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French experiences with mediation in criminal justice

The double life of victim-offender mediation

Jacques Faget

In the mid-1980s a number of French associations,¹ supported by a small group of magistrates, decided to try mediation in penal matters, drawing their inspiration from initiatives originating in North America. In response to a judicial process that the associations considered abstract, oriented towards the past, degrading for offenders and indifferent to the needs of victims, the associations put forward a more flexible solution, one more respectful of individuals, more concerned to repair the damage done by crime, one which, instead of cutting across and exacerbating disputes, tries to unravel and assuage them.

Victim-offender mediation, as it came to be called, takes place before the trial begins (in other countries it is also carried out during the trial or after sentence has been pronounced) and is aimed at adults 18 years and over (the majority of initiatives in other countries concern minors). By virtue of the power to choose the most appropriate course of action to take in a criminal case, the public prosecutor can suggest mediation for the complainant and the offender. They are referred to a mediator or to an information session about the mediation process, which they are then free to refuse or accept. If mediation is chosen as the preferred option, one or more sessions are organised by the mediator (or mediators if co-mediation is practised) to take place within three months. This period can be extended if necessary. On the basis of the report provided by the mediator at the conclusion of these sessions, the public prosecutor makes a decision to proceed or not to proceed with prosecution.

A spectacular and confused rise to prominence

Although victim-offender mediation was initially faced with opposition from a number of lawyers, it rapidly attained a fairly significant level of development due to the combined effect of strategic militancy and institutional necessity. In effect, it appeared not only to treat sensitive conflicts (family disputes, for example) in a more subtle fashion, but also to avert an explosion in the number of criminal cases the public prosecutor was choosing not to

point where a record 48,145 mediations were carried out in 1997.

However, this apparent success should not hide the extreme confusion which prevails in the practice of victim-offender mediation. The reality is that a considerable number of so-called mediations usurp the title, being more in the nature of a caution whose aim is to lecture or frighten the offender rather than to carry out a genuine mediation.

According to mediation theory the particular nature of criminal law

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proceed with because of a sharp increase in the workload of the courts.²

The relatively rapid rise of penal mediation was reinforced simultaneously by its legislative consecration in 1993³ and the progressive acceptance of the need to deal with criminal matters⁴ immediately, rather than several months or years after the crime.⁵

According to the annual statistics compiled by the Ministry of Justice, 11,552 victim-offender mediations were carried out in 1992 and the number continued to increase to the

should not affect the ethical principles which form the basis of the mediation process. It should always be a consensual process in the course of which an impartial, independent third person, without decision-making power, strives to establish the conditions in which communication can occur between opposing parties (called the disputants) so that they themselves can find a solution to the problem that divides them.

The progressive recognition, reinforced by the law of the 23 June 1999,⁶ of the distinction between a



	Legal model	Restorative model
Place	Centres for justice and law courts	Local associations
Mediators	Individuals or associations Men Sessional employees Legally trained No specific training in mediation No supervision	Associations Gender balance Professionals or volunteers Trained in the social sciences Specific training in mediation Analysis of practice
Process	Offender/victim Short period of time One meeting Significant % of agreements	Complainant/offender Median or long period of time available One or more meetings Average % of agreements

Table 1. Attributes of legal v restorative models of mediation

caution and mediation had the effect of deflating the total number of victim-offender mediations which dropped to 25,972 in 1998 to climb steadily back to 33,700 in 2002. However, magistrates do not always clearly distinguish between the two and there is still considerable overlap between the two measures.

Two models of practice

A national evaluation presents a fairly precise picture of the use made by the tribunals of victim-offender mediation.⁷ Despite disparities between the jurisdictions, some general tendencies can be observed.

A significant portion of disputes treated in mediation are related to physical (36 per cent) or mental (11 per cent) violence. The percentage is even higher in the Court of Appeal of Paris (44 per cent for offences involving physical violence only).⁸ Next are the offences related to the family, such as the non-presentation of children and family desertion (15 per cent) and vandalism (14 per cent). The cumulative total of all offences against property (thefts, fraud, and so forth) only represents 13 per cent of the volume treated.

It is important to underline that a mere 28 per cent of disputes treated in mediation are concerned with people who do not know each other. In all other cases, they involve family or partners (39 per cent), relationships arising out of propinquity (friends, neighbours, 26 per cent) or social

relationships (professional or contractual, 7 per cent). This figure demonstrates that victim-offender mediation has become the method of preference in the treatment of disputes of proximity.

When mediation is offered, 42 per cent of cases do not actually go ahead (due to non-response, refusal, either initially or subsequently, or withdrawal of the complaint). It should be noted that complainants rather than offenders are more often the cause of this situation.

When mediation is accepted, the success rate is in the order of 76 per cent and varies according to the offences. However, in examining this figure, one should take into account that certain agreements are not actually executed, and that while in some mediations agreement is not reached, those mediations can lessen the conflict and provide a better understanding of its nature. Research demonstrates that the success rate also depends on the mediator. Thus the percentage of 'success' appears inversely proportional to the level of competence⁹ (based on indicators such as the quality and length of specific training, and participation in sessions analysing techniques). Observation of mediations allows this paradox to be explained. Procedures used by mediators who are less well trained are often very directive, while as the level of training and competence rises, so does the respect for the ethical principles of mediation.

The analysis shows that there are two models of practice:

- The first model, which one could call *legal*, is used in the majority of cases (two-thirds of the organisations observed). It is more often located in the courts or in the centres for justice and law where victim-offender mediation is carried out by practising or retired lawyers who have not been specifically trained in mediation. The time available for the sessions is very short and the success rates are spectacular. The research on the Paris Court of Appeal confirmed that the delegates of the public prosecutor practising in the courts (who have been mandated to mediate!) obtain the best results. Judicial logic is very evident: one 'summons' people who are designated offenders and victims, and one relies on the brief of evidence to guide communication between the parties.
- The second model (one third of cases) which is derived from the reform movement of *restorative justice* is carried out within the framework of associations by mediators who have received specific training in mediation. Judicial logic hardly impinges, people designated complainants and offenders are invited to meet the mediator who does not rely on the brief of evidence, but on his or her subjective impressions of the disputants and their needs. The time available for these sessions is longer, several meetings between the parties can be conducted and the 'success rates' are much lower than for the preceding model.

'Penalisation' of the social or a new model of justice?

Penal mediation represents an excellent indication of the cultural conflict which opposes the defenders of two antagonistic ideas of justice:

one based on a very vertical and symbolic idea about the regulation of conflict, the other oriented towards a more democratic and instrumental view. The question arises as to how these two forms of logic are to meet. If mediation is reinterpreted by legal logic, does it then become a little like a false nose stuck onto the face of legal institutions or does it actually result in the production of a new model of justice?

Some analysts (and it is a view that enjoys a certain cachet) see the strategy of diversifying legal responses as a 'penalisation of the social'. It is true

second sanctioning a relationship of dependency by qualifying the mediator with the title of 'mediator of the Public Prosecutor of the Republic'.¹¹

Moreover, the spectacular progress of mediation has aroused a certain amount of trepidation, mainly in lawyers, sometimes based on commercial considerations and sometimes on democratic imperatives. The flexibility that mediation brings to the regulation of disputes in comparison with the legal process is not without danger for the fundamental rights of the person

The flexibility that mediation brings to the regulation of disputes in comparison with the legal process is not without danger for the fundamental rights of the person and has the potential to create the conditions for the development of an 'under-justice'.

that mediation allows situations to be treated legally – and by the public prosecutor, identified with repression – that formerly were not. It is true that the power of legal ideology is considerable. The confrontation of magistrates with a less professionalised, less structured and less prestigious body than their own usually highlights a relationship of domination, and all social practices institutionalised by the judicial apparatus run the risk of becoming predominantly institutionalised and of losing their soul. Two recent legislative changes illustrate this scenario, the first intensifying the weight of the 'imaginary law' of mediation by requiring the mediator, if agreement is reached, to make a record of proceedings to be signed by him or herself and the two parties,¹⁰ the

and has the potential to create the conditions for the development of an 'under-justice'. The devolution of numerous penal disputes to mediators may have the effect of shutting the door of the courthouse to underprivileged populations and of privatising situations which should necessitate debate on the public stage. This would be the case, for example, with domestic violence, where the search for consensus risks hiding the social warfare that leads women to denounce their domestic oppression.¹²

On the other hand, others have remarked on the potential of mediation when compared with legal intervention. They present mediation as a place where a 'communicational act'¹³ reveals itself to be gentler and more reparative for the victims and makes



offenders more responsible for what they have done. Mediation could therefore constitute one of the ways of setting in train a restorative justice where the conflict is not appropriated by the state, but given back to the community and to the interested parties, where priority is given to the construction of the future, to a commitment to do good, to compensate for the harm done rather than to the expiation of the past. From this perspective, it would be wise to apply it to the regulation of more serious disputes and to all stages of the penal chain.

However, while recognising the educational benefits of mediation, it is appropriate not to minimise the

will avoid the perils of mixing different forms of logic which could end either in a de-formalisation of the law or a subordination of mediation to legal reasoning. By identifying its zones of relevance and irrelevance, one would more wisely choose the circumstances in which to use mediation and more readily accept the complementary nature of the different modes of handling disputes. ●

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dangers of uncontrolled deregulation in the management of disputes of a penal nature. It therefore appears useful to envisage the judicialisation of mediation, not by confining its procedures into a logic which would turn it into an additional battleground for litigation, but by adopting a preventive strategy based on the need to provide specific training in mediation for mediators and more sustained information for court mandated mediators. In this way, increasing understanding and respect for the ethical principles of mediation

will avoid the perils of mixing different forms of logic which could end either in a de-formalisation of the law or a subordination of mediation to legal reasoning. By identifying its zones of relevance and irrelevance, one would more wisely choose the circumstances in which to use mediation and more readily accept the complementary nature of the different modes of handling disputes. ●

2. Faget J (1997) *La médiation. Essai de politique pénale (Mediation. Essay on the politics of crime)*, Toulouse, Erès.

3. The law of 4 January 1993 amends article 41 of the *Code of*

Endnotes

1. *Translator's note:* In France, most professionals in the social sector (for example, social workers, psychologists, counsellors) work in so-called associations regulated by the *Associations Law of 1901*. The associations are very powerful, having worked in close association with the bureaucracy and government for more than a century. A good analysis of their role can be found in an article by researcher Laurence Dumoulin (2003)

'Is family mediation "a utopia which succeeds"? From conflict resolving technique to social and political project' ('La médiation familiale est-elle "une utopie qui réussit"? D'une technique de résolution des conflits à un projet social et politique'). Paper presented at conference, Mediation and Politics, October 2003.

Civil Procedure in these terms: 'Prior to his or her decision to proceed with prosecution, and with the agreement of the parties, the Public Prosecutor can decide to have recourse to mediation if it appears that such a measure may be able to assure reparation of the harm done to the victim, put an end to any problems resulting from the infraction and contribute to the rehabilitation of the offender.'

4. *Translator's note:* Penal mediation covers a broader range of offences than is usually dealt with under the banner of victim-offender mediation in common law countries. This is because the trigger for penal mediation is the commission of an infraction, which includes offences carrying the penalty of a fine. Failure to present children for an access visit, minor traffic offences, and so on are therefore included in penal mediation, although penal mediation involving family offences is usually handled by trained family mediators, not penal mediators.

5. Treatment in real time has generalised the use of the telephone and fax (instead of written transmission of files) as means of communication between magistrates of the public prosecutor's office and police officers in the conduct of the action.

6. Notably, the law of 23 June 1999, in article 41-1 of the *Code of Civil Procedure*, lists the possibility, among other alternatives to prosecution, of informing the offender of his or her rights under this law and the possibility of 'proceeding, with the agreement of the parties, to a session of mediation between the offender and the victim'.

7. Faget J (1999) 'National evaluation of the practice of victim-offender mediation', GERICO, No 13. This quantitative research, completed by a qualitative investigation, was carried out in 1998 and 1999 on a

representative sample of 24 French tribunals and 1200 cases.

8. Catala P, 'La médiation pénale dans le ressort de la court d'appel de Paris' (Victim-offender mediation in the Paris Court of Appeal) in *Les modes alternatifs de règlement des litiges (Alternative means of regulating litigation)*, La documentation française, 2003, pp 127-137.

9. On this point see Milburn P, *La médiation: expériences et compétences (Mediation: experiments*

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and skills), Paris, La Découverte, 2002.

10. Law of 9 March 2004, *Official Journal* of 10 March 2004.

11. Decree of 27 September 2004.

12. Digneffe F, Parent C, (1997), 'La médiation face aux situations de violence contre les conjointes: quelques éléments à verser au débat', *Politique, police et justice au bord du futur (Mediation faced with situations of violence against spouses: some elements to pour onto the debate in Politics, police and justice on the edge of the future)*, Brussels, Bruylant, at 153-69.

13. Habermas J, *Théorie de l'Agir communicationnel (Theory of the Communicational Act)*, Fayard, Paris, 1981.



diary and happenings

- LEADR is holding its **8th International Mediation Conference** on 31 August–2 September 2005 at the International College of Tourism and Hotel Management, Sydney. For more information, or to express interest, visit <www.leadr.com.au>.
- The **Australian Commercial Disputes Centre** has released the dates for its forthcoming training courses up to June 2005. Training courses to help ADR professionals to develop their skills through a series of stages are available, as well as a number of one-day options including two new one-day courses – ‘**Mediation/Conciliation: Advanced Negotiation Techniques**’ and ‘**Concilio-Arbitration and how do you do it**’. Visit <www.acdcltd.com.au> for more information.
- The **Trillium Group** is conducting 4-day ADR Certificate Workshops (Level 1) and Advanced ADR Certificate Workshops (Level 2) in Sydney, Melbourne, Canberra and Townsville throughout 2005. For more information call 1-800-636-869 toll free or 02 9036-0333 or visit <www.thetrilliumgroup.com.au>.
- LEADR is holding various training workshops throughout 2005 in Sydney, Melbourne, Brisbane, Canberra, Adelaide, Perth, and Darwin. Available workshops include a **4 Day Introduction to Mediation**, a **2 Day Advanced Workshop**, and an **Effective Complaints Handling Workshop**. Visit <www.leadr.com.au/training.html> for more information.
- **Creative Facilitation: A Manual for Group Leadership and Conflict Management** is an essential resource for managers, mediators, human resources officers, teachers and all those who regularly work in groups. It provides new ways of analysing and managing conflict as well as working with resistance. The author, Peter Condliffe, is a Barrister (Victoria), specialist mediator and facilitator, and Director of Mediate and Facilitate Australia. RRP is \$75 (GST and postage included). Contact the author at pcmediate@bigpond.com or 03 9225 6888 to order your copy.
- Pepperdine University School of Law and the Straus Institute for Dispute Resolution present **Pepperdine’s 18th Annual Professional Skills Program in Dispute Resolution** on 16-18 June 2005 in Malibu, CA. There are 12 workshops offered including Advanced Mediation: Skills and Techniques, Specialised Mediation: Handling Challenging Employment, Medical Malpractice and PI, and Cultural and Gender Issues in Dispute Resolution. Visit <www.law.pepperdine.edu/straus/conferences> or email lori.rushford@pepperdine.edu to register or for more information.
- CEDR is holding its **10th International Summer School** on 21-27 August 2005 at Lake Maggiore, near Milan, Italy. The course will provide mediator skills training leading to assessment for CEDR Mediator Accreditation. Places are limited. Visit <www.cedr.co.uk/index.php?location=/training/programmes/summerschool.htm> or email training@cedr.co.uk to register or for more information.
- The **World Mediation Forum V Conference**, jointly hosted by the Institut Universitaire Kurt Bösch and World Mediation Forum, is being held on 9-11 September 2005 at the Congress Centre “Le Regent”, Crans Montana, Switzerland. The Conference, entitled ‘**Mediation: A New Culture of Change**’, will bring together mediators, academics, lawyers, psychologists and all who support mediation to resolve conflicts, including former Eastern Europe, Asia-Pacific countries, Africa and South America. The English language program is available in PDF Format at <www.mediate.com/world/flyer+grand+anglais20041125c.pdf>. For additional information and online registration, see <mediation.qualilearning.org> and <www.mediate.com/world>.

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