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Victim-Offender Mediation : Legal and Procedural Safeguard : Experiments and Legislation in Some European Jurisdictions

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Victim-Offender-Mediation: Legal and Procedural Safeguards.
Experiments and Legislation in some European Jurisdictions.

Leuven, October 28, 1999

1. Introduction

The problems connected with traditional ways of adjudication in penal matters are well known and indisputable. Criminal procedure tends to have conspicuous shortcomings while its positive achievements are hardly discernible for participants and spectators alike. Hence it is only logical that there have been major efforts to replace formal criminal proceedings by alternatives which are more promising in terms of beneficial results. One of these potential substitutes is called victim-offender-mediation. Victim-offender-mediation is part of a larger movement generally referred to as restorative justice. This phenomenon has an international scope and orientation and it presents itself in many ways and forms. On the one hand this state of affairs makes it a superb subject for comparative legal research. On the other hand, however, the buzz-words in the area of mediation and restorative justice are quite often used in a confusing way. As recent as in 1997, Weitekamp correctly made the following observation:

"In reviewing the historical background and the development of the paradigm of restorative justice, I must point out that the terms restitution, reparation, compensation, reconciliation, atonement, redress, community service, mediation and indemnification are used interchangeably in the literature (...)"(Weitekamp 1999)

Weitekamp is right in describing the way these concepts are used in ordinary everyday language. From a legal point of view, though, this state of affairs would render any discussion on the theme of mediation virtually pointless, since it would have to include the most diverse of restorative strategies in response to crime. So, for purposes of academic analysis we need a more precise definition of the phenomenon of mediation. Two useful examples quickly come to mind. The first one is proposed by Martin Wright in our conference papers:

"Mediation: a process in which victim(s) and offender(s) communicate with the help of an impartial third party, either directly (face-to-face) or indirectly via the third party, enabling victim(s) to express their needs and feelings and offender(s) to accept and act on their responsibilities."

And the second example is from the Explanatory Memorandum to the Council of Europe Recommendation concerning Mediation in Penal Matters¹:

¹Mediation in Penal Matters, Recommendation No.R(99)19 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999.

"Mediation in penal matters is defined as a process whereby the victim and the offender can be enabled, voluntarily, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party or mediator."

The key-elements in these definitions are the following:

a. Mediation features as a process. This implies it is of a dynamic rather than a static nature. The procedure in itself constitutes its intrinsic value. It is the process which lends authority and legitimacy to the outcome, rather than the substantive quality of any decisions taken.² This property enables mediation to contribute to what was recently labeled as 'procedural justice' (Wemmers 1996).

b. Mediation is all about participation by the principal parties: the victim and the offender. The process is supposed to stimulate communication. This means that the parties are directly involved; they are insiders rather than objects or spectators in a system owned by the government or by society. Participation and involvement can avoid feelings of alienation which are so prevalent in the traditional criminal justice system.

c. The process of mediation offers the victim an opportunity to express his needs. This is essential in order to operate on the basis of a consumer perspective. This 'bottom up-approach' warrants actual acknowledgement of victimisation. Yet there are two - interconnected - problems involved in this point of view. One is that mediation should not be applied as a strategy to ease the congestion of the traditional criminal justice system, as is visible in quite a few jurisdictions. And the second problem in taking victims' needs as the point of departure is that, when asked, victims in actual practice very rarely give a high priority to having a face to face meeting with the offender. These facts must always be taken into account when shaping and maintaining mediation schemes.

d. One of the defining features of mediation is that during the process the offender accepts responsibility for what happened. This requirement forms a practical and indispensable basis for interaction between the parties. Yet the extend - and conversely: the limits - of this requirement have hardly been explored. So I will return to the implications in section 4 below.

e. The assistance of an impartial third party is essential for the process to work smoothly. The third party is supposed to have the required expertise; some degree of detachment can also be helpful to facilitate the communication between the principals. Impartiality is usually presented as a condition for voluntary participation by victims and offenders.³

²In sociological research this effect of open procedures was analysed by Luhmann 1969.

³The United Nations Crime Congress and Basic Principles on the Use of Restorative Justice; draft paper prepared by the Working Party on Restorative Justice, October 1999, p. 6 contains an entire section on the position of 'facilitators'

It is clear from these conceptual observations that victim-offender-mediation in penal matters (VOM) is a constructive, restorative response to crime.⁴ It is about money in as far as it often includes agreements on financial reparation or restitution. But it also takes non-pecuniary issues into account. Intangibles like moral amends, allocating and accepting blame etc. are at least as important as compensation of damages.

The first question of a legal nature to address, then, is the relationship between VOM and the conventional system of criminal law and criminal procedure. How do VOM efforts relate to the traditional criminal justice system which is on the one hand firmly institutionalised and on the other so ostensibly focused on the public interest? This question will be dealt with in section 2. Next, I shall discuss the basic advantages of having formal legislation on VOM (section 3). And subsequently, some standard parts of the content of any such legislation will be outlined (section 4). It will be demonstrated that in this area some problems and dilemmas are more interesting than quick and easy answers. The final part of this paper contains some conclusions (section 5).

2. VOM and the criminal justice system

It has often been remarked that VOM presents itself in many shapes and forms. It is not my intention to repeat or summarise previous attempts at classifying or categorising all the different activities which come under the umbrella of VOM. For the purposes of this paper, it is more fruitful to distinguish three types or models of VOM, depending on the different relation they bear to the traditional criminal justice system. The models are based on VOM projects and legislation I have reviewed in Austria, Germany, Belgium and the Netherlands.

The first model is present where VOM is part of the regular criminal procedure. This model obtains, for instance, when at a certain stage of the criminal procedure the case is referred to a mediator charged with reaching an agreement between

of the process. Since this subject will not be addressed separately in subsequent sections of this paper, I quote the most significant phrases here: (17) Facilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. (...) (18) Facilitators should perform their duties in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. They should always respect the dignity of the parties and ensure that the parties act with respect towards each other. (19) Facilitators should be responsible for providing a safe and appropriate environment for the restorative process. (...) (20) Facilitators should receive initial training before taking up facilitation duties, and should also receive in-service training. (...)

⁴VOM is part of the broader concept of restorative justice processes. See the United Nations draft paper (footnote 3 above), p. 1; p. 4.

victim and offender. If this is accomplished successfully, it will have an impact on the outcome of the public proceedings: either the charges will be dropped, or the agreement will affect sentencing. This model is employed in many European jurisdictions. Examples are the Belgian 'herstelbemiddeling'⁵, the German 'Täter-Opfer-Ausgleich'⁶ and the Austrian 'Ausergerichtliche Tatausgleich'⁷.

The second model features VOM as a real alternative for criminal litigation (i.e. diversion). This happens when a case is at a very early stage diverted from the criminal justice system. VOM then altogether replaces any penal response to the crime committed. A prime example of this approach is constituted by the Dutch project on 'dading'.⁸ This involves negotiating a settlement between victim and offender which is of a private law nature. In ideal form and shape, the conclusion of this type of settlement precludes re-entrance of the case in the criminal justice system.⁹

The third and final model has VOM situated adjacent to the conventional system of criminal justice. It is a complementary device, often used after the criminal trial has run its course. Usually this type of intervention is employed in instances of the most serious crime and in the prison context.¹⁰

So the keywords are: sometimes VOM is part of the criminal justice system, sometimes it is used instead of the system, or elsewhere it is a program on top of the structure of criminal justice.

⁵See de Gemeenschappelijke omzendbrief inzake de bemiddeling in strafzaken - Wet van 10 februari 1994 and Koninklijk Besluit van 24 oktober 1994; Tony Peters a.o. 1995.

⁶There is an overabundance of publications on this topic. I refer to some of the most valuable sources: Bannenberg&Uhlmann 1998; Dünkel 1989; Hassemer 1998; and Kilchling 1996.

⁷Löschnig-Gspandl 1996 with many further references. Since then, Austrian legislation was reformed substantially in 55. Bundesgesetz: Strafprozessnovelle 1999. Interesting comparative reflexions are made in Löschnig-Gspandl&Kilchling 1997.

⁸This project is aimed at achieving agreements on restitution of a strictly private law nature.

⁹One has to note that this even applies when the offender does not fulfil the obligations stemming from the contract. When this eventuality occurs, civil law remedies have to suffice.

¹⁰The UN draft document on Basic Principles (see footnote 3 above) states in this connection: "Restorative justice programmes should be generally available at all stages of the criminal justice process" (p. 5).

The models have a distinctive bearing on the dogmatic justification of VOM and on the question which procedural safeguards should be respected.

First I start with some brief remarks on the dogmatic justification of VOM. The age old objective of criminal law and procedure is to restore the legal order after a crime has been committed. This goal, however, has to include restoring individual victims' rights. In this framework penal mediation can be regarded as serving all the goals of punishment in a preventive way (Löschnig-Gspandl 1996). It follows from the principle of subsidiarity and from the ultimo remedium-function of criminal law that formal punishment and even a criminal trial should be avoided as long as possible. From this point of view VOM is a legitimate vehicle for diversion, and where diversion is not feasible - for instance, because of the gravity of the case - it is acceptable as a means to mitigate the severity of the retributive response by the criminal justice system. By the same token, it can be argued that the principle of minimizing the total level of suffering is the modern equivalent of the utilitarian approach. From this angle, it follows that the positive benefits of VOM should be highlighted in any dogmatic discourse. And finally, mediation is probably better fitted than traditional repressive responses to crime to encourage reintegration and rehabilitation of offenders. The conclusion is that VOM can be justified by dominant parts of the philosophy of traditional criminal law. This body of thought is significantly richer and more flexible than proponents of the 'just desert-approach' suggest.

As far as procedural safeguards are concerned, it follows from the description of my three models that where ever VOM is part of the public decision making process on a criminal charge, art. 6 of the European Convention on Human Rights (Rome 1950) applies. The implications of this observation will be discussed in section 4, about the required content of relevant legislation.

3. Basic arguments favouring legislation on VOM

The Council of Europe Recommendation R(99)19 contains the principle: "(6) Legislation should facilitate mediation in penal matters".¹¹ Apparently, formal, written legal rules are considered to be conducive to the objectives of VOM. In my opinion, the following arguments can be mustered to support this position:

a. As an overriding consideration, it can be maintained that legislation offers superior conditions for broad factual implementation of VOM schemes. Where legislation exists, it is less likely that legal opportunities for VOM remain dormant or end up as only 'law in the books' as contrasted with the 'law

¹¹The UN Crime Congress and Basic Principles on the Use of Restorative Justice (footnote 3 above) is more cautious in this respect: "(11) Guidelines and standards should be established, with legislative authority when necessary, ..." (emphasis added).

in action'. Experience has shown that full use of VOM provisions is substantially promoted by establishing an obligation to give a reasoned opinion in cases where the decisionmaker refrains from applying them. Obviously, quite often there is an attitude problem at stake. Many authorities which are involved, most notoriously the judiciary, are usually reluctant to engage in new approaches like VOM. A legal obligation to give reasons for not using these opportunities may help to overcome inhibitions of this type. ¹²

b. Formal legislation serves legal certainty and predictability as well as equality. An example from the model in which VOM is part of the criminal justice system may underscore this point. In many jurisdictions it is an accepted principle that restitution payed voluntarily to the victim by the offender is taken into account as a mitigating circumstance in sentencing. Quite often, though, offenders are slightly distrustful or uneasy about the question how and to what extent their restorative efforts will be reflected in actual sentencing policies. For instance in The Netherlands many defendants tell their lawyers that the lack of predictability leads them to take their chances in stead of paying restitution. This kind of apprehensions can be diminished by introducing legislation specifying the legal consequences of paying damages. For instance, the German Criminal Code in § 46a provides for more predictability:

when the offender, in an effort for mediation with the victim, has paid restitution to the victim or has made a serious attempt to do so, the court can mitigate the punishment prescribed by law, and when the act is punishable by imprisonment of one year or less (or with a fine of medium size) the court can abstain from imposing any penalty.

Since this type of provision still offers the judge an option ("can mitigate..., can abstain ..."), one could even contemplate going a step further by introducing mandatory measures. In some jurisdictions the law stipulates that compensation payed by the offender automatically leads to a reduction of the sentence by for instance one-third. Attractive as this solution looks at first sight, I feel that this approach has very little added value. The problem is that most judges tend to calculate the net result of the sentence they pronounce. This means that they will ordinarily add the mandatory 'discount' to the sentence they originally had in mind and subsequently distract the addition according to law in order to reach the effect they aimed for.

¹²An analogy may be found in the English provisions on the so-called compensation order. After its initial introduction it was not succesful from the start. Then the legislator ordered the judges to give reasons in their verdict when they did not impose a compensation order in cases where this was prima facie appropriate. Consequently, the number of compensation orders rose significantly.

Equality of all citizens before the law is promoted by legislation covering VOM because it usually leads to more harmonised practices throughout a jurisdiction. VOM on the basis of experiments, on the other hand, by definition runs the risk of major territorial differentiations and discrepancies, offering benefits to victims and offenders in some parts of the country which are denied to others living elsewhere. Let there be no misunderstanding: I am not opposed to experiments with VOM preceding approval by written statutes.¹³ The point is that experiments should serve in order to gain experience and expertise. Depending on the results, the knowledge acquired in this way should then be exploited on a larger scale. In operational terms this means that special projects and experiments should always be shaped on the basis of a fixed and limited duration.

c. Finally, legislation offers the opportunity to make clear decisions on the particulars of VOM arrangements in different circumstances and in various stages of the criminal proceedings. Let me mention just a few items which need to be settled in an unequivocal way. It should be clear from the outset what type of cases can be settled out of court on the basis of VOM, and under what conditions. Next, the law should provide for timetables. How long after the crime can VOM still be considered? There should be a well considered relation to statutes of limitation. The next question to be addressed is about the time period allowed to fulfil obligations engaged in agreements between victim and offender.¹⁴ And last but not least legislation should fully determine the legal consequences of the various modalities of VOM. There should be no doubt that discharges based on mediated agreements have the similar effects as judicial decisions or judgements and should for instance preclude prosecution in respect of the same facts (Ne bis in idem or 'double jeopardy').¹⁵ And the outcome of media

¹³See, e.g., the communication by the European Commission, Crime Victims in the European Union - Reflexions on Standards and Action, Brussels, 14 July 1999 COM(1999)349, p. 9, where the Commission observes that "additional research and experiments in victim-offender-mediation with evaluation of the particular interests of victims" should be considered (emphasis added). It should be noted that, globally, there are literally thousands of projects in mediation. See e.g. Fagan&Gehm 1993.

¹⁴Here an interesting analogy can be drawn with the development of community service orders and other alternatives for custodial sanctions. In most countries these alternative sanctions also started as experiments and were subsequently regulated in detail by statutory provisions.

¹⁵Council of Europe draft recommendation, no. 17; and the UN Congress and Basic Principles on the Use of Restorative Justice (footnote 3 above), no. 14: "Judicial discharges based on agreements arising out of restorative justice programmes should have the same status as judicial decisions or judge-

tion should be documented in much the same way as verdicts of the court. Austria offers a good example of best practice in this respect. The Code of Criminal Procedure prescribes in § 90m StPO, effective since January 2000, that the relevant files be kept for a 5 year period. This enables the authorities to have a reliable record in case of reoffending.

4. The contents of legislation on VOM

What should be the substance of legislation governing VOM? Again, this paper is not the right place to deal with all the details that can be included in statutory provisions. I will just point to some issues which are of a more general nature and which are relevant for all European jurisdictions.

A fundamental procedural safeguard is that VOM arrangements can only be entered into on a voluntary basis. According to the Council of Europe recommendation, mediation in penal matters should only take place if the parties freely consent (general principle no. 1).¹⁶ "Freely consent" also means an informed consent. Hence the parties need to be fully informed about their rights, the nature of the mediation process and the possible consequences of their decision (ibidem, no. 10). Furthermore, neither the victim nor the offender should be induced by unfair means to accept mediation (no. 11). And, mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process (ibidem, no. 13). The concept of free consent, or voluntary participation, is of vital importance in connection with the requirements of art. 6 of the European Convention on Human Rights. This article provides for a free access to court when a criminal charge is at stake (" a fair and public hearing ... by an independent and impartial tribunal established by law"). VOM can only be accepted as long as this right is not violated. However, the European Court in Strasbourg has consistently ruled that a defendant can waive his right to access to a court, "as long as a high degree of vigilance is provided for such a waiver". In the Deweer case it was stipulated that the crucial consideration is whether the waiver is made under proper circumstances, i.e. in circumstances where the accused is not virtually forced to accept the proposition of entering into VOM.¹⁷

One critical remark has to be added to these observations. It is both interesting and somewhat troubling to note that the requirement of voluntary participation has attracted

ments and should preclude prosecution in respect of the same facts".

¹⁶The UN Crime Congress and Basic Principles on the Use of Restorative Justice (footnote 3 above) follows up with: "(7) Restorative processes should be used only with the free and voluntary consent of the parties".

¹⁷Deweer-case, European Court for Human Rights 27 February 1980, Series A, Vol. 35.

more attention in relation to the offender than from the perspective of the victim. Yet there is plenty of reasons to start to pay more attention to this side of the story. Experience gained by various national victim support organisations seems to suggest that even the mere question of asking the victim permission or consent to participate in VOM can in itself have harmful consequences. A prime example of this is that quite a few victims suffer negative effects - e.g. feelings of guilt - after refusing to take part in diversionary proceedings.¹⁸ Against this background I would recommend that serious research be undertaken on the exact victim impact of failed or aborted attempts of reaching an agreement between victim and offender.

A topic which is relatively easy to deal with on the level of principles is the question of language. With the increasing incidence of cross border victimisation and the growing number of migrants not living in their home country, it will occur more and more that proceedings are conducted in a language which is not familiar to a victim or an offender.¹⁹ From the concept of informed consent it can be inferred that assistance of an interpreter must be available for participants who do not understand the language used in VOM. This basic right is recognised by all international documents prescribing procedural standards in this area.²⁰

But then there is a host of issues which are much more complicated from a legal point of view. The first one to mention is the question of legal assistance. The Council of Europe recommendation does not spot a problem in this respect. It simply states: "the parties should have the right to legal assistance"(no. 8). Of course, legal advice can be useful within the framework of assuring informed consent. However, in my opinion it is far from clear whether it is advisable to have the victim and the offender supported by a lawyer during the mediation process. Research findings seem to indicate that the

¹⁸Research findings on the numbers and proportions of victims who refuse to take part in VOM are mentioned by Aertsen&Peters 1998 (in footnote 20).

¹⁹In the communication by the European Commission of 14 July 1999, the problems of foreign victims are cited as strong additional arguments to promote mediation programmes: "For foreign victims mediation has two advantages. Firstly, the immediate use of mediation, by the police or the prosecutor. This ideally solves the problem - e.g. to get back (part of) the stolen property or reimbursement of its value before leaving the country concerned - before it is even reported as a crime. (...) Secondly, third party mediation, i.e. where an intermediary person acts on the victims' behalf in an effort to reach a mediated agreement, is of benefit when the victim has already returned to his/her home country"(p. 9).

²⁰Council of Europe Recommendation No. R(99)19 speaks of the right to translation/interpretation.

chances of successfully reaching an agreement are generally reduced by the presence and the participation of lawyers. The problem here is that lawyers quite often tend to resist mediation. The background of their reluctance is twofold: they want to preserve their monopoly in litigation and they have vested financial interests in using the conventional legal procedures. Legal assistance in the traditional sense of the word therefore could seriously jeopardise attainment of the objectives of VOM. My conclusion on this item is that the participants should be able to have relevant legal information available. But it is at least doubtful if this has to take the form of actual assistance by a lawyer during the proceedings. The United Nations document on basic principles offers guidance in this respect, where it states that "the parties should have the right to legal advice before and after the restorative process".²¹

Another difficult problem is constituted by the requirement of the presumption of innocence (art. 6 par. 2 European Convention on Human Rights). According to conventional wisdom, as embodied or exemplified by the commentary of the Council of Europe recommendation on VOM:

"It is a normal requirement for mediation that the victim, as well as the accused, accepts the relevant main facts of the case. Without such a common understanding, the possibility of reaching an agreement during mediation is limited, if not excluded. It is not necessary that the accused, in addition, accepts guilt, and the criminal justice authorities may not pre-judge the question of guilt in order not to infringe the principle of the presumption of innocence (article 6.2 ECHR). It suffices that the accused admits some responsibility for what has happened. Furthermore, it is emphasised that participation in mediation should not be used against the accused if the case is referred back to the criminal justice authorities after mediation. Moreover, an acceptance of facts or even "confession of guilt" by the accused, in the context of mediation, should not be used as evidence in subsequent criminal proceedings on the same matter."(p. 22)²²

I personally doubt whether this can be the whole story. It is striking that all principles governing VOM refer to the principals as victim and offender. Only when the presumption of innocence is under consideration, all of a sudden the offender is no longer called the offender, but instead is referred to

²¹See footnote 3 above, no. 12.

²²Virtually identical insights are expressed in the UN statement of basic principles (footnote 3 above), no. 8: "All parties should normally acknowledge the basic facts of a case as a basis for participation in a restorative process. Participation should not be used as evidence of admission of guilt in subsequent legal proceedings."

as "the accused". I seriously question the wisdom of this approach. As far as I can see, the essential feature of any mediation scheme is highlighted in the definition quoted in the introduction, which reads that it enables the victim to express his needs and feelings and the offender accepts and acts on his responsibilities. I cannot understand how an offender can visibly accept his responsibility for the crime without admitting his guilt in the legal sense of the word. So, from the conceptual and theoretical foundations of VOM it follows that the offender who voluntarily participates in the process thereby waives his right embodied in the presumption of innocence. If an offender wants to retain any claim to innocence, the mediation process could never be really serving the best interests of the victim involved. My conclusion is that the theoretical discourse on the foundations of VOM has so far, as far as the presumption of innocence is concerned, at best been incomplete. This clearly is a topic in need of more reflexion in future research.

Legislation should also determine the legal consequences of failing to reach an agreement in a mediation process. In the first model - where mediation is part of the regular criminal procedure - the consequences are rather obvious. Charges will not be dropped; there can be no 'discount' in sentencing.²³ In the third model I have distinguished - where mediation is attempted after the criminal trial has run its course - the question of consequences of failure is usually irrelevant.²⁴ In the second model - mediation as a means for diversion - failure to reach an agreement, or failure to fulfill the terms of the agreement, makes it inevitable to revert to criminal charges and prosecution.²⁵

Finally, the existing legislation in some European jurisdictions leads to questions as to the scope - and potential limits - of the various modalities in which the outcome of VOM can affect the decision to be taken in the criminal proceedings. It would appear to be obvious that it is acceptable for the prosecutor to dismiss a case on the ground that prosecution

²³It is interesting that the UN document on basic principles (footnote 3 above) notes that "lack of agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings". From a dogmatic point of view, this is undoubtedly correct. In actual practice, though, things may be more complicated. Judges may consider the failure to reach a fair agreement as evidence of a lack of repentance on the part of the offender and take this into account as an aggravating factor in determining a proper sentence.

²⁴With the possible exception of impact on decisions on parole or early release. It is doubtful whether this has to be covered by statutory provisions.

²⁵As is mandatory in the Austrian system. In Belgium and in some projects undertaken in The Netherlands this used to be not always the case.

would no longer be serving the public interest.²⁶ However, this solution is only available during the preliminary stages of the proceedings and is made easier in systems which accept the expediency principle. If the case comes into court after a settlement has been reached in mediation, the German approach is to deem the offenders' guilt to be reduced to such an extent that the imposition of punishment is no longer required (§ 46a StGB). From a dogmatic point of view this is quite interesting, because traditionally guilt used to be assessed and appraised as at the moment the crime was perpetrated ('mens rea'). The Austrian legislation on mediation takes this even one more step further. In effect, the currently obtaining provisions stipulate that an act can cease to be criminal in nature because of ex post facto restorative actions performed by the perpetrator. I only mention these different legal techniques as examples out of a much wider range of possibilities to shape the integration of VOM-results into current criminal justice systems. The great variety of available options makes it clear from the outset that much more research is needed in order to gain sufficient understanding of the best ways to proceed in legally fine-tuning victim-offender-mediation arrangements.

5. Conclusion

Victim-offender-mediation has acquired a distinctive position in many European jurisdictions. Experience has shown that this type of proceedings can be beneficial for victims and offenders alike while at the same time avoiding many of the pitfalls of the traditional criminal justice systems. In this paper I have argued that VOM - as part of the criminal procedure and as a means of diversion - can be justified by basic propositions of the philosophy of traditional criminal law and procedure (e.g. the principle of subsidiarity, 'ultimum remedium' etc.). In the initial stages most jurisdictions have started VOM schemes on the basis of special projects or experiments. In the next stage of development it is useful to create a statutory status. This improves chances of factual implementation and it provides for more legal certainty and predictability as well as for equality. Furthermore, the mediation process should be as informal as possible. The involvement of lawyers in actual negotiations should be minimised as mediation must not turn into a mini-trial in disguise. VOM challenges us to do more research in the future. I have identified several topics in need of special attention. One of these concerns some specific victims' needs which have until the present day been neglected: as an example I refer to the potentially harmful effects when victims decline to take part in a mediation procedure. It was also argued that we need a more sophisticated approach of the complicated questions about the presumption of innocence. When we succeed in increasing our intellectual command of these issues, victim-offender-mediation can become even more important as an in-

²⁶An example is art. 167 of the Code of Criminal Procedure in The Netherlands.

strument to reform outdated and dysfunctional parts of the traditional criminal justice systems throughout Europe.

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