Reconciliation between retribution and restoration: attitudes of judges and prosecutors towards restorative justice in Hungary

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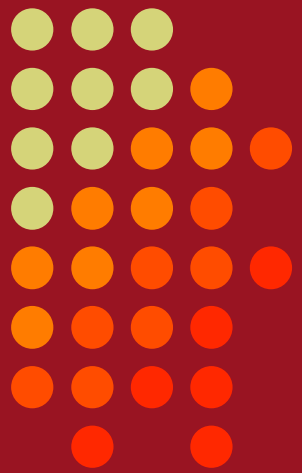

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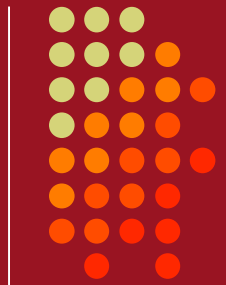
9 November 2007, Budapest

OVERVIEW



I. Background

II. Methodology + Sample

III. Results

IV. Summary

V. Discussion

VI. Principles that have been lost in transition

VII. Conclusion

Background: State of RJ in Hungary

- **Legislation**
- **Institutional background**
- **Evaluation** (since 1 January: 1500 referrals, 600 agreements, 480 EUR compensation)

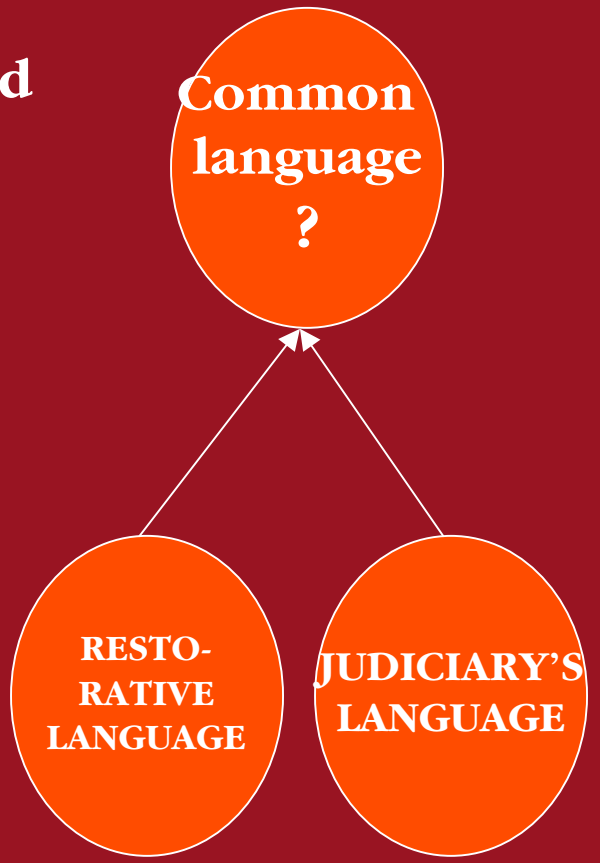
[detailed overview by Fellegi, B., Torzs, E. and Velez, E. in Aertsen, I. and Miers, D. (eds.) (forthcoming), *Comparative Study of National Legislation of RJ*]

MY MOTIVATION

was to explore what the main concerns and motivations of judges and prosecutors concerning RJ are right before its implementation.

What do they think
about their judicial role in general?

How can mediation fit into this context?



WHY IS RESEARCH NEEDED on attitudes of judges and prosecutors?

1. Discretionary power

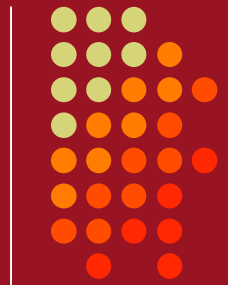
2. Timing

3. The 'myths of pure objectivity'

4. Who are the main actors?

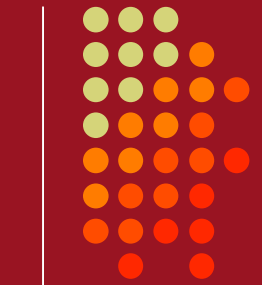
> J: - You ask what gives me a good feeling? When the trial was done in a proper way. Even if we all know it is a kind of theatre. But still. When you know it is a very lonely feeling after the trial. Like when the actor stays alone in his dressing room after a spectacular performance. (Judge: 5)

SOME HINTS FROM INTERNATIONAL STUDIES



- Sentencing: facts + legal, social constraints + **individual attitudes** (Hogarth, 1971)
- Significant **differences between individual judges** concerning sentencing (e.g. Berghuis, 1992)
- Differences in **perceiving** certain **sentencing objectives** (Hogarth 1979, Carroll et al. 1987, Forst and Wellford, 1981)
- **Consistence** between judges' penal philosophies and **punitiveness** (Kapardis, 1987)
- M**oral framework** underlying the practice of punishment (Keijser 2001)
- Measurement of penal attitudes _ implications for legislative and policy changes (Bazemore and Feder, 1997)
- Desistance studies (Maruna, 2000: 160): how can a judge contribute to a turning point in offenders' life?

THE HUNGARIAN CONTEXT

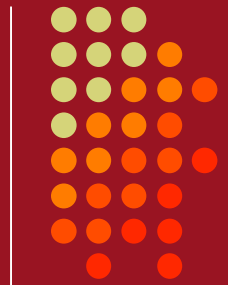


- Micro: **Some inconsistencies in their views:**
  - **dissatisfaction** with the CJS, importance of compensation and active responsibility-taking in the sentencing system; but also high **punitivity**; concerns, misunderstanding concerning restorative justice? (Kerezsi 2006)

- Macro: **Heritage from the state-socialist system** (Kulcsár 1977; Lederer, 1977; Sólyom, 1985; Fleck 1996, 2004, 2006)
  - Independence?, evaluation/transparency?, acceptance of critics?, flexibility?, openness to learn? Law-making function? – instead: bureaucratic law-application

_ only 5 analysts have written studies on this professional group

II. METHODOLOGY I.



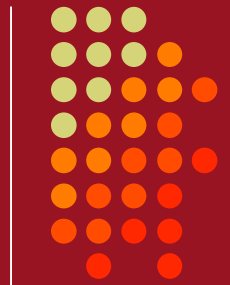
- Snow-ball sampling
- 1st instant level
- Attention, no statistical conclusion!
- 45 subjects, 90 min. interviews
- Interviews: concrete ___ abstract

  Views on mediation ___ views on CJS

II. METHODOLOGY II. - OBSERVATIONS

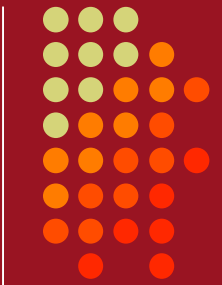
- Calculated bias (sample selection, film introduction)
- Why is 90 minutes needed?
  - Re-questioning the same question 3 times (1. formal, 2. more personal, 3. revised answer)
- Opening in the interviews_ emotions _ more positive towards mediation
- Different dynamics in the focus groups

Who were these people?



- 45 professionals
- Profession: 62% prosecutors – 38% judges
- Specialisation: 30% juvenile – 70% adult offender
- Age: almost 90% is between 30 and 50
- Gender: 43% men – 57% women
- Location: Budapest: 30% - East: 25% - West: 45%

III. A) Views on the system



1. Justification and purpose of punishment

- **no individual definitions**

  BF: - How would you define the purpose of punishment?

  P: - The purpose of punishment? One does not think about it on a daily basis. One is doing it. He is doing it. Now that you are asking me, I realise I do not have an own definition. We are living in a system that is working by itself. Purpose of the punishment is defined in the Penal Code and we work according to it.." (Prosecutor: 27)

- **confusion between punishment and consequence**

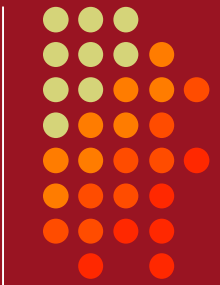
  P: - People want to see that if someone commits a crime, he gets a *punishment*. It cannot stay without *consequences*. Otherwise he doesn't understand either that his behaviour is unacceptable. You also need to educate with it. From the offender's point of you, it should prevent further crime. To make him feel, 'I cannot do it, otherwise it will result in these and those *consequences*.." (Prosecutor: 75)

- **controversy: punishment's goal is deterrence, although declared that punishment does not deter**

  P: - We are just working and working, like a machinery. People get their punishment, each after each. But it does not reduce the number of crime at all, even imprisonment does hardly deter."] (Prosecutor: 77)

  J: - [the purpose of punishment is] to prevent from further crime. Although it is not the punishment that can deter. But on the other hand it should have a purpose … ".] (Judge: 17)

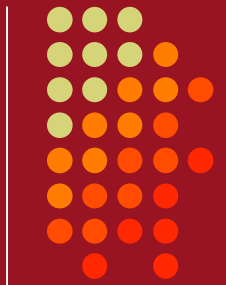
2. What is effective in responding to crime?



- consequences are faced
- active responsibility-taking
- 'feel' the effect of sentencing
- shortly after the crime
- shame-feeling
- offender is encouraged to think about what has happened
- feedback is given to the offender
- intensive control
- long-term duration
- support
- consistency
- individualisation
- guarantees
- prevents from further crime
- stigmatises

Think about the justice system in your country. Are these aspects represented in the practice?

3. Current sanctioning system



- critics about the current sanctioning system (lack of the requirements listed before)
  - mostly preferred: community work (difficulties: stereotypes, lack of partnerships, no appropriate places)

- How could the current system be improved?
  - Emphasising restorative elements! (mentioned before)
  - Not mentioned: voluntary aspect

4. Victims' needs in the court-room

- **Victim as a witness**

P: - From my point of you, it has no relevance how much the victim's damage is. It needs to be arranged with the insurance company. For me victims in traffic crimes are only those persons whose injuries last more than 8 days. A victim within 8 days is not a victim for me." (Prosecutor: 21)

- **No time for details ("*Respond to the question, Miss*!")**
- **Questioning the reliability of the victim**
- **If no cooperation with the authorities _ punishment**

J: - What is quite effective (*in cooperation with witnesses*) when the victim gets an official letter that if she is not coming to the next trial, she will need to pay a 50 000 HUF (200 EUR) fine. Interestingly, they do present next time at the court… (Judge: 91)

- **The reconciliation-paradox: who are the 'good' victims for CJS and RJ?**
  - 'the truth – justice dilemma'

J: - It is important to make sure the victim is not influenced during the procedure at all. Because if accusation is made, she will be an important witness in front of the court. It must be assured that the mediation process does not influence the victim's interrogation in any way…How to ensure that a mediation between victim and offender does not make the victim subjective, biased concerning the offender, when the case gets to the court? (Judge: 70)

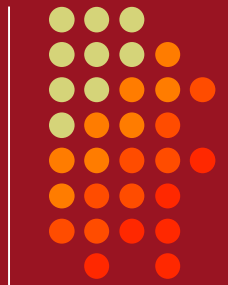
B) Daily work I.

- Risk of burn out: Overburdened professionals, routine, impersonality, paper-based subjects, no socialising effect on the offenders, delays in the procedure _ no effect, no influence on the system

Kép: Marabu

Judge: "Convicted for 2 years, 6 months, 4 days, 1 hour, 22 minutes and 5 seconds".

Lawyer: "The old guy has become quite precise, since these digital scales are in use…"

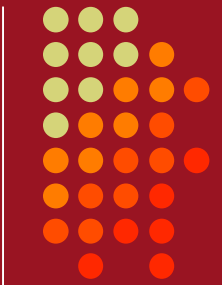


J: - Yes, the criminal procedure itself is not more than a harmful but necessary step…I have no illusions about it, that I will cure anyone. The maximum I can do is to prevent from further crime those people who recognise its significance. (Judge: 65)

BF: - Do you feel the chance that sometime you could influence the system?

P: - Not really. We are those people that are told about their obligations. And all these reforms usually mean another extra task to do. Whatever we think, mediation will also be another new task for us. But we will accommodate. ..we will receive all the expectations (*guidelines*) from our authority (*High Prosecution Service*) that it needs to be done. And it will be done". (Prosecutor: 62)

B) Daily work II.



- **Isolation + hierarchical setting:** Segmentation, communication, influence, openness, training, leader's influence, 'lonely agent' operating

J: - The legislator treats the legal practitioner as the legal practitioner treats the client: similarly to a child, we protect, direct and punish the client when necessary. The legislator treats us in the same way. There is no trust." (Prosecutor: 96)

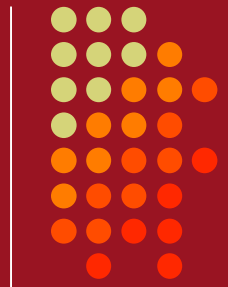
J: - As a result of this loneliness in the judicial work, it is normal that someone ends up thinking he is the smartest person in the world. This is quite unavoidable, since in the court room everyone shuts up (*no dialogue*)." (Judge: 64)

- **Interests:**
  - 2 types: **case-oriented – human-oriented**
  - Stability, self-confidence in the daily work

C) Attitudes I.

- Style: formal – informal: 50% - 50%
- Focus: cognitive – emotional: 50% - 50%
- General attitude:
  - positive – negative: 62% - 38%
    - of prosecutors: 20% negative - of judges: 42% negative

C) Attitudes II.



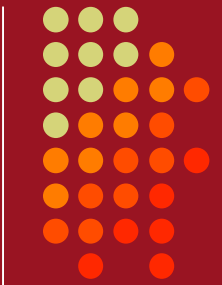
- 5 personality types:
  - Bureaucratic – "the procedure and the system"
  - Philosophical – "the world"
  - Pedagogical – "the personal development"
  - Emotional – "the self"
  - Cynical – "the pointlessness"

- Successes – Failures: **I. case focus – II. human focus**
  - **Fair procedure!**

    P: - In this work we often need to raise the question, what success means to us. To successfully accuse someone and send to prison for 3 years? Not really. Much rather for example, to see the results of a mediation. If the victim gets out with satisfaction from the case. …That is a success for us." (Prosecutor: 105)

    P: - I had a complainant who regularly came in and ask for help in getting compensation. And once she told me: You know, what, Ms Prosecutor? You mean more to me than 2 pills of Seduxen (anti-depressant pill). Well, this was my biggest success in my whole life." (Prosecutor: 57)

C) Attitudes III.



- Risk of burn-out

  P: - I see that after a while the colleagues totally burn out. They deal with the cases as papers. And this is not good. This is the reason why we tend to follow the simple ways. Lets him accuse and then something will happen. This is why they are afraid of new things. (Prosecutor: 88)

- Sense of mission _ – previous carreer _

- By age _ confidence+openness

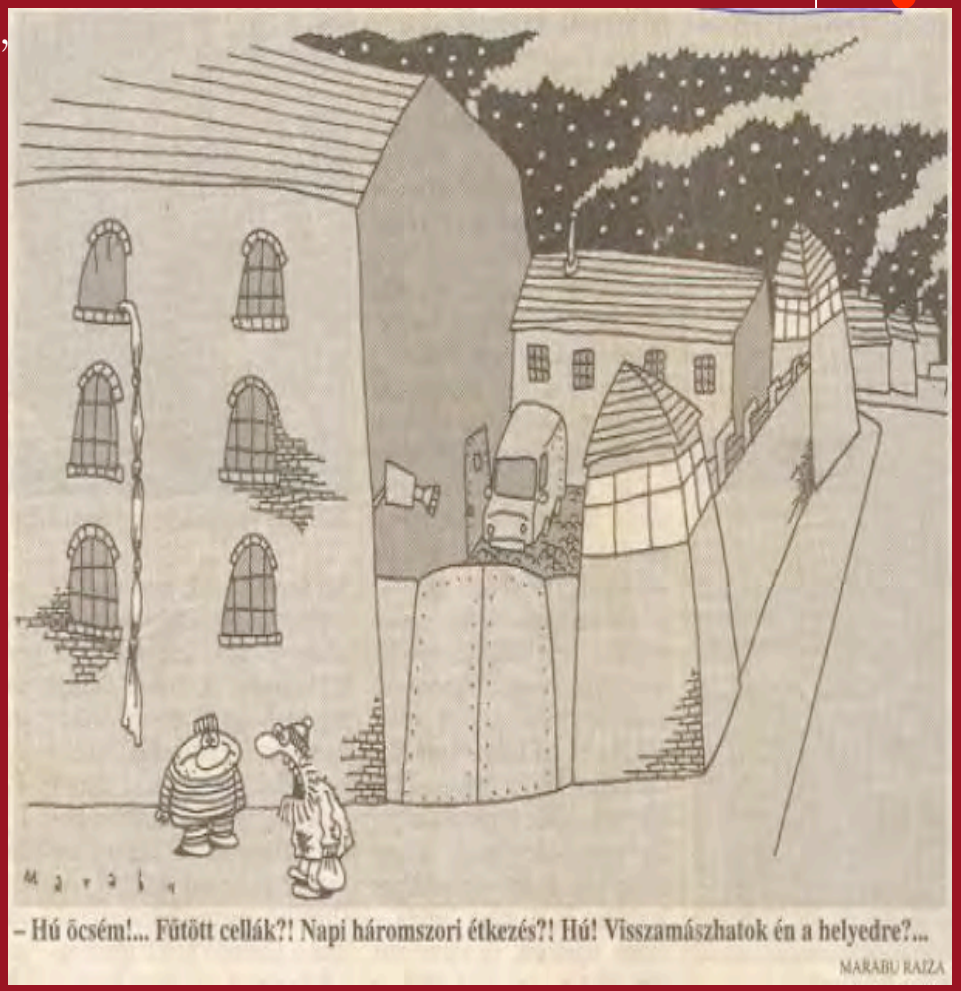
- Personalised tone, subjectivity

- Punitivity: generalisation _ high; individualisation _ low

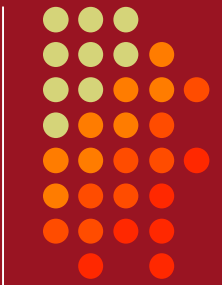
Illustration for differences:

J: - As an example, I was in many prisons. I asked the staff to lock me up in a cell. And also put me into a segregated cell. Wow, what a bad feeling it was! A person like we are, could not cope with it, not even for an hour, for any time! As a person who values liberty, it is striking to feel what it means that they lock the cell behind *me*, and *I* cannot get out anymore. (Judge: 74)

P: - In my opinion, and I think it is the opinion of the *public* also, that the *rights of defence* has largely increased. As an example, if I look at the prison conditions: it is not even punishment to get there. *Someone* gets into the prison, can go home during week-ends, gets a pocket, TV, radio, newspapers, can do body-building. Where is the punishment then? The punitive system loses its punitive aspect. And it is nice warm in the prison. Often it is warmer than in their flats. (Prosecutor: 24)



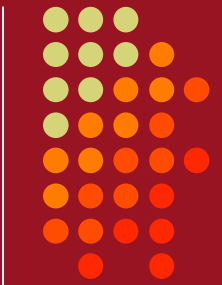
D) Attitudes towards mediation I.



Pros

- Victims' needs
- Effective cooperation with parties
- Requirements towards effective sanctioning + emphasising the role of procedural elements: dialogue, informing, emotions, education, individualisation, personalised, humanised
- Happy to give out the decision power to the parties!
  - If procedural guarantees are assured
- Community sanctions
- A tool to make the CJS less rigid, to contribute to the paradigm-shift: from bureaucracy-orientation towards the victim-orientation
- Reducing stereotypes
- Trust in the probation system
- Special mission for mediation in case of juveniles

D) Attitudes towards mediation II.



Con(cern)s

- Fear of victims
- Projecting their negative attitudes to the parties ("they would not want", "would not be genuine"), test question: "Would you accept to take part? Yes, of course!"
- Diversion = no consequence?
- Safeguards: fundamental rights are assured, no re-victimisation, genuine voluntariness
- Generalisation results scepticism
- Net-widening
- Difficult procedure, more administration, no clear guidance on applying discretion
- No trust in the civil society
- Institutional limitations (resources, infrastructure, training, routinisation, lack of awareness)
- Rich people: pays and goes?
- Lawyers as mediators?

D) Attitudes towards mediation III.

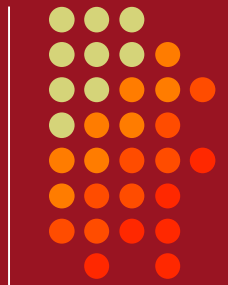
3. Special issues

- Domestic violence: support
- Juvenile – adult offenders: differentiation
- Serious offences: controversies
- Stereotypes against Roma people: controversies
- Victimless crimes, drug offences: : controversies
- Traffic offences: controversies

4. Needs

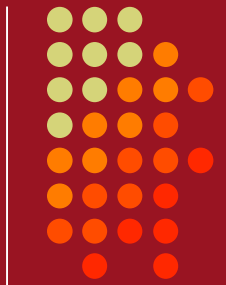
- Mediation also in robbery cases
- Need for restorative principled community working projects, also for juveniles
- Assurance of legal safeguards, genuine voluntarieness of the parties, control of the process
- Dealing with the fear of victims, making them cooperative
- Proper information/credible communication about the principles of mediation towards the related professionals and the public
- Mediator should step in the process as soon as possible
- Simple case-management protocol, not too much space for discretionary decisions
- Vision of a multidisciplinary penal policy
- Long-term legislative reforms, trust (not 'ad hoc' policies)

IV. Summary



- Importance of micro aspects (role of individual personalities, attitudes in decisions)
- Legislative constraints, bureaucratic obligations are more significant than individual views
- Different types (5) of legal practitioners
- Consequence is more important than pain
- While listing the requirements towards an 'ideal' CJS _ mentioning the components of RJ
- No problem with giving out the decision to the parties
- Above all: they are human beings wishing for positive feedback from their environment

V. Discussion

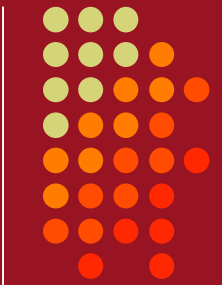


Further research should be made to:

- test these typologies and to see the dynamics on higher levels.

- explore on the macro level how can the judiciary be on the one hand independent, but on the other hand, sufficiently **transparent** concerning its recruitment system, competency system, individual skill assessment system, supervision system, system evaluation activities, etc

VI. Principles that have been 'lost in transition'



- Message of 'restorative justice' as a new paradigm
- Excluding serious crimes
- Confusing diversion with 'letting go'
- Judge = mediator?
- Excluding the civil society from being mediators
- Discretionary power at the beginning of the process
- Material restitutions overwrites symbolic restitution
- Excluding mediation in many cases (victim's interest?)
- Victim is still authorised, used as an instrument in the process
- Difficult process
- Over-regulation: eg. limiting number of participants
- Trust by the legislator?

VI. Preliminary recommendations I.

1. Clarify that mediation is not about 'letting go', it is not a soft option. On the contrary, it is about facing consequences, actively taking responsibility and giving something back to the harmed person/community.

2. Introduce mediation at all stages of the procedure, not necessarily as diversion (alternative to punishment), but as a possibility for the victim to ask for restoration (additional to the criminal procedure).

3. Consequently, consider to include the possibility for mediation also in serious crimes.

4. Develop restorative principled community working projects, also for juveniles.

5. Revise the excluding factors that do not allow applying mediation: are the victim's interests represented in these exclusions?

6. Revise the over-regulated aspects, eg. do not limit the number of participants.

7. Train about the main differences between the retributive and restorative approach.

VI. Preliminary recommendations II.

8. Simplify the procedure: involve the mediator in the process as soon as possible; use the prosecutors'/judge's discretion after the mediation took place

9. Provide a system for the methodological quality assurance, define clear standards (safeguards) in mediation.

10. Evaluate the judiciary's work by measuring the parties' satisfation.

11. Support a multidisciplinary penal policy not only in theory but also in practice.

12. Instead of 'ad hoc' policy-making, prepare long-term legislative reforms, trust in the practitioners.

13. Do not lose the wood for the trees: go back to the underlying principles and test if the bylaws, protocols, regulations do still reflect on them.

14. In general, focus on more awareness-raising for related professionals and the public about the underlying philosophy behind mediation, about its dynamics, method, possible outcomes and effects in the community and the society.

VII. Conclusion

This research intended to contribute to future policy development by drawing a picture on the judiciary's attitudes, motivations, concerns and needs. I do think it is crucial to be aware of these issues, if we want to effectively introduce new institutions into the CJS, in which legal practitioners play key (gate-keeping) roles.

Highlighting some possible risks about how principles might become lost in transition during the institutionalisation can be helpful in further improving the system.

THANK YOU
FOR YOUR ATTENTION!

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