

IMPLEMENTATION OF DIVERSION ORDER SETTLEMENT WITH THE INJURED PARTY: THE PRACTICE OF THE CENTRE FOR SOCIAL WORK IN BELGRADE*

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Legal reforms in Serbia that started a decade ago brought some elements of restorative justice to the criminal and juvenile justice system in Serbia. The Law on juvenile offenders and criminal protection of minors and juveniles (2005) introduced, inter alia, diversion orders as a specific form of measures, which purpose is to divert juveniles from traditional court proceedings whenever appropriate. One of the foreseen diversion orders is the settlement with the injured party so that by compensating the damages, apology, work or otherwise, the detrimental consequences would be alleviated either in full or partly. The aim of this paper is to present the findings of the research on the application of this diversion order in the practice of the Centre for Social Work in Belgrade in a one-year period (February 2015-February 2016). The findings are analysed in the context of the reform of juvenile justice system and should be used as a basis for both proposing possible reforms of the existing legal solutions and for the promotion of broader use of diversion order that fosters encounter and dialogue between juvenile and his/her victim.

KEY WORDS: diversion / juveniles / mediation / research / Centre for Social Work / Belgrade

1. INTRODUCTORY REMARKS

Since 2005 and legal reforms some hints of introducing restorative justice to the criminal and juvenile justice system in Serbia have been visible (Ćopić, 2015). The Law on

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juvenile offenders and criminal protection of minors and juveniles (2005) introduced, *inter alia*, diversion orders as a specific form of measures (measures *sui generis*), which differ from criminal sanctions both substantially and in their purpose (Radulović, 2008: 28). The purpose of diversion orders is to avoid initiating criminal proceedings against a juvenile or to suspend the proceeding and to influence the proper development of a juvenile and enhance his/her personal responsibility in order to avoid recidivism (the so called diversion with intervention). Diversion orders could be applied by either the prosecutor for juveniles or a juvenile judge. Therefore, the Law enables diversion at different stages of the procedure against a juvenile offender, which is in compliance with relevant international standards in this field (Ćopić, 2009). If a juvenile does not fulfil obligations taken over, he/she may always be returned to the regular court procedure. This solution can be estimated as a positive one, because applying the so-called simple diversion, which means no obligation taken over by the juvenile offender, can hardly lead to repairing the damage and restoring relationships violated by the criminal offence, neither to active involvement of the victim and/or the community in solving problems in the aftermath of a crime.

Diversion orders could be applied to a juvenile offender for criminal offences punishable by a fine or imprisonment of up to five years. Additionally, the juvenile needs to admit the execution of a criminal offence, while his/her attitude towards the offence and the injured party are taken into account, too. Decision on imposing a diversion order is made in conjunction with the juvenile's parents, adoptive parent or guardian and competent guardianship authority.

There are five diversion orders provided for by the Law: 1. Settlement with the injured party so that by compensating the damages, apology, work or otherwise, the detrimental consequences would be alleviated either in full or partly; 2. Regular attendance of classes or work; 3. Engagement, without remuneration, in the work of humanitarian organisations or community work (welfare, local or environmental); 4. Undergoing relevant check-ups and drug and alcohol treatment programs; and 5. Participation in individual or group therapy at suitable health institution or counselling centre. According to the Law, the prosecutor for juveniles could impose only the first three diversion orders, while the juvenile judge has all diversion orders at his/her disposal. However, the ratio of such provision is not clear. This solution is not completely in compliance with the idea behind diversion measures, which should be primarily in hands of the prosecutor, and only secondary to be used by the judge, in which case the judge may have a correctional role: if the case has not been diverted at an earlier stage by the prosecutor and the judge finds that diversion order could be applied in certain case, he/she could also decide to divert the case. Therefore, as also correctly noticed by other authors, prosecutors should have all diversion orders at their disposal as well (Satarić, Obradović, 2014).

Even though the Law on juvenile offenders and criminal protection of minors and juveniles entered into force ten years ago, there is still a lack of the by-law that should regulate application of diversion orders. Nevertheless, some research and the official statistics suggest that diversion orders are implemented in practice, although still sporadically (Perić, Milošević and Stevanović, 2008: 154).

Table 1: Number of juveniles against whom diversion orders were imposed

Year	No. of juveniles against whom diversion orders were imposed	Index	Diversion orders imposed by prosecutor for juveniles	Diversion orders imposed by a juvenile judge
2007	57	100	40	17
2008	69	121	55	17
2009	110	193	72	38
2010	151	265	59	92
2011	187	328	87	100
2012	126	221	106	20
2013	205	360	171	34
2014	206	361	176	30

Implementation of diversion started in 2007. According to the statistics of the Statistical Office of the Republic of Serbia (Table 1), there has been a permanent increase of the number of juvenile offenders against whom diversion orders have been imposed since 2009. A small decrease was visible in 2012, while a new increase was noticed in 2013 and 2014. Except in 2010 and 2011, more diversion orders were implemented by prosecutors for juveniles than by juvenile judges, which coincide with the legal nature of this form of measures. Nevertheless, the portion of juveniles against whom diversion orders were implemented in the total number of juveniles against whom the criminal records were submitted is still very low: in 2014 it was only 6.6%.¹

Looking through restorative justice lenses (Zehr, 1990, 2002, 2003), the most relevant diversion order is the first one - settlement with the injured party, which assumes more active role and position of both the offender and the victim (Stevanović, Milošević, 2006: 492). As suggested by the data of the Statistical Office of the Republic of Serbia, in 2014 settlement with the injured party presented the most frequently implemented diversion order by the prosecutors for juveniles (in case of 137 juveniles or 77.8%), while it was applied in 13 out of 30 cases when the case was diverted by a juvenile judge.² Taking that as a departure point, the focus of this paper is exactly on this diversion order (hereinafter referred to as mediation) and its application in the practice of the Centre for Social Work in Belgrade. In order to see in which way this diversion order is implemented in practice, we conducted a small research into the cases of juvenile offenders referred to the Centre for Social Work in Belgrade for mediation during a one-year period (between February 2015 and February 2016). The aim of this paper is to present the findings of this research and to point to the practice of applying mediation in response to juvenile crime, as well as to its future broader use. The findings are analysed in the context of the reform of juvenile justice system and should be used as a basis for both proposing possible reforms of the existing legal solutions and for the promotion of broader use of diversion order that fosters encounter and dialogue between juvenile and his/her victim.

¹ Ibid.

² Ibid.

2. ABOUT THE RESEARCH

The subject of the research was the implementation of diversion order settlement with the injured party (mediation) in the practice of the Centre for Social Work in Belgrade.³ The aim of the research was getting to know in which cases this diversion order is imposed, how the process of mediation flows, what are the outcomes of this process, as well as what challenges and problems are faced in practice. The research encompassed 26 cases of juvenile offenders referred to mediation to the Centre for Social Work in Belgrade during a one-year period, i.e. from February 2015 to February 2016.

The data was collected from the records of the Centre for Social Work in Belgrade. A semi-structured questionnaire was used for collecting the data. The questionnaire consisted of the following parts: socio-demographic characteristics of juvenile offenders, committed criminal offence, referral to mediation, data about the victim/injured party, the type of mediation, preparation for mediation, process of mediation, outcomes of mediation, supervision of the implementation of obligations taken over and mediator's observations.

The data are analysed with the use of qualitative methods, while for some data analysis we used descriptive statistics.

3. APPLYING MEDIATION IN JUVENILE JUSTICE SYSTEM: THE RESEARCH FINDINGS

3.1. Juveniles referred to mediation

In most cases referred to mediation in the observed period juvenile offenders were males (20), while in six cases female juveniles were referred. As to the age of juveniles referred to mediation, in most cases those were older juveniles (16-18 years of age), while in ten cases juveniles from the age category between 14 and 16 were referred to mediation. Except in two cases, juvenile offenders were students in the secondary school who regularly attend the school. In two cases juveniles left the school.

Most juveniles referred to mediation to the Centre for Social Work in Belgrade come from complete families, i.e. they live with both parents (18); seven juveniles live with only one parent, primarily due to the divorce of the parents, while in one case a juvenile does not live with parents, rather with grandmother. In most cases parents of juvenile offenders are employed.

Property crimes dominate in the structure of criminal offences for which juveniles were referred to mediation: theft (14), aggravated theft (3) and destruction or damage of another's object (1). Additionally, in four cases criminal offence of bodily injuries

³ Within the project of the reform of juvenile justice system, which is implemented by the IMG, in 2012 a working group of the Republic Secretariat for Social Welfare drafted standards and procedures for applying diversion orders. This document was piloted during 2013 and 2014 in four higher prosecutor's offices and higher courts in Serbia: in Belgrade, Novi Sad, Niš and Kragujevac. The idea was to test the drafted procedures for some diversion orders, including the one on settlement (mediation). Cases referred by the prosecutor for juveniles or a juvenile judge in Belgrade were referred to the Centre for Social Work in Belgrade. For more information, please look at Satarić, Obradović, 2014: 40.

was committed: in three cases light bodily injury and in one case a serious bodily injury. In two cases juveniles were referred to mediation because of the criminal offence endangerment of safety, in one case for endangerment of safety and in one for violent behaviour. In all cases juveniles were first-time offenders.

3.2. Injured parties/victims

Most injured parties were natural persons (16), while in eleven cases those were legal persons. In case of natural persons there were eleven male and five female victims. Fourteen victims were underage at the time of the crime: four victims were below 14 and four belong to a category between 14 and 16 years of age, while six victims belong to a category of older juveniles (16-18). Additionally, two victims were adults at the time when the crime was committed. Given the education, it was noticed that 14 victims attended school at the time of their victimisation: nine attended secondary school and five went to primary school, while two victims had already finished secondary school at the time when they were victimised. Thus, in most cases we could speak of peer violence, i.e. about committing crime against peers.

When it comes to legal persons, it can be noticed that those were the school, boutique, kiosk, perfumery and supermarket. Therefore, in these cases mainly property crimes were committed (theft, aggravated theft and destruction or damage of another's object).

3.3. Referral to, preparation for and the process of mediation

In most cases diversion order consisted in mediation was imposed by the prosecutor for juveniles (23), while in three cases it was implemented by a juvenile judge.

Although a typical form of mediation consists of direct (face-to-face) contact of a victim and an offender in the presence of a mediator, which has been accepted in most European countries as a rule, with some exceptions in terms of organising indirect mediation (shuttle diplomacy) (Miers, Willemsens, 2004; Raye, Roberts, 2007), it can be noticed that in most of the analysed cases (19) indirect mediation actually took place. In only four cases direct mediation was organised. Main reasons for that are seen in the lack of interest and time to meet the offender, although even in these cases victims/injured parties consent to indirect mediation, considering it to be important for future behaviour of a juvenile offender.

Main preconditions for successful mediation include voluntariness, understanding the aim and importance of mediation by the parties and trust in the third party, i.e. mediator, which has to enable mutual respect and appreciation of the parties. Voluntariness is one of the basic standards foreseen by international documents and a fundamental procedural safeguard (Groenhuijsen, 2000: 76). It means free and voluntary acceptance of both parties to participate in the process with the possibility to give up at any moment. Voluntary consent does not mean only the absence of coercion, force or threat to a victim or an offender, but rather the existence of informed consent (De Mesmaecker, 2013: 336-338). This implies informing both parties about their rights, the nature and relevance of mediation, possible consequences of participating in mediation, etc. Additionally, mediation could not take place if any of the parties is not capable to understand the essence of this measure. Taking that as a departure point, we may conclude that in the analysed cases high relevance was given to preparation for

mediation and obtaining informed consent for participating in the mediation. Preparation is done with both the offender and his/her family and the victim and his/her family in cases when a victim is underage person as well.

Preparatory phase begins with preparatory meetings with the juvenile offender and his/her parents, which are organised and conducted by the mediator. During preparatory meetings the mediator informs the juvenile and his/her parents about the process of mediation, its relevance and aims, and helps them to identify and articulate their needs. The mediator also collects information about the juvenile and his/her family, which is relevant for defining the needs of the juvenile and addressing his/her fears, which is important for developing mediation strategy.

This phase is followed by contacting the victim/injured party, which is done through a phone call or by a letter. This order of steps could be estimated as an example of good practice since it enables protection of the victim from secondary victimisation in case that a victim accepts to participate in mediation first, and then the offender refuses. Analysed cases suggest that preparatory meetings with the victim and his/her parents are very important for providing support and additional motivation of the victim to enter the mediation process, particularly when he/she is also underage and when the juvenile offender and victim know each other. Preparatory work with the victim and his/her parents is crucial in deciding about the type of mediation (direct or indirect). Analysed cases suggest that the type of mediation depends to a great deal upon the attitudes of the victim's parents. Namely, when the victim's parents were not in favour of direct mediation, it did not occur, while juvenile victims in these cases only verbalised wishes of their parents. Nevertheless, practice suggests that in most cases when victims are underage, parents have important role in supporting their children to enter mediation and dialogue, for encouraging and empowering them; then, in defining their children's needs, in proposing possible ways of restoring relationships between a victim and an offender, in proposing how the damage could be repaired/compensated, etc. In general, from mediator's perspective, parents' role was valuable and contributed to healing function of a mediation process. It also seems important to give the space to parents to express their needs and fears and to get support. However, in some cases it happened that a victim's parents had unrealistic expectations from the process. Sometimes they are more protective towards their children, leaving no space to children who had been victimised to verbalise their own needs and to tell what had happened. These findings also suggest the need to work on raising public awareness about restorative practices and their relevance in responding to juvenile crime.

During separate preparatory meetings with the parties the mediator also gets information about the event (what happened, when, how did the parties feel, how do they feel today, what are their needs, how do they see the future, etc.). Questions about previous relations between victim and offender are also addressed and defined, as well as security issues. Thus, all of this information is relevant for organising and facilitating mediation once it takes place.

In the analysed cases, participants of (direct or indirect) mediation were a juvenile offender, the victim, the mediator and parents of both the offender and a victim. Preparatory meetings and encounters in cases of direct mediation took place in the premises of the Centre for Social Work in Belgrade, in its local departments or in other places, such as school.

Indirect mediations were organised both in cases when the injured party was a legal person and a natural person. It took the form of either conveying messages to one another via mediator (shuttle diplomacy) or just in writing an apology letter by the offender, which was handed over to the injured party personally, via mediator or by the post. This is illustrated by some remarks made by a mediator:

Indirect mediation was conducted through separate meetings with a victim, juvenile offender and their parents. Juvenile female victim and her parents did not want to meet juvenile offender in person; they rather wanted him not to contact a victim (not to call her, to send her messages etc.).

A juvenile offender wrote an apology letter. The letter was personally handed over to a victim and his parents who expressed satisfaction. A juvenile victim wanted to know why his mobile phone was stolen. It was important for him to know something about a juvenile offender. Information conveyed to him was that the offender is regularly attending the school, that this was a first time he had stolen something and that he did not know the victim personally.

A mediator was conveying messages between the parties. A juvenile female offender expressed regret and promised that a victim is safe. The dialogue was established via mediator. Girls involved in this case live in a small town near Belgrade. Indirect dialogue contributed to decrease of embarrassing feelings of both parties, to ending the conflict and preventing its occurrence in the future.

In cases of direct mediation, in one case there was only one meeting of the offender and victim, in two cases there were two meetings, and in one case, three meetings were organised. During direct mediation participants sit in a circle: parties usually sit opposite to one another and the mediator is in between. The mediator opens the meeting (session), greets the participants, compliments them for coming and attending the meeting. The mediator once again gives all relevant information about mediation and its aim. This is followed by asking participants who would like to talk first. If nobody is willing to start, the mediator usually gives floor to the juvenile offender first. This is followed by asking the victim to tell his/her story and then parents of both parties. What seems important is to give time to both parties to tell each other something about themselves, pointing to the positive things, to their strengths and capacities, and then to speak about the event which is a cause of gathering. The mediator could also remind parties about what they said during preparatory meetings, and also takes care that participants speak about what happened without trying to justify one's own behaviour. In other words, the mediator encourages parties to try to address the issue from a distance, to be critical, objective as much as possible and self-reflective. The mediator encourages dialogue and helps the parties to direct it. Therefore, the story-telling and dialogue were essential parts of mediation in the analysed cases. At the end of the mediation, the mediator compliments participants for their time and efforts to reach an agreement. Participants usually shake hands.

3.4. The outcome of the mediation

Most mediations ended with an agreement (oral or in writing). In the analysed cases the most often outcomes were apology (oral or in writing), accepting obligation to compensate or repair the damage (e.g. giving back the stolen goods) and to take over some community work (e.g. to repair the furniture in the school, to work on tidying up

the school yard, to plant the trees in the school yard, etc). In one case a juvenile offender accepted to be included in a humanitarian work.

In direct mediations apology is always personal and oral. The mediator checks if the victim is satisfied with an apology and how he/she feels about it. In all analysed cases in which the agreement was made, accepted obligations were fulfilled. This is illustrated by mediator's notes:

Apology letter was handed over to the management of the company. Additionally, mediator personally handed over a copy of the letter to a seller working in the shop on the day when the crime was committed. They were all touched with the words of a juvenile offender. They were interested in the juvenile; they wanted to send him support and wish him to succeed in his decision to work and be able to buy goods and not to still them.

A juvenile apologised to a school management and his friends. He took over responsibility to participate in community work in his school (to help in repairing the furniture in the school).

Mediation ended with an agreement. It was important that parties could talk about the conflict, about what preceded, which contributed to understanding of the whole situation, reconciliation and accepting apology by a victim.

In most cases, the mediator who runs the case was also responsible for supervising fulfilment of the obligations. This was done through contacts with a juvenile offender, while in one case the school took over responsibility to follow the execution of the obligations.

In four cases the process was stopped since the mediator estimated that there is no use in continuing mediation, because the parties gave up from participating or because they solved the conflict with a support of their families and on the initiative of the case manager. Two cases are still at the very beginning of the mediation procedure.

Qualitative analysis of the mediator's notes about analysed cases suggests that in general participants of mediation are satisfied with such an approach to both juvenile offenders and victims, particularly when a victim is an underage person. It was also estimated as positive that through applying this diversion order the community is involved in responding to juvenile delinquency and is active in supporting and assisting juveniles and preventing re-offending. It is important for victims to know why what happened had happened, but also to get to know something about the offender. Another important issue raised by some victims and their parents is that they do not have to go to the court and participate in the court procedure. Therefore, mediation is seen as more effective and efficient way of dealing with the consequences of a crime.

4. CONCLUSION

As pointed out in this paper the aim of diversion order settlement with the injured party is to remove or repair in full or partly damages caused by a crime through compensation, apology, and work or otherwise. Thus, it seems that the focus is on reparation and less on the encounter and dialogue between the parties, which is visible even in the name of this diversion order – settlement, which implicates some material giving. Nevertheless, the practice of the Centre of Social Work in Belgrade suggests that

this diversion order is implemented through mediation, which assumes a more active role of a victim, and which may result in moral and/or material satisfaction of a victim. Therefore, it seems more appropriate to only have mediation as a separate diversion order instead of the settlement with the injured party, as well as not to determine in advance (by the Law) possible outcomes of this process as is the case now. In making this change the legislator would also make a shift from understanding mediation as a form of settlement towards considering it as a form of dialogue about the conflict and its impact on the parties. By making this change the focus would be moved from the outcomes to the process, i.e. from making things right to healing of both parties.

The practice of the Centre for Social Work in Belgrade suggests that diversion order settlement with the injured party is implemented through a classical model of mediation, which implies gradual development of a case with the use of social work methods (the so-called social work case development model) (Price, 1995: 1). This is important for trust building and understanding the very nature of the mediation process, and the inclusion of all relevant stakeholders in the process. The way mediation was organised and implemented in the analysed cases suggests that it is in compliance with crucial international standards and principles, as well as with practice adopted in numerous, primarily European countries (Miers, Willemsens, 2004). Additionally, it is observed that family (parents) of both juvenile offender and victim (when the victim is underage) are involved in mediation. This finding speaks in favour of considering some other restorative approaches to be introduced in responding to juvenile crime in Serbia, such as family group conferences, which would provide space for more active role of a family and the community (community of care) in solving problems in the aftermath of a crime, which is relevant in cases of juveniles (Consedine, 2003; Shearar, Maxwell, 2012; Zinsstag, Teunkens, Pali, 2011; Zinsstag, 2012; Zinsstag, Chapman, 2012; Zinsstag, Vanfraechem, 2012; Vanfraechem, Lauwaert, Decocq, 2012). Therefore, it seems that even cases we analysed were somewhere in between mediation and conference.

Analysed cases suggest that mediation is used for first-time offenders and primarily for property crimes, although there were cases in which crimes against life and limb occurred and juveniles were referred to mediation. Nevertheless, it seems important for the prosecutors to estimate in each particular case the possibility of referring a juvenile to mediation, because there is always a possibility to have a juvenile back into the court procedure and to impose criminal sanctions. So, as the legislator does not limit the use of diversion orders to first-time offenders, the practice should also go in direction of broader use of this form of social response to crime even in cases of re-offending, when other formal criteria is met.

Even though indirect mediation could positively influence juvenile offender and give sense for active participation in solving problems in the aftermath of a crime for a victim, it seems that direct mediation should be given priority as it enables dialogue, which is a core element of restorative processes (approaches) (Ćopić, Nikolić-Ristanović, 2016). Namely, restorative dialogue is inclusive, and it fosters communication between participants who are sharing experiences, perceptions, emotions and perspectives (Ray and Roberts 2007). Dialogue is primarily relationship-oriented: it tries to transform the relationship, which is relevant in cases of juveniles, particularly when an offender and a victim had some relations before the crime was committed. Restorative dialogue is based on mutual respect, acknowledgement and

understanding, which is crucial for accepting accountability by the offender and a healing for both the offender and a victim.

However, the practice of using diversion orders in general and the one that consists of mediation in particular is still rather poor. Therefore, there is a need to bring the by-law that will regulate implementation of diversion orders, but also to work on promoting their broader use in practice. This is particularly important if bearing in mind the fact that participants of mediation in the analysed cases were in general satisfied with such an approach to both juvenile offenders and victims, as it suggests that community really cares about both parties.

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PRIMENA VASPITNOG NALOGA *PORAVNANJE SA OŠTEĆENIM*: PRAKSA GRADSKOG CENTRA ZA SOCIJALNI RAD BEOGRAD

Zakonodavne reforme, koje su počele pre više od jedne decenije, unele su elemente restorativne pravde u krivičnopravni sistem i sistem maloletničkog pravosuđa u Srbiji. Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica iz 2005. godine uneo je, između ostalog, vaspitne naloge kao posebnu vrstu mera, čiji je osnovni cilj nepokretanje krivičnog postupka prema maloletniku ili njegova obustava, dakle, skretanje redovnog sudskog postupka kada god je to moguće. Jedan od zakonom predviđenih vaspitnih naloga je poravnanje sa oštećenim kako bi se naknadom štete, izvinjenjem, radom ili na neki drugi način otklonile, u celini ili delimično, štetne posledice dela. Ovaj rad ima za cilj da predstavi nalaze istraživanja primene ovog vaspitnog naloga u praksi Gradskog centra za socijalni rad u Beogradu u periodu od godinu dana, tj. od februara 2015. do februara 2016. godine. Nalazi su analizirani u kontekstu reforme maloletničkog pravosuđa i trebalo bi da posluže kao osnova za predlaganje mogućih izmena postojećih rešenja i za promovisanje šire primene vaspitnog naloga koji podrazumeva susret i dijalog između maloletnog učinioca i njegove žrtve.

*KLJUČNE REČI: vaspitni nalozi / maloletnici / medijacija / istraživanje /
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