

**Resolving Disputes
in the 21st Century**

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Foreword

This publication is the main outcome of the LLP project Grundtvig – REDICT (2011-2013). The project itself was initiated and led by Mrs. JUDr. Marie Boháčová, Chair of the Board of the European Institute for Reconciliation, Mediation and Arbitration with the seat at Křtiny, Czech Republic. The organizations participating in the project were: Foresee Research Group (Hungary), University of Prešov in Prešov, Greek-Catholic Theological Faculty (Slovakia), Association for Adult Education (Lithuania) and Italian Institute of Collaborative Law (Italy).

The project was based on the perception that while mediation and other methods of alternative dispute resolution (ADR), such as for example collaborative practice or restorative practice, are common in Western countries, they are not so well-known and used as they could be in many Central European and Eastern European countries.

The project aimed to gain an insight into the current state of and prospects for ADR and to create a product for encouraging these methods among the professional and lay public. The members of the project team invited also other professionals to contribute to this volume. The final product consists of 26 chapters, which are divided into six main parts.

Part I - “Philosophical and ethical aspects of ADR” contains: a chapter that points to the selected characteristics of a postmodern society which are related to sources of conflicts as well as means of their resolution (*Kamil Kardis*); a chapter devoted to the issue of truth in its ethical dimension as a condition necessary for the peaceful coexistence of people and nations (*Arkadiusz Modrzejewski*); a chapter focusing on the biblical conception of justice as a necessary means to understanding the cultural–religious background of Europe and how it is widely influenced by Christian tradition (*Mária Kardis*); a chapter about misunderstandings over the issues of forgiveness and reconciliation which can play a crucial role in how we treat victims and offenders of serious crimes (*Slávka Karkošková*); a chapter focusing on values as philosophical assumptions which affect the purpose of mediation, its concept, course and outcome (*Lenka Holá*) and a chapter reflecting the hidden power imbalance in the mediation process (*Grethe Nordhelle*).

Part II - “An Overview of ADR in selected European countries” contains chapters describing the legal framework and state of implementation of ADR in the Czech Republic (*Lenka Pavlová, Eva Vaňková* and *Robin Brzobohatý*), Slovakia (*Renáta Dolanská* and *Slávka Karkošková*), Poland

(*Sylvia Pelc*), Hungary (*Eszter Posch* and *Borbala Fellegi*) and Italy (*Maria Francesca Corradì*).

Part III - “Mediation in the family setting” focuses on the meaning, state and prospects for this form of mediation in selected countries, particularly the Czech Republic (*Lenka Holá* and *Lenka Westphalová*), Slovakia (*Emília Halagová* and *Beáta Swanová*) and Poland (*Artur Łacina-Lanowski* and *Michał Szyszka*).

Part IV - “Collaborative law in Europe” brings attention to the new ADR procedure which gives the parties concerned the power to self-regulate their relations and assigns to their respective lawyers a central role in assisting them during negotiations aimed at finding a consensual solution to separation or divorce or the modification of divorce or separation conditions or the regulation of relations between unmarried parents. All authors who contributed to this part (*Marco Calabrese*, *Marina Petrollo*, *Novella Telesca*, *Laura Nissolino*, *Marina Marino*, *Desirée Giudetti*, *Maria Rita Consegna* and *Adriana Galimberti-Rennie*) are members of the Italian Institute of Collaborative Law.

Part V - “Victim-Offender mediation as a challenge” contains a chapter about practical experience of VOM in Hungary (*István Szikora*), a chapter describing the socio-cultural conditions of domestic violence (*Leon Szot*), and two more chapters that discuss the controversial topic of VOM application in cases of intimate partner violence and cases of child sexual abuse (*Slávka Karkošková*).

Part VI - “Toward a culture of meaningful dispute resolution” concludes the whole book with a chapter on how various media can be used for ADR awareness-raising (*Gabriel Pal'a* and *Martina Poláková*).

This publication should contribute to an improvement in the quality of adult education, especially students of various helping professions, as well as practising mediators, social workers, lawyers, judges, psychotherapists, counsellors and other professionals who participate in resolution of various interpersonal conflicts. The publication is also aimed as an inspiration for state bodies that are responsible for creating legislation supporting ADR methods. The final aim of our effort is to improve the quality of the social environment in Europe.

CONDITIONS OF VICTIM-OFFENDER MEDIATION IN CASES OF INTIMATE PARTNER VIOLENCE

Slávka Karkošková

Introduction

Intimate partner violence (referred also as a *domestic violence*) is not a new phenomenon, rather than the one that existed during the whole history of a mankind. While for a long time it was perceived as rather common (perhaps even normal) part of behaviour and in any case a problem that should be dealt with in a private manner, last decades have brought a shift toward the criminalization of intimate partner violence. “Pro-arrest policies made arrest of abusive partners mandatory, and in some jurisdictions jail terms were also mandatory. Victims who filed charges were not allowed to drop them and sometimes forced to testify against their partners. All this was done for the victim’s protection and it seemed to make a lot of sense at the time. However, it took away from victims their decision-making power regarding how they dealt with the violence“ (Hayden & Van Wormer, 2013, p.123). They might not have wanted their partners arrested and perhaps had just wanted the violence to stop (Morris & Gelsthorpe, 2000; van Wormer, 2009).

Although intimate partner violence may be defined as a crime (within legislation of various states) and thus law enforcement is viewed as a primary way of responding to domestic violence cases (Satel, 1997), it does not mean that the problem will be magically solved. Frederick and Lizdas (2010) found in their study of victims of domestic violence that many of the women affected by family violence had little faith in the criminal justice system. Michalovová (2011) conducted a qualitative survey, in which she asked the representatives of organisations involved with domestic violence in Slovakia: *What do you think the problems in addressing domestic violence are at present?* She found that the enforceability of law in Slovakia is generally considered to be desperately insufficient. Moreover, professionals also think that criminal justice intervention

would fail to provide a complex solution anyway, as the majority of battering incidents are below the crime “intensity”.¹

Although its nature does qualify domestic violence as a criminal offence, the problem remains unresolved; as a matter of fact, foreign studies indicate that battering victims do not see criminal justice procedures as an appropriate way of solving their “sensitive” problem (Tjaden & Thoennes, 2000). Given the fact that this kind of crime is characterised by a high level of latency, it might be the time, as Grauwiler and Mills (2004) argue, to expand our efforts to focus the needs of victims who avoid the criminal justice system. Community-based interventions that do not rely on criminal prosecution may be applied. Alternatively, such practices could become an additional process for justice available under the umbrella of the criminal justice system (Jülich, 2010).²

While the traditional criminal justice system relied on notion that through sentencing and imprisonment of crime perpetrators justice will be satisfied, the foundational postulate of restorative justice approach is that crime harms people and relationships and that justice requires the healing of the harm as much as possible (Zehr, 2002). Victim-offender mediation (VOM) is the most widespread model of restorative justice application. In addition to its standard (dyadic) type, VOM also exists in modified or extended versions, such as family conferences, or “sentencing circles” that involve, besides the victim and the offender, also the concerned community members. The meeting outputs usually include a written or oral apology from the offender to the victim, an agreement on compensation of damages, or on any other service delivered by the offender to the victim or to the community, and/or by the community to the victim and to the offender (Presser & Gaarder, 2000, pp. 181-182).

Applying of VOM in domestic violence cases is not a matter of course; rather it is viewed with controversy by professionals (Strang & Braithwaite, 2002). This study presents an overview of arguments of both opinion groups, as well as, examples of the best practise in the field of restorative justice implementation in cases of intimate partner violence.

¹ Indeed, as a member of an international research team of the VICTIMS project (no. JLS/2008/DAP3/AG/1157, *Daphne III Programme*, 12/2009 – 12/2011), I could see for myself that a lot of domestic violence cases are classified by the police only as “a misdemeanour” (meaning that the offender is only punished with a fine, without criminal prosecution).

² In this regard, Fernandez (2011, p. 149) emphasizes that intimate partner violence is „too dangerous to be left without the “big stick” of the legal system“.

Arguments against the application of VOM in domestic violence cases

If mediation is viewed as an encounter of two opposing parties, involving negotiation and an effort to come to a fair mutual agreement, the primary objection against the use of mediation between domestic violence victims and offenders would be an *imbalance of power*.³ Some authors maintain that domestic violence (the substance of which is the controlling and intimidation of victims by offenders⁴) severely undermines the victims' strength to a point where they become unable to express their needs freely and make their own decisions. The victims might thus be unable to defend their lawful interests and during mediation may prefer solutions favourable to the offenders; as a result, mediation may be experienced as a secondary victimisation of the victims (Lerman, 1984; Viano, 1996; Zylstra, 2001). Their relationship with the offenders deprives victims of their freedom, making them live in fear, servitude and submission. Such a strategy, essential for the victim's survival, is deeply rooted. According to those who oppose the use of mediation in domestic violence cases, the mediation process cannot be immune to such power imbalance. Many think that such an effect can be brought about not only by the victim and the offender, but also by other VOM participants who either deliberately or unwittingly protect the offender at the expense of the victim. For a vic-

³ According to Nordhelle (2010), *power* itself is neutral and means an energy, strength, capacity or ability to act. It is only the way of wielding this power that makes it positive or negative. *Negative power* can be defined as deliberate control of other people intended to make them act against their own will to comply with the will of the power-wielder. The *instruments of power* and control include knowledge, resources, physical or mental strength, or fear (i.e. rather obvious ones) and manipulation (which usually remains hidden). *Manipulators* usually aim to make other people emotionally sensitive (e.g. through impressing, accusation, intimidation, playing the role of a victim, and targeting the sensitive spots of the others, such as their needs, interests, desires, fears or flaws). Over-sensitised people have a decreased capability of critical thinking and can be better manipulated. Presentation of false reality is a typical leverage used by manipulators to gain benefits.

⁴ Fernandez (2011) stresses that power and control dynamics are typical features of intimate partner violence. One of the most frequent elements of this dynamics are coercion and threats, which „range from threats to harm the victim, to leave her, or to commit suicide, employed as a way to force her into doing his wishes. Sometimes, batterers use intimidation as a control tactic to frighten the victim through looks, gestures, smashing things or property, or displaying weapons. Another control tactic might be emotional abuse (putting the victim down, calling her names, making her think she is crazy or guilty, humiliating her), minimizing/denying the abuse (making light of the abuse), or blaming the victim for the abuse. Isolating the victim from contact (be it verbal or physical) with other family members and friends, and monitoring or limiting her movements is yet another power and control tactic. Batterers might also exert male privilege, including sexual abuse, and use children (using visitation as an opportunity to harass her or threaten to take the children away) as tactics to control the victim“ (Fernandez, 2011, p. 50).

tim it can take several years (following the end of the abusive relationship) to gather the internal strength necessary to get rid of the offender's manipulating influence (PATHS, 2000, pp. 3, 20-21). Some women's advocates argue that because of the inherent inequality that exists between victims and offenders, the traditional adversarial process of the criminal justice system could better serve victims of domestic violence (Hooper and Busch, 1996). Besides power imbalance, the balancing of power is also considered controversial by many authors. In their opinion, the fact that the victims and offenders are expected to engage in the offered negotiation as equals could imply that violence is not such a despicable offence and that the offender may avoid being held liable (Rimelspach, 2001).

Another reservation one can have about the VOM application in domestic violence cases is associated with the potential *threat to the woman's safety*. In the opinion of some authors women tend to be weakened to such an extent that their safety is in constant danger in the presence of the offenders (Grauwiler & Mills, 2004, p. 62). As well as manipulation and threats from the offender there is also another potential risk related to VOM – the danger that the offenders could use the negotiation contact to pursue their victims after the partners' separation to their new address which was supposed to remain undisclosed" (Cholenský, 2006). There are even cases where victims don't feel safe unless the batterer is in prison (PATHS, 2000, p. 19).

A concern that this form of mediation is too *focused on the needs of the offender at the expense of those of the victim* is also an argument against the use of VOM in domestic violence cases. There are restorative justice advocates who indeed consider the offender's rehabilitation to be the key benefit of VOM and who regard offenders as victims (of social milieu, abuse, circumstances etc.) needing therapy rather than punishment. This attitude, however, makes other experts worried that victimisation of offenders would eclipse their wrongdoing, relativise the arising needs and result in secondary victimisation of the victim (PATHS, 2000, p. 3).

Opponents of VOM in the domestic violence context believe that, as proven by statistics, robust legislation and uncompromising imprisonment of offenders is the best prevention of domestic violence. According to them not only does mediation *fail in abuse prevention*, but it also fails to address problems associated with the abusive relationship (Krieger, 2003).

Another argument against VOM in domestic violence cases is the assumption that if a woman has experienced very intimate forms of violence from her partner (sexual violence, for instance) *she will not be able to*

freely share her suffering, fears and feelings in mediation sessions. While such sharing is one of the fundamentals of restorative approaches, what badly victimised individuals usually need to confide in others is a strong feeling of safety and trust – something which is unlikely to occur face to face with a person who has brutally assailed the intimacy of a woman. Moreover, the humiliation and stigmatisation in sexual violence cases makes the sharing harder with respect to other VOM participants as well. VOM may then be hardly expected to assist in a battered woman's rehabilitation (PATHS, 2000, p. 21).

Expectation of reconciliation is another similar reservation one may have about VOM (along with expectation of the victim's rehabilitation). Positive results of restorative approaches include reconciliation, forgiveness, conclusion (of a problem) and restoration (of a relationship, for instance). Although according to restorative justice philosophy such outcomes are considered rehabilitating (for the VOM parties) and deserving support, there is a danger in creating expectation or promises of such results for participants of VOM in domestic violence cases. (Haslett & Edwards, 2002, p. 2-3)

Restorative justice philosophy accentuates (among other things) the role of the community, which may also bear a share of the responsibility for crime causes and consequences. The community of people around the victim and the offender should therefore also take part in solving the situation resulting from the crime. However, VOM opponents do not think the community's involvement is an outright positive action. They tend to regard *community as an abstract concept* rather than a cohesive group that could adequately address domestic violence without contributing (either overtly or in a subtle manner) to secondary victimisation of battered women (PATHS, 2000).

Last but not least it should also be noted that a lack of specially-trained mediators is the most criticised aspect associated with the application of VOM in domestic violence cases (Davis, 2007).

Arguments in favour of VOM application in domestic violence cases

The advocates of VOM in domestic violence cases point out that, unlike in the classic-type mediation (used in disputes not qualified as criminal offences) mediation parties in restorative justice are differentiated as *a victim* and *an offender* (i.e. not as parties to a non-criminal dispute). VOM therefore does *recognise victims as persons*, stressing and upholding their need to reveal the truth, to be heard by others and to express their emotions (Braithwaite & Daly, 1994, p. 207). To recover, the victims need an opportunity to tell their story to people who allow them to open up and

who can acknowledge the reality of their experience. Public acknowledgement substantially contributes to final solution of the trauma (Herman, 1997, p. 70) and the victims need to hear that their injury was unfair.

In this respect the advocates of VOM usage in domestic violence cases believe that while the criminal justice model, as well as the classical-type mediation model deliver pre-determined outcomes (i.e. punishment and reconciliation), the restorative justice model is based on *creating conditions for the rehabilitation process* rather than on aiming to reach a specific result (Gaarder & Presser, 2000, p.184).

While some experts disqualify the VOM application in domestic violence cases due to the imbalance between the mediation parties, another opinion group points out that the (restorative) justice model provides an *opportunity for restoration of power on the side of victims* of domestic violence. The power restoration or empowering of victims is primarily spurred by their own decision on whether to take part in VOM, and if they opt to do so, they can choose their companions or representatives. The above-mentioned chance to tell their story and to express their emotions, as well as the acknowledgement of their suffering (if not from the offender, then at least from others) is also a source of strength (PATHS, 2000, p.21). According to Pranis (2002), the strengthening of previously unheard voices (i.e. victims) has an immensely significant value in the restorative justice philosophy; and it is our respectful listening to the victim's story that enables such a strengthening. Power restoration is also stimulated by the victims' opportunity to address questions to the offenders and to define the conditions for repair of injury and for contact with the offenders. The restoration justice process thus makes the victims actively participate in tackling their post-traumatic situation (Presser & Gaarder, 2000, p. 183).

VOM supporters believe that *power between victims and offenders can be re-balanced* in battering cases too, and they present various methods for power imbalance rectification (Steegh, 2003, pp. 186-188; Nordhelle, 2010). Cholenský (2006) extends this opinion by observing that the power imbalance is relative as both partners may have (or might have had) a different degree of influence in various areas of their shared life (such as child care or household management). Besides that, power imbalance is typical not only for domestic violence cases, but also occurs in other contexts in which mediation is successfully applied.⁵

⁵ In this respect Cholenský (2006) notes: "As shown by experience in international mediation used in confrontations between states (...), mediation is the most suitable technique for settling a dispute where a nation has a distinct advantage over its counterpart (e.g. by owning more weapons)."

The reservation based on the opinion that the female victim's safety is put at risk by VOM is opposed by the assertion that safety can in fact be ensured, with experts in the area listing a wide range of potential measures (Davis, 2007).

Another argument supporting the use of VOM in domestic violence cases is the community's promising potential. As Pranis, Stuart, and Wedge (2003) have argued, restorative justice—based programs can provide a legitimate forum for needed community intervention in family violence and counter the bystander community effect. The *community involvement* in addressing the post-traumatic and post-crime situation arising from domestic violence is *very important for prevention of re-offending*. They refer, for instance, to the *reintegrative shaming theory* (Braithwaite, 1989) derived from the family life model in which the family members who did something wrong aren't forgiven unless they express remorse. As relationships continue even where battering occurs, involvement of the family in the restorative process is perfectly appropriate. Relatives have a lot of possibilities to shame the offender whilst keeping him a member of the family, thus making prevention more efficient (Sherman, 2000; Presser & Gaarder, 2000, p. 184; Fagan, 1996, p. 26). Similar logic gives ground also to the *routine activity theory* (Cohen, Felson, 1979) according to which violence is a result of an opportunity – i.e. the presence of a suitable target and the absence of people capable of deterring the offender from his action. In restorative approach the family and community members keep an eye on offenders and encourage their positive behaviour. Due to the fact that they can perform unexpected visits and have access to intimate information, family members may play a significant role in domestic violence deterrence (Sherman, 2000). Relatives, friends or neighbours also contribute to prevention by supporting the victim, acknowledging that she has been harmed and offering any help they can (Presser & Gaarder, 2000, p. 183).

As suggested by observations presented in the previous paragraph, application of the restorative justice model encourages the offender to change. Domestic violence offenders have a tendency to get trapped in a “vicious circle” of shame and anger, compensating for their feeling of shame with rage and escalated violence (Braithwaite & Daly, 1994, p. 205). Stigmatisation of offenders alone is unlikely to bring about more than merely a defensive response (e.g. denial). If aggressors are to change, they also need, besides rebuke and supervision, some support that would prevent their exclusion from the community and would make them perceived as individuals capable of different behaviour (Presser & Gaarder, 2000, p. 185).

Perhaps the strongest argument in favour of the VOM application in domestic violence cases is the fact that *there are couples who wish to remain together*. For a woman her relationship may be important despite violence (Mills, 1996, p. 266). As many as fifty per cent of women are estimated to stay in an abusive relationship due to emotional, cultural or religious reasons (Griffing et al., 2002). While being an aggressor's partner, the battered woman is often also a mother, a lover, a friend, and a member of a family, a religious group, or a tradition; all these facts may have a very contradictory impact on the woman's decision about *whether to stay or go* (Grauwiler & Mills, 2004, p.55). Staying with the batterer is rarely seen as a decision of free choice, an expression of commitment, understanding of the assistance system limitations, and expression of self-determination or self-confidence (Lempert, 1996). Some authors (e.g. Mills, 2003; Grauwiler & Mills, 2004, p.55) think that the criminal justice system fails to address the victim's individual needs and ignores the fact that the victim and the offender used to share (usually over a period of time) their lives including child care. The restorative justice model, on the other hand, promotes the wishes of the victim, including requests that might seem rather irrational (such as a desire to repair the relationship) – in this respect Cholenský (2006) points out that “there are no grounds for depriving domestic violence victims of legal capacity and therefore the will of the victim should be respected.” In addition coercion of victims is inconsistent with the feminist movement's and social work's goal of *self-determination* (Presser & Gaarder, 2004). Victims' rights to determine their own needs and the means of attaining them are more likely to be protected within a less formal restorative justice setting than in a criminal justice jurisdiction on its own (Hayden & Van Wormer, 2013, p.123).

For couples who wish to end the violence but not the relationship, the restorative justice model presents *a chance to comprehend the dynamics of violence*. All intimate relationships, including abusive ones, have internal dynamics of their own that can shed light on the causes or stimuli of violence⁶. Putting the violence dynamics into perspective⁷ is crucial for prevention of re-offending (Grauwiler & Mills, 2004, p. 55).

⁶ In this context experts believe that violent behaviour may be triggered by negative feelings which, according to men, can be ignited by woman's excessive complaining, irking or nagging (Dobash, & Dobash, 1998, p. 155; Eisikovits & Buchbinder, 2000). The violent behaviour of a man can also be fuelled by a man's feeling of having been abandoned by his wife (or if she has grown emotionally alienated). The perceived loss of the female produces panic and hysterical aggression in the man (Dutton, 1995, pp.60-68). Therefore it seems appropriate to seek the opinion of men and to examine the facts behind their grievances. Although a woman cannot be held accountable for battering, she should assume responsibility for the aggression forms that she induces in the relationship.

Restorative justice advocates maintain that these models *address the very roots of the domestic violence issue*, tackling social inequalities, sub-surface norms tolerating violence in intimate relationships, isolation of individuals or families and neutralisation of guilt (Presser & Gaarder, 2000, p. 188).

Conditions for VOM application in domestic violence cases

Experts who are inclined to support the use of VOM in domestic violence cases do not assert that this option is suitable for all cases of this type. Having a realistic view of the issue and being aware of possible advantages as well as risks, they stress that case-specific consideration is imperative (Pence, 1999; Daly, 2002; Edwards, 2002; Davis, 2007).

There are some fundamental conditions for application of VOM in domestic violence cases. The baseline condition is the preparedness of the mediator and preparedness of the system on which the mediator depends. The central requirement is the appropriate disposition and attitude of the victim and the offender. And the complementary condition is the appropriate disposition of the community of persons associated with the victim and the offender which (even without their direct VOM participation) can have an indirect influence on the process. In the following paragraphs we are going to have a closer look at these conditions, starting with the disposition of a person most affected by a crime.

An essential prerequisite for mediation dialogue between domestic violence victims and offenders is the *disposition of the victim*; if the victim has the desire and strength to talk about her experience of violence with its consequences and to present her own needs⁸ (Edwards & Haslett, 2002). To build up such strength the victim usually needs to spend some time away from the offender and to have a possibility to use professional legal or social counselling services, or to undergo psychotherapeutic treatment. Professional assistance can enable the victim to assess her experience and to make a free decision about accepting or refusing the VOM. The victim should be informed about her rights and about all the alternative ways of solving the situation in order to select the option that she sees as the most appropriate. Therefore, she should be aware of all the objective benefits and risks of VOM (PATHS, 2000, pp. 2, 21). As it is

⁷ An effort to reveal the individual components of the hidden dynamics of violence doesn't actually contradict with the principle that a victim shouldn't be blamed for the offender's behaviour (Grauwiler & Mills, 2004).

⁸ According to Cholenský (2006) it is necessary to exclude from mediation such cases in which "the victim is not capable of putting her needs above those of her violent partner (or, at least, on an equal level)".

the victim who knows best all the circumstances of the case, the aggressor's character and the risk of further harm, the ultimate decision about solving the issue should reside within the victim herself (Davis, 2007). In no way can the victim be forced to take part in VOM and all the potential forms of pressure (from her partner, relatives or restorative justice staff) must be assessed and eliminated (Edwards & Haslett, 2002, p. 2; Presser & Gaarder, 2000, p. 187). The VOM application in domestic violence cases can only be regarded as an option if it is requested, after due consideration, by the victim herself.

Another prerequisite is the *openness of the offender* towards participation in the VOM. Such openness can be expected if the offender accepts responsibility for his actions⁹, shows remorse for his behaviour towards his spouse, expresses willingness to work on changing himself, and is open to hearing about the victim's experience and the impact his actions have had on her (Edwards & Haslett, 2002, p.2). The offender cannot be considered positively disposed towards meaningful participation in the VOM if he lacks a certain amount of empathy towards the victim and if he shows a strong inclination to continue to control and manipulate the victim (Presser & Lowenkamp, 1999, p.187; Davis, 2007; Zylstra, 2001, p. 256).

Any *signs of power imbalance* between the mediation participants must be carefully screened prior to VOM and continuously *monitored* throughout the mediation process (Davis, 2007). When detecting such signs, mediators should *adopt adequate methods to avert them and to eliminate any negative impact* on the victim. Batterers "use a range of tactics to gain advantage and power in mediation: they may assume the role of a sensitive parent, pin the blame for the violence on the victim, or arouse compassion for their housing situation. Through the use of threats or manipulation they strive to gain control over the partner's testimony" (Holá, 2010). Presence of violence may be indicated by the victim's non-verbal communication (signs of fear), attempts of the batterer to control

⁹ Experts on domestic violence stress that violence occurs both in conflictual situations and in situations where conflicts are absent; the use of violence against a partner is a strategy for gaining power and control in a relationship and is the result of the offender's choice rather than an uncontrollable impulse. Concerning the responsibility for violence, the experts highlight that there is a substantial difference between acknowledgement of violence occurring and assuming of responsibility for that violence. Responsibility includes recognizing that from a number of choices the offender opted for the wrong one and that he had no right to commit his actions. Without responsibility being taken by the offender, the VOM dialogue seriously risks causing further harm to the victim and is not likely to be conducive to positive changes in the offender's behaviour (Edwards & Haslett, 2002, pp. 2, 4).

the discussion, his use of offensive and humiliating remarks, breaking into the victim's speech, and disputing or twisting her statements (Davis, 2007; Presser & Gaarder, 2000, p. 187). Mediators must always bear in mind the risk of manipulation and intervene properly if it occurs. A mediator should help the manipulated person pass from merely feeling emotions to being able to make a sound analysis of the way she is being manipulated in order to transform her response from spontaneous emotional reaction to a consciously controlled one. Such a process may require interruption of the mediation and intervention through a separate session with the victim. Mediators can handle the manipulator by empathetic listening to his allegations and asking naive questions revealing his lies. Rather than direct confrontation with the manipulator, appealing to his positive traits is recommended (Nordhelle, 2010, pp. 147-148). Other *methods* that mediators can use to eliminate the power imbalance include, for instance, setting clearcut rules, setting a topic for discussion, allowing the parties to speak only with the mediator's permission, limiting their speaking time or stopping the discussion in the event of the victim being threatened, explaining the allegations of a participant to the other party, progressive transfer of power from the mediator to the parties if they seem to be able to wield it appropriately (Steegh, 2003, pp. 186-188), holding separated sessions, use of teleconferences, presence of an "attorney" to support the underrepresented or hesitant victim, employing two mediators (a male and a female) instead of one to conduct the mediation (Cholenský, 2006). Edwards and Haslett (2002, p.7) highlight that besides monitoring the power dynamics in the mediation room it is also necessary to keep an eye on what is going on between the couple outside the mediation sessions (e.g. whether the woman is not being punished by her partner for what she has said in the session and/or whether she is not being coerced to change her statements or requirements).

The essential conditions of VOM in domestic violence cases include *ensuring safety* (Fernandez, 2011, p. 151). Although application of the above-mentioned power imbalance elimination methods substantially contributes to making the victim feel safe, it is not the ultimate response to the issue. To maximise the victim's safety (both psychological and physical), the mediator should carefully examine all the causes of her concern and adopt adequate measures to reduce her further victimisation (Edwards & Haslett, 2002, p.5). The victim's safety can be ensured by measures such as separate entry of the two VOM parties into the session building, differently scheduled arrival and departure of the parties (the victim should leave the building earlier than the offender), separate waiting rooms for both parties, non-disclosure of the victim's address, escort-

ing the victim *from* and *to* her place of residence, and a possibility to call in a security service in case of a violent incident during the mediation (Davis, 2007; Cholenský, 2006). Moreover, during the mediation, the victim may also suggest an acceptable manner of contact with the offender outside the mediation session, e.g. phone, e-mails, or face-to-face meetings (Davis, 2007). If the threat posed by direct contact with the offender exceeds the victim's tolerable threshold and she still feels the need to communicate her emotions, feelings, perceived consequences of the abuse and compensation requirements to the offender, the mediator can offer her alternative forms of VOM in which there is no direct contact between the victim and the offender (Presser & Gaarder, 2000, p. 187; Davis, 2007) and communication is conducted by the mediator, a representative (spokesperson) of the victim, or with the use of audio and video recordings, or letters.

A core feature of the restorative justice theory is an assumption that the community knows best how to cope with crime and wrongdoing. However, our experience of domestic violence cases shows that the surrounding society often acts as an accomplice to the crime. This context gives rise to another rule that should be respected during domestic violence VOM: if *members of the society around* the victim or the offender are supposed to participate in the VOM (or in any other restorative justice model) they must possess *an appropriate disposition*. Restorative justice approach works only when the community unites in holding perpetrators accountable (Smith, 2009, p. 259). Thus mediators must examine whether these persons are not proponents of the folk-wisdom myths about domestic violence that may lead to putting blame on the victim, vindication of the offender or trivialising the situation (Edwards & Haslett, 2002, p.7; Presser, Gaarder, 2000, p.185). Where community members could obviously sabotage the VOM efforts rather than assist in its meaningful progress, it is better to hold private sessions (i.e. without involvement of friends, relatives, neighbours etc.) (Edwards & Haslett, 2002, p.7).

Concerning the conditions of VOM in domestic violence it is also necessary to highlight that a *message of zero tolerance of violence* should be stressed throughout the entire restorative justice process. No restorative justice model must be regarded as an easy way of coping with serious crimes and VOM cannot offer the batterers a sanctuary to avoid liability and criminal justice sanctions (PATHS, 2000, p.37).

Another aspect of equal significance is that there should be *no expectation of reconciliation, forgiveness and restoration*. That would be an ideal outcome requiring a strenuous process which, even after a long time, may not come to a successful end (see chapter 4) and it thus cannot be

viewed as a definite result of VOM. What mediators can do is to assist the participants in identifying their needs, expectations and options, and to support them in thoughtful and free decision-making in their issue (Llewellyn & Howse, 1999). In no way should the reconciliation attempted to maintain the relationship become an objective of VOM. Within the restorative justice movement there has actually been a shift in understanding of reconciliation – nowadays reconciliation is viewed as coming to terms with one's own past, and is associated with making offenders accountable and willing to provide certain compensation to their victims (Presser & Gaarder, 2000). In relation with the restoration concept it should be noted that the aim of VOM in domestic violence cases is not a restoration of the partnership in the shape existing prior to outbreak of the battering (as that would create conditions for renewal of abuse); instead, restoration can be characterised as establishment or re-establishment of relations of social equality (Llewellyn & Howse, 1999).

There is yet another condition arising from those mentioned above: mediators should reserve *sufficient time* for handling cases involving domestic violence. The build-up to a dialogue encounter may require several lengthy meetings over a period of time to carefully assess whether the victim, the offender and the community members are adequately prepared for VOM participation. The mediation process itself is equally likely to require more time than in other cases; experienced mediators say that there are very few single sessions and more frequently two to three sessions are held, whereas some dialogues may run from five to eight meetings (Edwards & Haslett, 2002, p. 6). Reservation of sufficient time for conducting a meaningful VOM in domestic violence cases greatly depends on the *preparedness of the system*. Even where mediators are greatly interested in the issue of domestic violence, the system providing the mediation framework (organisations or institutions) sometimes fails to create suitable conditions for the process.

Last but not least, the conditions required for a meaningful application of VOM in domestic violence cases include the *preparedness of mediators*. Required to be properly trained to handle such tasks, they should have theoretical and practical training focused on the specific features of domestic violence: on a range of myths, stereotypes and prejudices that are elements of patriarchal culture and may overtly or subtly encourage such crimes, on the ability to detect signs of violence, on the patterns and circumstances of battering behaviour, on an ability to detect the symptoms of victim's traumatisation, on the ability to detect the ways used by offenders to avoid accountability for their actions and to distort reality, on the ability to discern the dynamics of power, to minimize the power im-

balance between the mediation parties, and a capacity to intervene efficiently if the offender attempts to manipulate the victim (Presser & Gaarder, 2000, pp. 186-187; Kelly, 2001; Edwards & Haslett, 2002, p. 6; Zosky, 2003; Davis, 2007, p. 264; Fernandez, 2011, p. 151). Mediators in the area of domestic violence cases are recommended to undergo continuous training (Edwards & Haslett, 2002, p. 6) and to be supervised in their work (Presser & Gaarder, 2000, pp. 186-187).

In addition to all the conditions described above, it should be stressed that *evaluation* of whatever models based on restorative justice philosophy is highly desirable. In this regard Fernandez (2011, p. 153) recommends that follow-up with victims „should be provided for a reasonable period of time after the encounters“. She adds that each restorative justice programs “should be required to evaluate formally both their processes and outcomes, and disseminate the successes and challenges (...). The metrics for success of how restorative the program is will be decided with full input and consultation with the victim-survivor and, if relevant, the batterer“. Similarly, the set of basic principles of *Communities Against Rape and Abuse* (CARA) contains the following recommendation: „Prepare to be engaged in the process for the long haul. Accountability is a process, not a destination. It takes time, people will probably try to thwart your efforts, and even if the aggressor engages the process, there must be long-term follow-up with her or him“ (CARA, n.d.).

To remain realistic, let's add that it could take a long time until the stakeholders are sufficiently prepared to VOM. In this regard Hayden and Van Wormer (2013, p. 126) note that „one use for restorative justice, not considered in the literature, would be to have a gathering years later following the abuse that took place, perhaps once the former partners have gone on to lead other lives. This might be healing in situations where some form of resolution is desired, where the former batterer has turned his life around and wishes to make amends to his former victim, while his ex-partner wishes to describe the pain she has lived with in the years since the violence took place, to receive support and understanding from her family members, and finally to accept the apology and even to forgive. Consider that other restorative practices, for example, truth and reconciliation commissions and victim-offender dialogue, take place years after the crimes have taken place, and, in many ways, that is their strength.”

Best practice examples

VOM has been used in domestic violence cases abroad for quite a long time. Cholenský (2006) observes that one of the renowned organisations active in this field is the Association of Family and Conciliation

Courts in Madison, Wisconsin, the USA.

As noted by Edwards and Haslett (2002, p. 1), since 1998 a VOM programme focused on domestic violence has also been conducted by the *Mediation and Restorative Justice Centre* in Edmonton, Alberta, Canada. Smith (2009, p. 258-259) remarks that restorative justice models „have been particularly well developed by many Native communities, especially in Canada, where sovereign status of Native nations allows them an opportunity to develop community-based justice programs: In one program for example, when a crime is reported, the working team that deals with (...) domestic violence talks to the perpetrator and gives him the option of participating in the program. The perpetrator must first confess his guilt and then follow a healing contract, or go to jail. The perpetrator is free to decline to participate in the program and go through normal routes in the criminal justice system. In the restorative justice model, everyone (victim, perpetrator, family, friends, and the working team) is involved in developing the healing contract. Everyone is also assigned an advocate through the process. Everyone also holds the perpetrator accountable to his contract.“

From a perpetrator's point of view, this approach is often more difficult than going to jail: First, one must deal with the shock and then the dismay on the neighbors' faces. One must live with the daily humiliation, and at the same time seek forgiveness not just from victims, but from the community as a whole. A prison sentence removes the offender from the daily accountability, and may not do anything towards rehabilitation, and for many may actually be an easier disposition than staying in the community (Ross, 1997, p. 218).

According to Smith (2009, p. 269) „some of the most well-developed community accountability models exist in queer communities of color, such as *Friends Are Reaching Out* (FAR Out) in Seattle. The premise of this model is that when people are abused, they become isolated. The domestic violence movement further isolates them through the shelter system, where they cannot tell their friends where they are. In addition, the domestic violence movement does not work with those people who could most likely hold perpetrators accountable – their friends. FAR Out's model is based on developing friendship groups that make regular commitments to stay in contact with each other. In addition, these groups develop processes to talk openly about relationships. One reason that abuse continues is that we tend to keep our sexual relationships private. By talking about them more openly, it is easier for friends to hold us accountable. In addition, if a person knows she / he is going to share the relationship dynamics openly, it is more likely that she/he will be accountable in the

relationship. This model works because it is based on preexisting friendship networks. As a result, it develops the capacity of a community to handle domestic violence.“

Stevens et al. (2007, pp. 37-38) refer to research conducted by the Austrian Institute of Sociology of Law and Criminology in Vienna, according to which restorative justice principles may be successfully applied in domestic violence cases too. The authors present a pilot project of VOM in domestic violence cases, implemented in Vienna: “The project is based on a method of mixed teams. Firstly, a male mediator holds a session with the male offender, while a female mediator talks with the female victim so that the two mediators may share both stories during the mediation. Both parties are then invited to a joint meeting to agree either on conditions to terminate their relationship or on ways of ensuring a violence-free co-existence in the future. The usual practice is that the mediators support the woman’s story and advance her right for a non-violent relationship. Besides the victim’s emancipation, mediation is often focused on identification of both parties’ needs. Rather than reintegration or re-socialisation of the offender, it is an improvement of victim-offender interaction which is the main objective of the mediation process.”

However, perhaps the most interesting approach is a cognitive-behavioral programme developed in the UK in partnership between Cheshire Probation Service and the National Society for the Prevention of Cruelty to Children. Incorporating a range of learning methods to maximise the influence on offenders, the programme normally runs for fifteen months and consists of two stages. Prior to the programme beginning, offenders are individually assessed by a male and a female member of the programme team. All the programme sessions are conducted by a male and a female mediator who represent the cooperating organisations. The first stage is focused on group dynamics screening and on tackling the tendencies to avoid responsibility, trivialise the violence and blame the victim. The aim of the effort is to make the perpetrators recognise their abusive behaviour as well as understand and begin the transformation process. The second stage of the programme is concentrated on examination of the broad range of ways used by men to abuse and exert power and control over their partners. The aim is to change the perpetrator’s violent behaviour and violence-inspiring attitudes, and to make him understand the equality in a relationship characterised by mutual respect, trust, support, honesty, fairness, a feeling of safety and welfare, responsibility for one’s own actions, and partnership in household management. The offender’s female partners or ex-partners and their children attend a parallel support programme led by a female programme worker representing child

protection organisations. This support programme is aimed to make the female victims understand the scope of the programme for males and the fact that there can be no guarantees of a permanent change in the offender. The women are also informed about the possibilities and resources available for ensuring their safety or the safety of their children. The project also helps them to understand the issue of violence and to prepare a reasonable safety plan. (Skyner & Waters, 1999) Such a programme aids in making offenders and victims better prepared for meaningful participation in VOM.

Conclusion

Application of restorative justice programmes in domestic violence cases has a high potential of benefits as well as risks. Safety of VOM on the part of domestic violence victims requires a thorough analysis of risks and consideration of disposition of all the stakeholders.

While exclusive application of criminal justice procedures may not be (and usually is not) perceived by those immediately concerned as a fair and appropriate solution, restorative justice offers a more meaningful, albeit more demanding method of coping with the situation. Although restorative justice is not a cure-all for violence against women, nor an ultimate response to the crime, it can be a suitable complement to law enforcement in a broader context (PATHS, 2000, p. 37). According to Pranis (2002, p. 38) “restorative justice requires a partnership with government institutions. Daly and Stubbs (2006), Coker (2006), and others specifically argue against developing restorative justice models as an “alternative” to the criminal justice system. “This tendency to assume a collaboration with the state happens because many domestic violence advocates argue that alternative models only work if they are backed by the threat of incarceration should the perpetrator not act in good faith” (Smith, 2009, p. 266).

Developing restorative justice programmes that would fit the specifics of domestic violence cases can be seen as a current major challenge for European countries (Stevens et al, 2007, pp. 36-37). “The best way forward may be to see a justice practice as a starting point, a gateway to support, therapy, and economic resources, rather than as an endpoint. (...) The most powerful justice remedies (...) lie outside of the “justice room,” and the goal is to mobilize them for victims and offenders” (Ptacek, 2009, s. 283). Let us hope that our society will build up enough competence and courage to offer services of restorative justice models to victims of domestic abuse, clients who are usually (in advance) excluded from the lists of potential clients.

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