

# Boundaries in Victim-Offender Mediation: Reflections on Mediation in Certain Cases and Crimes<sup>1</sup>

## 1. Mediation in Belgium (Flanders)

The first experience with communication and mediation between offenders and victims in Flanders date back to the end of 1987 and concerned cases with juvenile offenders. Together with the public prosecutor and the juvenile court, a creative search was initiated for new forms of reaction to juvenal delinquency. So, a model was developed to give young persons the possibility to take up their responsibility in a constructive way in the process of restorative justice. In the meantime, in almost every legal district in Flanders, there are a number of offerings for victim-offender mediation focused cases with juvenile offenders.

In 1993, within the Research group Penology and Victimology of the University of Leuven, an action research project was initiated with the title '**mediation for redress**'. The researchers were strongly inspired by the questioning of victims of serious violent crime. In this they heard from the victims an explicit wish to be more closely involved in the settlement of the offence. At the same time, they were impressed by the often present need for interchange with the offender.

The action research also had as object to explore to which extent victim-offender mediation was a viable method for relatively serious criminal cases in the phase prior to the judgement. That way we as mediators, and the parties in mediation themselves, try to anticipate in a more Communicative and Participative Justice.

In the meantime, by order of the federal minister of Justice, similar offerings have been initiated in almost every Flemish district. Since June 2005, a law is voted, giving to each person, involved in a criminal procedure, the possibility to ask for mediation. These days, the victim-offender mediation is organised by a non-profit organisation (subsidised by money of the department of Justice), Suggnomè for Flanders, who has in almost every district formal cooperation agreements with the local penal and extra-penal authorities.

There's one different form of mediation, which is legally foreseen since 1994, named '**penal mediation**', a form of mediation offered by the public prosecutor, where the positive ending of a mediation may serve as conditions for the termination of the criminal proceedings. This condition can be accompanied by an agreement for certain educational and treatment programmes. This form of mediation is prescribed by law, and can only be offered in cases where the public prosecutor would not demand more than a two-year prison sentence. Since the law in 1994, thousands of cases are settled annually using this form of mediation. Its introduction as a form of settlement within the juridical proceedings, however, places questions on the depth and the quality of what can be offered in the way of communication. Many also ask the question the possible instrumental use of the mediation form.

Since 1996, in a few Belgian cities, there are also mediation projects at the **police level**. It concerns an offering that is strongly focused on material compensation in offences with little relevance to criminal justice. Very often the intervention of the mediator is then followed by a classification of the file without further penal consequences.

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<sup>1</sup> This article concerns a workshop given by Alice Delvigne, victim-offender mediator in Belgium, at the 7<sup>th</sup> International Conference on Conferencing, Circles and Other Restorative Practices, Manchester, England, November 9-11, 2005.

Finally, since 2000, Flanders has had a limited experience of mediation **after trial**, and particularly during the course of detention. The communication possibilities offered to the parties here usually concern the most serious penal offences, and usually have a profound, quasi-therapeutic character.

As a summary, there are three different forms of victim-offender mediation in cases with adult offenders<sup>2</sup> in Flanders before judgement / before trial. First of all there's the form of mediation at the police level, for the not so severe cases, where most of the time, no other reaction follows when the mediation is succeeded. Secondly, there's mediation followed by the termination of the criminal proceedings, possibly accompanied by a treatment or educational program. Finally, there is mediation in those cases which will go to trial anyway, no matter the result of the mediation process. Both are offered by the public prosecutor, but the first one is conducted by social workers within the penal system itself, the second one is organised by a non-profit, independent organisation, financed by the Federal Department of Justice.

The fourth form of mediation is mediation after trial, financed by Flemish Department of Welfare.

## **2. Boundaries in mediation / objections**

### **2.1 Examples**

Often, we as mediators, have to defend ourselves and the mediation. Critical voices shout that it's impossible to mediate with certain persons, in certain crimes, etc. As mediators, we also notice sometimes difficulties and limitations in our practice. In order to summarize possible difficulties, many examples passed in mind.

We will first sum up some difficulties and ask the question if indeed there are cases, persons or crimes, where mediation is impossible. Then we will search for some boundaries and ask the question if mediation, despite of the possible difficulties, might be the best way to react.

#### **2.1.1 Difficulties in specific crimes**

We often find difficulties with mediation in crimes as **stalking, interfamilial violence, violence between (ex-)partners, ...** As a mediator, in those crimes it sometimes feels like you're someone just passing by, passing information and messages, but once you leave, the communication still continues. When you come back to see one of the parties, with a message of the other side, they already know it, or on the contrary, just heard the opposite. The way to solve this, is to put people soon around the table, to motivate them to communicate openly and to identify the double messages with all parties together. But sometimes that's not possible. What if one of the parties is scared? What if for example the victim tells you she's still afraid of her partner, what if you notice real power-abuse (e.g. in cases of incest this is very common) and she doesn't want you to communicate this. What to do in this case, when mediation can only stay on the surface, or can only stop? Do you interfere as a mediator? What if that's not what the parties want, but what if you feel things said are only creating an hypocritical atmosphere? Do you quit as a mediator?

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<sup>2</sup> For practical reasons, mediation for minors will not be discussed here.

And what if you find out that actually the violence is still continuing? Do you continue the mediation? Do you report? Even worse, what if you have the feeling that the offender (e.g. in stalking) is actually using the mediation to continue the violence?

These are typical problems noticed during mediation in crimes as stalking, interfamilial violence, violence between ex-partners, .... Does this mean that mediation in those crimes is not possible, and therefore shouldn't be offered??

Another typical problematic kind of crime for mediation is **fraude**. What to do when you notice or hear that actually, the fraude is still continuing? Once a deceiver always a deceiver, can't be changed so shouldn't be brought to mediation?

Another example of crimes which can be difficult to mediate is **traffic violence** with serious damage (e.g. death, very severe physical consequences, ...). The problem here is that you often mediate between two victims. When it's a real (car)accident, when the offender e.g. for one second wasn't being careful, it can be a really dramatic second in both lives of the offender and the victim. Even when the offender was drunk for example, when he normally doesn't drink, and then had a car accident with serious consequences, this can be really seen as a mediation between two victims. Of course, also in other crimes you notice sometimes first-time offenders, but in traffic accidents, it's not always as easy to speak about a 'real crime'. It often just was an accident... The other thing about these crimes is that the insurances play a very big role and can cause a huge polarisation instead of pacification. But again, is this a reason not to mediate in those cases?

At last (there are more, but we will stick with these), there's the problem with **sexual crimes**. We often notice that there's the problem or difficulty of not being able to talk about the facts. This shouldn't be a problem in general, but sometimes it can block the mediation. Is this a reason to stop it, as a mediator?

### 2.1.2 General difficulties, possible in all kind of crimes

After summing up some specific crimes, we will discuss some more general difficulties in mediation. We will see some examples where critical voices say mediation is impossible, or shouldn't be offered. Again, we will then ask the question if indeed that's the fact.

Is mediation possible with persons with **personality disorders**? Can you mediate with psychopaths? Are there limitations when crime is too **severe**, should we protect the victims against secondary victimisation?

Can you mediate with persons who really **don't have a moral insight**, who don't feel guilty at all and who aren't prepared to face their faults? If not, how can we make sure in advance that we don't mediate with this kind of persons? And if so, can we communicate about this fact or feeling? Should we protect victims for secondary victimisation? If there is indeed a danger for it in these cases, how can we prevent it? Can we ever fully? Victims often have the questions 'what kind of person is he, why did he do it, how does he feel about it now?', is it not possible to give them answers to these questions, even if the answers are not easy to cope with? Maybe the fact of finally having an answer, though not a nice one (e.g. that the offender doesn't have moral insight), can be more worth than having no answer? Or should we –or the public prosecutor who does the offer of mediation- read the psychiatric reports and decide not to mediate if there's no sign of moral insight?

How about mediation in cases where people aren't really used to communicate? This kind of people who **don't have the capacity of verbal expression** of their feelings and thoughts, can be difficult to mediate with. This can be because of a lower IQ, general intelligence, but also because of the environment they grew up in. Maybe mediation is typically for the middle and upper class where verbal capacities are thought as more important? Is it really?

## 2.2 Possible boundaries?

After the examples, we will search for some general boundaries in mediation. We might say that we prefer a general offer of mediation, and that in every case, for every kind of crime and kind of person, mediation should be possible. But even if so, we can notice some limitations. Which doesn't mean mediation isn't possible, but which acquires sensitivity and being aware of everything that happens through mediation. Some basic principles can be a solution for these limitations, or can make clear what is possible.

### - Legal boundaries

Because of the fact that mediators work independently, and that mediators are not penal investigators, some legal criteria are made, the process of mediation should not interfere with the penal investigation. The sort of cases where mediation in Belgium is offered, in theory can be anything. The only **criteria** are that it goes to trial, that the offender confesses, that there's a known victim and that there's some sort of (moral or material) damage. So the only legal boundary is that the file doesn't answer to one of this criteria<sup>3</sup>.

### - Boundaries of deontology

The basic principles of mediation are **neutrality** (of the mediator), **confidentiality** (the mediator does not write a report, the only thing reported to the penal authorities is the possibility of a written agreement), and the mediation is **voluntary** (nobody can be forced to mediate, and the offender will go to trial anyhow, so the mediation can't be used as a way to escape trial). Almost every difficulty can be brought back to those principles. For example: if you feel that the mediation is done because of power-abuse of one of the parties, you can't speak anymore of voluntary mediation, so the mediation can be problematic and even be stopped.

Other boundaries of deontology are when **the mediator himself** feels like he's limited by certain cases. For example, a mediator who just became a mother can feel difficulties with mediating with child-abusers. Again, this can be brought back to the three principles, it's possible that the mediator thinks she can't be neutral anymore. This can be a reason for her to stop the mediation, but a colleague should take over the mediation.

Another problem can come up when the mediator discovers, through information in the mediation, **new facts**, that the penal authorities don't know. That's a reason to stop the mediation, or to cancel it until the time the parties themselves go to the authorities to tell the

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<sup>3</sup> Actually, the future might be quite different, when the law will come into force, because we will see what the law will prescribe when it comes into practice.

facts. Mediators are independent, and everything is confidential, so we don't report (except when there's real danger of life, then every civilian has the duty to report). But the penal process is still running, so we can't continue mediating when essential information is known by us and by nobody else. Again, we are not investigators.

#### - **Boundaries of the parties themselves**

One basic principle when there's a difficulty in mediation, is to communicate openly about possible difficulties, to give the problem back to **the parties themselves** and to ask them what should be done. Mediators are no problem solvers, nor negotiators. If it's difficult to pass a message, the mediator should confront the party with this difficulty, and ask him or her how to solve this problem. The same goes when one of the parties wants to quit the mediation. It's not the task of the mediator to stop the mediation (except when it concerns a deontological boundary). The parties themselves should end it when they feel they arrive to their boundaries.

### **3. Conclusion**

In theory mediation should be possible in every kind of case, every kind of crime and with every sort of person. Sometimes practice shows things aren't always this easy, difficulties in certain cases and possible boundaries are possible. But to solve this, there are three possible limitations to bear in mind: law, deontology, parties themselves. So limitations aren't crime-dependent or person-related, the only real limitations can be brought back on these principles of law, deontology and especially the parties themselves. It's their mediation, not ours.