

BUILDING AND TONING:
AN ANALYSIS
**OF THE INSTITUTIONALISATION OF MEDIATION IN PENAL MATTERS IN
HUNGARY**

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Abstract

Since 1 January 2007, victims of crimes and offenders have been offered the chance to have recourse to mediation in Hungary. This paper will first give a short overview of the current situation of mediation in penal matters in Hungary, then it will discuss some general phenomena and dilemmas concerning the general introduction of mediation. After that, I will present a SWOT analysis² of the current Hungarian mediation system in penal matters. The main goal of this article is to set up certain criteria for the further development of the restorative approach. The lessons we have learnt, the strengths and opportunities of the system and the identification of weaknesses might prove useful for other countries when they choose to introduce mediation, and in relation to the protection of victims in particular.

Keywords

mediation, Hungary, restorative justice, SWOT analysis

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² SWOT is the acronym for strengths, weaknesses, opportunities, threats

Mediation in criminal cases in Hungary

Under the regulations applicable to mediation in penal matters effective from 1 January 2007, mediation is available for both adult and juvenile offenders if the crime is a crime against the person, a traffic offence or a crime against property not punishable by more than five years of imprisonment, and

- the parties voluntarily request mediation,
- the crime has a victim,
- the offender has pleaded guilty,
- if the offender is not a habitual offender committing a similar crime for the second time or committing a crime more than twice,
- there was not a criminal procedure pending against the offender at the time the crime was committed, and
- the crime has not resulted in death.

In addition to the conditions listed above both the prosecutor and the judge have discretion to decide which cases may be referred to mediation. In exercising their discretion they need to consider the following factors: whether

- the offender confessed during the course of investigation;
- the offender has agreed and is able to compensate the victim for damages resulting from the crime or to provide any other form of restitution;
- the offender and the victim agreed to participate in the mediation proceedings, and
- in view of the nature of the crime, the way it was committed and the offender's personal circumstances, court proceedings are not required, or there is substantial reason to

believe that the court will take into account the offender's contrition as a mitigating circumstances (Criminal Procedure Act, art. 221/A (3)).

Mediation in penal matters is carried out by the Office of Justice, a government agency of the Ministry of Justice and Law Enforcement (now called Ministry of Justice and Public Administration). At this time, only specially trained probation officers from the Office of Justice and, since 1 January 2008, attorneys under contract with the appointed probation service entity for mediation activities are authorised to act as mediators.

Legislation first made mediation available for minor crimes and crimes of medium severity (for its detailed procedure see Figure 1). It is only available in the phases of the procedure before the prosecutor or the court. The mediation procedure may be initiated by the competent prosecutor at its own discretion *ex officio*, or if the parties (or their attorneys) request mediation. In contrast, during the court phase, the court is not allowed to order mediation *ex officio*, only at the request of the parties. Both the judge and the prosecutor are required by law to inform the parties about the availability of mediation. The victim and the offender are to be treated equally in the proceedings and they may withdraw their voluntary consent to participate at any time. These rules guarantee that mediation cannot proceed if either party objects.

If mediation is successful and the crime is not punishable by more than 3 years of imprisonment for adult offenders (5 years for juveniles), the criminal case is automatically closed and therefore the offender will not have a criminal record. When mediation is successful, prosecutors have no discretionary rights to decide whether, in their opinion, the result of the mediation is sufficiently "constructive" or not; if the mediation qualifies by law as being "constructive", the criminal case must be closed. In these cases, mediation is a

diversionary measure, an alternative to the regular court procedure, and eliminates the need for a criminal sanction.

If the adult offender's crime is punishable by more than 3 years of imprisonment but the statutory sentence does not exceed 5 years, there is an indictment and the mediation's result essentially supplements the outcome of the regular court procedure. In this case the judges decide, at their own discretion, the extent to which they will take the mediation agreement the parties have reached into consideration as a mitigating factor.

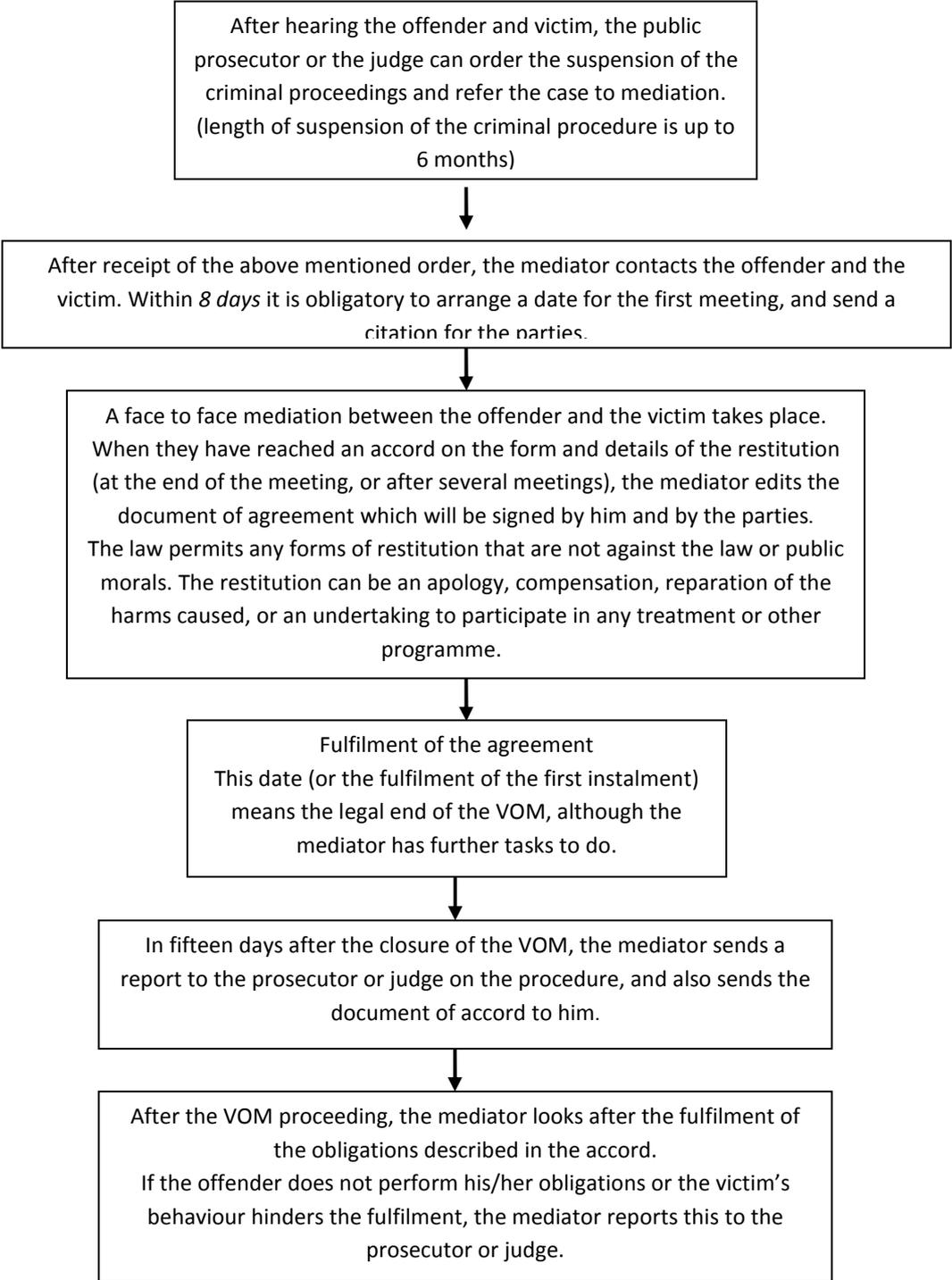


Figure 1: The mediation procedure (Fellegi, Törzs, Velez, forthcoming)

In the three-year period since the introduction of mediation in penal matters, the Probation Service has had approximately 8500 cases referred to mediation. The latest trends suggest that more than 80% of mediation cases are referred to mediation by the prosecutors, while mediation is based on a court decision in less than 20% of the total number of mediation cases. The parties have been able to reach an agreement in 80% of mediation cases and 90% of the agreements have been kept. The majority (more than half) of the cases are crimes against property; the second most frequent type is the category of traffic offences and the least common are crimes against the person. (Office of Justice, 2008, 2009, 2010)

Professional and policy dilemmas regarding the general introduction of mediation in Hungary

1. Over-formalisation and 'lawyerisation'

The Hungarian system over-emphasises the expert nature of restorative justice, and this results in a diminishing role of the community through volunteers and NGO workers. The clearest sign of this is the over-formalisation of restorative approaches and practices. The so-called 'lawyerisation' expression refers to a unique solution in Europe, namely that besides probation officers, only lawyers, i.e. attorneys, are allowed to conduct mediation in penal matters. It is feared that, in this event, "mediator professionals" will "steal" the citizens' power to settle their conflicts, and mediation will become similar to formal procedures in spite of the fact that our original goal was to cure the problems of formal procedures through mediation.

2. Institutionalised solutions v. NGOs; bottom-up v. top-down regulation; uneven v. organic regulation

When social policy is institutionalised, it is a common theoretical and practical problem to decide at what social level development should be started. Local, typically NGO-initiated micro-level solutions are significant because, if local and inter-agency networks are developed, it can be trusted that each affected specialised field will cooperate. The applied principles must be put into practice in a consistent and strictly controlled manner. This is the only way to guarantee quality in service-delivery and that the initial approach is not modified during implementation. However, such local programmes are only designed to reach relatively small target groups; their results are less spectacular and they are more difficult to maintain at a national level.

In comparison, macro-level initiatives affect larger target groups, and they are capable of making fundamental and noticeable changes. These goals are often pronounced as the primary considerations of government agencies, as results at this level are easy to communicate to voters. However, if institutionalisation is carried out at a national level, in the course of developing a multi-level institutional regime, it very often happens that the starting points, the initial intentions and principles, become 'lost in transition'. By the time a national network and a stable institutional background is created, it might well happen that the basic principles defined at the start are compromised, redefined or misinterpreted. It does happen that the implemented local programmes therefore become distorted versions of the first principles and have little to do with the goals originally set.

The theory and foreign practice of restorative justice suggests that the logical way is that demand for restorative practices appears first in small communities; this allows the development of pilot programmes, the discovery of local requirements and the development of effective solutions (Fellegi, 2005, 97). In an ideal situation, the formal introduction of restorative justice is a bottom-up procedure and international guidance plays a supplementary role in the process.

In Hungary, the process seems to be reversed. NGOs appear to have started off too early, and their initiatives could not gain strength as government support was missing. The current system is not based on practical experience but rather on theoretical expectations. This is because the legal reforms in mediation were made due to the pressure exerted by the European Union³ and the reforms were introduced relatively rapidly and somewhat hastily. In this process, the NGOs had little left to do but to carry out the “fine-tuning”. The NGOs' role was limited to importing innovative practices to Hungary, but they were not able to grow into a nationwide network.

However, civil society has a crucial role in spreading and applying methods of alternative dispute resolution in areas other than the justice system (schools, family affairs, employment relations, business life etc.). This is essential to help the approach and practices of amicable dispute resolution to become an actual part of everyday life.

This means that, in the Hungarian legislation, there is unnecessary over-regulation, which is a sign that the legislator does not trust those applying the laws (Fellegi, 2009: 215-307), and, at the same time, regulatory loopholes in certain fields. This situation not only makes coordination between services impossible but in a number of cases even their introduction is proving to be too difficult.

³ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings

The lack of coordination is apparent in the field of special policies. This is caused by simultaneous government strategies with similar aims and overlapping state-funded national professional networks, which fritter away the limited funding and human resources available.

SWOT analysis of the Hungarian system of restorative justice

Strengths

The main strength of the Hungarian institutionalisation process is that by now the state, international and NGO initiatives have more or less caught up with each other. The Framework Decision of 2001 has been complied with and therefore the majority of the international community's mediation-related expectations have been met.

Another strength is that the probation service, which carries out the mediation service, now has nationwide coverage; its institutional background is reliable and it is an integral part of state administration and the criminal justice system. The skills and knowledge of the professionals in the field is also a strength. There are a few methodology standards (such as compulsory attendance of further training and mandatory involvement in the mentoring system and case discussions for staff, continuous documentation and evaluation of practice, the provision of information to peer professions and other mediators of results and difficulties, requesting feedback from external actors etc.). Such standards are common expectations of any social services and professions.

Additional strengths of the current system:

- it allows mediation to be used for both adult and juvenile offenders;
- in addition to its use as a diversionary measure and for petty crimes, it is also available in the court phase and for crimes of medium severity;

- a strong emphasis is put on the basic principles specified by the Council of Europe⁴ (confidentiality, voluntary basis and the impartiality of the mediator in particular);
- it is a requirement that the parties must attend the mediation meeting directly and in person; and
- persons carrying out mediation activities must meet strict training/qualification requirements.

It is both a pre-requisite for and evidence of success of successful introduction that the number of mediation cases is *high*. The high number of mediation cases will stimulate the process of institutionalisation by generating trust in mediation by the actors of the justice system, the specialised policymakers and the people in general alike.

Weaknesses

The weaknesses of the current Hungarian system are the results of a process in which the initial principles and intentions become lost or change in the course of institutionalisation. The legislator introduced the regulation of mediation procedures with relatively short deadlines, without preparation, practical experience and pilot programmes, and *in a hurried manner*. The legislator did not even have sufficient information on the basic principles of the restorative approach, and could not provide adequate information for justice system professionals or prepare them for the changes. All this produced an unnecessarily over-regulated statutory background; it seems that the legislator did not trust the competence of judges, prosecutors or future mediators. Moreover, in spite of this, there are significant

⁴ Council of Europe, Recommendation R(99)19 concerning mediation in penal matters (including its Explanatory Memorandum).

differences between the levels of application in different locations. (Partners Hungary Alapítvány, 2008: 64-68.)

This means that the current regulation of the mediation procedure made mediation *overly formalised*. As a result, *victim protection* and *active participation* considerations as key elements of the restorative approach, while not lost completely, have become *secondary factors*. Following some general remarks, let us list some of the most important weaknesses identified concerning the implementation of VOM.

Limiting the number of participants

According to Section 7 (3) of the Mediation Act in penal matters, a maximum of two persons each for the offender and the victim may be present at the mediation meeting. It is difficult to understand why it is necessary to regulate this in a primary source of law. The fundamental principles of restorative approach would suggest that the mediator's decision should be based on the parties' request concerning whose presence and support they want at the meeting (see eg. O'Connell et al., 1999). This limitation also means that the state wants to limit the extent of external resources in the procedure. This statutory provision excludes the possibility of using the conference model in mediation in penal matters, which model would require the participation of a larger group of people (O'Connell et al., 1999).

Lack of trust in those applying the law: excluding the possibility of mediation in certain cases

There are additional details of the legislation that suggest mistrust on behalf of the legislator: for instance, the general exclusion of *violent crimes punishable by more than 5 years of imprisonment* or of *crimes without a victim*.

Victim protection considerations are taken into account here. However, there is a question: why should we rid someone of the chance of meeting the offender in person, asking him/her questions and possibly receiving restitution just because the crime the victim has experienced is more serious? Restorative programmes have significantly higher benefits for victims and offenders of serious and violent crimes than for victims and offenders of less serious ones (see e.g. Miers et al., 2001; Sherman and Strang, 2007).

Another restriction of the law is that mediation is only allowed *when the offender confesses/pleads guilty as early as in the investigation phase* of the procedure. It can reasonably happen that the suspect does not plead guilty for each charge brought against him or her, but otherwise would be willing to accept responsibility for some of the charges. It is important to observe that the police are not allowed to pressure the suspect into a guilty plea. The “plead guilty and they’ll go easy on you” kind of argument is a threat to the offender's basic rights (such as the right to a fair trial).

In the majority of cases, the actor authorised to order mediation *is entitled to exclude the possibility of mediation without comprehensive knowledge of the parties and the circumstances of the case*. A common element of the above is that the legislator does not trust the parties applying the law and have an even lower opinion of the mediators' professional skills, that is, whether the mediators can decide on a case-by-case basis whether mediation services can be offered if the parties voluntarily request it.⁵ The legislator has therefore taken the option of mediation away from a number of victims and offenders (based on the facts of the case only) for whom the procedure would be quite beneficial.

⁵ Please note that mediation is not simply an alternative to punishment; it can also be used as a supplementary procedure. Consequently, if a crime is so severe that the state is not willing to give up its right to impose a penalty (for instance, in crimes of robbery), mediation can still be used effectively. In this instance, the judge can take into consideration (at his or her own discretion) the outcome of the mediation procedure when passing sentence.

The authorities applying the law have excessive discretionary powers at the beginning of the procedure and have no discretionary powers at the end

Due to the above, a procedural law weakness of the current rules is that the referring authority has too much discretionary power before the referral is made. Consequently, the legislator places an exceedingly large burden of decision-making on the prosecutors/courts when they are obliged to decide whether they refer the cases to mediation. From a methodological standpoint, it would be a more substantiated solution if it was not primarily the prosecutor's or the judge's decision as to whether mediation is applicable. Prosecutors and judges only know the facts of the case and barely know the parties in person. It would be wiser to allow the mediator to *make a decision on the applicability of mediation* and the parties should be informed by the mediator of the possibility of mediation *as early in the procedure as possible*.

In relation to the role of the authorities applying the law, there is a certain doubt whether it is reasonable *to close the case automatically*, simply because the mediation has been successful. The prosecutor's or the judge's discretionary powers are needed not before but rather after mediation. The offenders should be involved in the mediation procedure not only because they can avoid punishment (that might also have a re-victimising impact on the victim). However, according to the current regulations, in a significant proportion of the cases it is guaranteed to the offender that the case will be closed. It carries, or rather would carry, an important message if the authority applying the law would itself evaluate whether mediation has been successful. By accepting the mediation or commenting on it, it would be able to communicate to the parties and society that the authority appreciates that the parties have reached a mutually acceptable agreement.

The exaggerated role of financial reparation

Another weakness of the current system is that both the legislator and the authorities *underestimate the importance of non-material (symbolic) reparation*. By law, mediation qualifies as successful if the offender pays damages to the victim or otherwise eliminates/provides remedy for the harmful consequences of the crime (Section 36 (1) of the Criminal Code). In practice, the second option is appreciated and stressed in a much smaller number of cases by the authorities in spite of the fact that it is obvious in a number of mediation cases that symbolic gestures have the same importance as financial reparations, or may even be more important than the latter. Moreover, victims seem to demand symbolic reparation more than was originally expected and they have a creative approach to such symbolic undertakings. The Prosecutors' Memorandum (an internal document detailing guidelines) states at points that the prosecutor is not allowed to refer cases to mediation when *there is no financial loss*, or when *the offender has already paid damages*, or when it seems that *the offender is not in a position to pay damages due to financial constraints*. This is the reason that mediation is rarely ordered in cases involving juveniles, who generally have no income of their own (less than 12% of the total number of mediation cases fall into this category) (Office of Justice, 2008, 2009). Additionally, when the offender has compensated the victim before the prosecutor's decision, the offender is treated more harshly than if not paying until the decision because the offender paying early loses the possibility of mediation, and it is not unlikely that the prosecutor will be required to file an indictment.

The priority of official procedures over victim protection: issues of concurrent crimes

Mediation may not be applied to offenders who only plead guilty to some of the crimes they are charged with; it may not be applied either when there is a procedure against the offender for a crime that is not eligible for mediation, and it may not be applied when the offender does not agree to participate in the mediation procedure regarding his or her additional charges. Mediation is also excluded when there are multiple victims but one or more of them refuses to take part in the mediation procedure. The grounds for exclusion listed above have been introduced partly because such cases require complex administrative efforts to handle the procedures and the crimes separately and the prosecutors have no resources to handle such cases. In this regard, the current regulations are discriminatory against certain victims regarding their eligibility for mediation.

No mediation is allowed in the event of *private prosecution* either. The question is similar: if there are private prosecution cases (typically petty cases that are results of serious emotional conflicts and constitute a heavy workload for courts) where the parties would voluntarily request mediation, why are they denied the opportunity to attempt to settle the case in this way?

The low prestige of the mediator profession

In addition to retrained probation officers, only attorneys may be registered as criminal mediators. This is discrimination against those professions that are properly qualified mediators, it also makes it difficult to implement the principle of representativeness recommended by the Council of Europe and also it sends the wrong message that one must have a bar exam, otherwise he/she cannot act as a mediator. A degree in law seems to be an irrelevant prerequisite, while probably even lawyers need more than the average level of training, supervision and self-awareness.

Opportunities

However, the current institutional, regulatory and practical experience may allow:

- evaluative research (supported by social science methods) and qualitative and quantitative impact studies to be carried out on the applicability and special characteristics of the restorative approach in Hungary;
- the justice, social, education and other ministries intending to apply alternative dispute resolution comprehensively to continue such activities and adopt strategies for the purpose of making further improvements;
- us to witness the spread of the new approach within the affected professions and the population;
- professionals and specialised policymakers to realise that, due to the increasing levels and worsening forms of juvenile delinquency and behavioural problems, there is no other solution to these problems but the introduction of alternative dispute resolution in as many areas of society as possible;
- allow the interdisciplinary approach to become a more serious expectation in the development of criminal and social policy institutions when future development is planned;
- the international network of connections broaden and strengthen, the possibilities of exchange of practical information improve and the chances of obtaining available European Union funding increase.

Threats

The main threats to the system include (but are not limited to the following):

- It is feared that, if the characteristics of the system listed as weaknesses and criticised above *do not change* (either because the specialised policymakers do not agree with the criticism or, even if they agree, they lack the political will and the institutional flexibility required for implementing the reforms) it may result in difficulties if future regulatory and institutional changes are introduced *without preparation, pilot and experimental projects and the related exchange of information, inter-professional consultation and comprehensive groundwork*, in the same way as these were missed in the past.
- It is feared that *there will be inappropriate and insufficient feedback/external evaluation to analyse the effects and results of practical implementation*, in spite of the fact that these are necessary for the well-designed further development of the system.
- If the legislator and authorities/persons applying the law involved in the processes do not expand their knowledge of the basic principles and broader connections of the restorative approach, it may happen that *a practice that has begun to be implemented will be slowly eaten up by the justice system* and local professionals will tend to become *defensive* because they will believe that the reform is just another unnecessary and time-consuming thing that takes a lot of learning but is hardly effective and has only been introduced because their work so far has not produced results. The lack of positive feedback and support, the growing professional uncertainty, lack of competence and the feeling that they have been left alone will increase the level of resistance to (and suspicion of) colleagues initiating the development of good practices in the given organisation.
- The *internal problems* of organisations with an interest in the application of restorative practices must be taken into account. The reparative approach's success largely depends on the ability of the affected professionals to discover the conflicts, to communicate

candidly, to consult with partners, to be open to the other's views and to develop and implement innovative practices.

- Uncertainties about funding, financial insecurity and cutting resources are all dangerous as the lack of confidence in making a living carries a risk both at a personal and at an organisational level.

- The impact of the media, which is interested in revealing sensational news and creating conflicts. The media can easily trigger *a popular demand for unnecessarily harsh retribution and exclusion.*

Closing words

It is apparent on the basis of the analysis above that the “muscle gain” in mediation has started in Hungary as a stable institutional and regulatory background is available and the number of mediation cases is now measured in thousands. It is definitely a breakthrough, as Hungary is still a relatively new democracy where both the NGO sector and conflict resolution techniques based on democratic values are novelties and the progress of mediation has a positive effect on both.

However, the time has come for “muscle toning” due to the weaknesses of the system and the fact that basic principles now seem to be lost from sight. ”Muscle toning” can be achieved through keeping existing strengths and opportunities, identifying weaknesses and threats and developing the necessary reforms. These need to be analysed regularly to set the direction of the reforms and this can mean sufficient support for other countries that, similarly to Hungary, are working on the institutionalisation of restorative justice.

Finally, this is all about one thing: that the practice of restorative justice should reflect the underlying principles, namely, that citizens and the victims of crimes in particular, must be

given the opportunity to voice their needs as well as to handle their conflicts peacefully and in a constructive manner, even if they are subjects of the worst type of conflicts such as the most serious crimes.

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