traffic violations while pursuant to the explicit provision in the law of petty offences, the above provision may not be applied to compensation for damage caused by traffic violation so in this case, the upper limit of the imposable punishment will not be halved. The legislator gives the following justification for the introduction of this restriction: in case of traffic violations, compensation for damage means compensating the party adversely affected by the accident but following from the character of traffic violation as a form of illegal conduct, the application of prohibition from driving is also possible. Therefore, compensation for damage does not involve full 'restitution' of the offence.¹⁶⁴

- The current Hungarian legal regulation on law enforcement of criminal sanctions does not include the promotion of appeasement and restitution as an objective. The Criminal Procedure Code provides an opportunity for the mediation process in criminal law in court proceedings of the first instance (until the meeting held for passing conclusive ruling) The application of restorative projects/programmes fall under flexible evaluation. On the one hand, restorative methods are applied with respect to a serious criminal offence. The other feature is that restorative programmes are conducted behind closed doors, in some cases in a higher security prison. Recently, parallel with the increased importance of symbolic restitution, restorative projects in prison have gained importance.

- Similarly to foreign examples, new working methods and 'good practices' have been developed in the work of probation officers. Linked with several punishments and measures, probation services and the conduct rules involved prove to be important. In this way, the restorative approach is closely associated with alternative and community sanctions.

¹⁶² Act LXIX of 1999 on petty offences (effective as of 1 March, 2000).

¹⁶³ Art. 24/A, Act on petty offences (Enacted by Act CXXXVI of 2009, effective for petty offences committed as of 1 January, 2010)

¹⁶⁴ Justification for Art. 3, Act CXXXVI of 2009

- Of the types of RJ, criminal mediation operates subject to legal regulation (prior to the sentence of the court of first instance) while the implementation of other forms, particularly that of family group decision making - mostly after definitive judgement – is primarily based on different projects. The application of the latter is becoming more and more widespread in both prisons and in the work of probation officers. Therefore, there is a strong need for the recognition on the part of the legislator, legal regulation and the assessment of successful restorative programmes in criminal law.

- However, it should be noted that in the scope of the implementation of probation, the methods of family group decision making, youth conference and community reparation are applied.¹⁶⁵ International expectations to be complied with are observed in implementation.¹⁶⁶

- Among juvenile delinquents (14-18 years of age), the mediation process is less frequently applied although its legal possibilities are wider than in the case of adult offenders. They commit offences against property in a large number. There is the possibility of mediation in the offences involving considerable value (approx. 170,000 Euro). With respect to high amounts involved in theft, the juvenile delinquent is far capable of giving at least partial material compensation.¹⁶⁷ It is closely related to this issue that in case of non-punishable child offenders below the age of 14, conference models have good potentials.¹⁶⁸

- For both prisoners and juvenile offenders, non-material forms of restitution should gain greater importance. This challenge is in harmony with the definition of victim in the international documents, which explicitly refers to physical or mental injury, emotional suffering and economic loss.¹⁶⁹

- RJ in criminal cases forms a part of dual criminal policy, starting in Hungary in a full-fledged way in 2003. One trend is characterised by the preference for alternative sanctions, diversionary solutions, mediation and other forms of RJ. The other trend can be characterised by a neorepressive approach. In Hungary, both trends of criminal policy and law are present.

I. ANNEX

Annex 1 E. Case Study

¹⁶⁵ For details see: Jóvá – Tett – Hely. <http://www.jovatetthely.hu/en/about-us/jova-tett-hely-community-day-centre> (25.09.2011)

¹⁶⁶ In particular: ECOSOC Resolution 2002/12 on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters; Declaration of Leuven on the advisability of promoting the restorative approach to juvenile crime, 1997.

¹⁶⁷ Görgényi 2006, Future Mediation with Serious Offences in Hungary. pp. 82-83.

¹⁶⁸ For details see: Család, Gyermek, Ifjúság Egyesület ('Association for the Family, Children and Youth') <http://www.csagyi.hu/> (5.10.2011)

¹⁶⁹ See Art. 1 a) 2001/220/JHA on the standing of victims in criminal proceedings.

Annex 2 Bibliography

Annex 3 Links to legislation and other relevant websites

ANNEX 1 F. Case Study

	Traditional criminal procedure	Mediation process	Relevant statute
<i>Investigation stage</i>			
Ordering of investigation	Following being caught in the act, Gergő is taken to the police station. The policeman on duty records the commitment of criminal offence, and orders investigation on account of the well-founded suspicion of a criminal offence. The investigating authority notifies the public prosecutor and the victim of the investigation within 24 hours.		Art. 164, s. 3, Art. 170 of the Criminal Procedure Code
Plea	Hearing of suspect: Gergő is informed of the essence of the accusation together with the relevant legal statutes (<i>petty offence of damage violating section (1), Art. 324 of the Penal Code but to be qualified and punished pursuant to section (2) therein</i>).		Art. 179 of the Criminal Procedure Code
	<p>As the suspect in criminal offence, Gergő makes a confession.¹⁷⁰</p> <p>a) does not propose / does not consent to mediation process</p>	<p>b) proposes / consents to mediation process.</p>	

¹⁷⁰ During hearing, the accused shall be warned of the option of mediation process, which is recorded at the end of the records taken of the hearing. This is certified by suspect's signature.

n c e o f a c t s o f i n v e s t i g a t i o n	Performance of other acts of investigation, hearing of victim as witness ¹⁷¹ .		
	a) victim does not consent to mediation process and wishes offender's impeachment under criminal law	b) Victim gives his/her consent to mediation process.	
I r a	Getting to know the documents of investigation: After the completion of investigation, in a room designated for this purpose, the public prosecutor or the investigating authority hands over the bound documents of the investigation to		Art. 193 of the Criminal Procedure Code

¹⁷¹ Pursuant to the Criminal Procedure Code, the victim shall have the right to get information of his/her rights and obligations in the criminal procedure from the court, the public prosecutor's office and the investigating authority. Art. 51 s. 2 of the Criminal Procedure Code. During hearing, he/she shall be warned of the option of mediation process (in a recorded form)

t i s m e r t e t é p r p r e s e n t a t i o n o f d o c u m e n	suspect and defence counsellor. Suspect and defence counsellor may propose the supplementation of investigation. After the presentation of documents, the police send the documents of the case to public prosecutor.	
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t s			
Prosecution stage			
	<p>Within 30 days of the receipt of documents, the public prosecutor examines the documents of the case and makes an accusation if the conditions of accusation hold.</p> <p>Within 30 days, the public prosecutor investigates the material and procedural criminal law conditions of referral to mediation process. He/she may order the acquisition of probation officer's opinion for the decision.</p>		Arts 216, 221/A of the Criminal Procedure Code, Art. 36 of the Penal Code
	<p>➤ <i>If the conditions do not hold:</i> the public prosecutor makes an accusation</p>	<p>➤ <i>If the conditions hold:</i> The public prosecutor passes a ruling suspending procedure and refers the case to a mediation process</p> <p>❖ Term of suspension: max. 6 months.</p> <p>❖ Pursuant to the Criminal Procedure Code, the preliminary hearing of suspect is <u>not mandatory</u></p>	Art. 216 s. 1 e), Art. 221/A s. 3, Art. 224 s 1) of the Criminal Procedure Code
Court stage		Start of mediation process	
	Preparation of trial: sending indictment to accused (warning of the possibility of mediation process if not ordered by public prosecutor). ¹⁷²	Together with his/her order concerning mediation process, public prosecutor makes the documents of the case available to mediator.	Act CXXIII of 2006 / Chapter 12 Criminal Procedure Code

¹⁷² It may also be proposed at this stage by victim and accused. If requested by both, the procedure is suspended and referral to mediation process is ordered (if unsuccessful, a trial is scheduled) See B. Legal frame of restorative justice 2. The specific legal provisions in all stages of criminal proceedings

Scheduling trial, court trial.	<p>Within 15 days of the receipt of documents, mediator sets the date for the first mediation discussion.</p> <p>The mediation process shall be organised in the way that it can be completed within 3 months upon the first mediation discussion, and the document of agreement shall be received by the public prosecutor's office prior to the expiry of the deadline for the suspension of criminal procedure (maximum 6 months).¹⁷³</p> <p>Within 15 days upon the completion of mediation process, mediator compiles a report on mediation process, sends it to public prosecutor, notifying victim, accused and their representatives of this fact.</p>		Art. 9, Act CXXIII of 2006		
	<p>a) An agreement is successfully concluded (set forth in a document)</p>		<p>b) No agreement is concluded</p>		Art. 15 Act CXXIII of 2006
	Performance of the provisions of agreement during the term of mediation process ¹⁷⁴	Start of performance of provisions in agreement ¹⁷⁵		Public prosecutor makes accusation	
Passing a sentence. Relevant punishment pursuant to Art. 324 s. 2 of the Penal Code (in case of petty offence of causing minor damage): maximum one year imprisonment	Public prosecutor cancels procedure (active repentance, Art. 36 s. 1 of the Penal Code).		Public prosecutor suspends accusation for the term of performance..		
			a) If accused fulfils the obligation undertaken	b) Accused does not fulfil	
			Cancellation of	Public	

¹⁷³ Both the victim and accused shall get written information about the essence of the mediation process. The mediation discussion shall start with the check of identity. The mediator shall hear victim and accused in appropriate detail. Victim and accused may express their views concerning the case orally. The first mediator discussion may be conducted in the joint presence of victim and accused but also in the absence of one of them. In case of the hearing of a victim with restricted disposing capacity, the legal representative shall be present. The victim (the legal representative if his/her presence is mandatory) and the accused (in case of a non-natural person, the authorised representative) are supposed to be present together at the signing the agreement. The victim and the offender may request permission for maximum two persons each to attend the mediation session, and to make statements on their behalf. The mediator may refuse to comply only if the presence of the person for whom permission is requested is prejudicial to the purpose of the mediation proceedings. The mediator's decision may not be contested.

¹⁷⁴ Compensation for the damage caused or restitution of the harmful consequences of criminal offence in some other way.

¹⁷⁵ In the mediation process, performance of agreement shall be verified by mediator, and after it, by the probation officer service.

			procedure (Art. 36 s. 1 of the Penal Code)	prosecutor makes accusation		
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ANNEX 2

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ANNEX 3

List of legal statutes and other legal rules

Act LXXXIX of 2011 on the amendments of other acts concerning procedure and justice

Act CLXXXIII of 2010 on the amendments of some acts promoting the efficient operation of courts and the acceleration of court proceedings

Act CXXXVI of 2009 on modification of the Act on petty offences, Criminal Procedure Code, Penal Code

Act LXXX of 2009 on modification of the Penal Code

Act CXXIII of 2006 on mediation in criminal cases.

Act LI of 2006 on the amendment of Act XIX of 1998 on Criminal Procedure Code

Act CIV of 2001 on the criminal law measures applicable against legal entities

Act LXIX of 1999 on petty offences

Act IV of 1978 on the Penal Code

Act XIX of 1998 on Criminal Procedure Code

Act XX of 1949 on Constitution of Republic Hungary

Decree 17/2003 (VI.24.)

Decree 115/2003 (X.28.)

Decree 58/2005 (XII. 23.)

Others:

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R 99(19) on Mediation in Criminal Matters, Council of Europe

2001/220/JHA Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.

ECOSOC Resolution 2002/12 on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

CD Jogtár Kommentár ('CD' Legal Commentary)

Opinion 56 BKv. of the Criminal Department of the Supreme Court on Factors that may be assessed in the course of imposition of punishment.

Opinion 3/2007. BKv. of the Criminal Department of the Supreme Court.

Opinion 67/2008. BKv. of the Criminal Department of the Supreme Court

Links to legislation:

<https://magyarorszag.hu/>

<https://kereses.magyarorszag.hu/jogszabalykereso> (Statute finder)

Links to other relevant websites

National Mediation Association: <http://www.mediacio.hu/>

Justice Service of the Ministry of Public Administration and Justice: <http://www.kih.gov.hu/alaptev/partfogo/mediacio>

Community – Day – Centre (Jóvá – Tett – Hely):
<http://www.jovatetthely.hu/en/about-us/jova-tett-hely-community-day-centre>

Justice Service of Ministry of Public Administration and Justice (KIMISZ):
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Association for the Family, Children and Youth (Család, Gyermekek, Ifjúság Egyesület):
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