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## Victim-offender Mediation in Poland – The Lay Perspective

**Abstract:** Restorative justice is a complex and multi-faceted concept, the introduction of which does not happen in a socio-political and economic vacuum. Every society engages with restorative justice in its own distinctive way as it is the society – lay people – that is always on the receiving end of restorative solutions. In this article I draw on my doctoral research that explored qualitatively how a small number of Polish people understand punishment and justice, and how their narratives inform the viability of restorative approaches to justice in Poland. In the case of Poland, it seems that the exceptionally limited interest in mediation and paucity of anticipated outcomes of victim-offender mediation is the problem. In order to explore the viability of restorative justice in the Polish context, one must therefore look beyond the legal basis and formal logistics which have been already in place for many years. I propose to consider a macro-sociological perspective, and how lay people's understandings of punishment and justice should be seen as an avenue by which to explore certain preconditions for the viability of restorative justice. The aim of this paper is to argue that the viability of restorative justice should be approached as a process that is influenced by broader socio-economic, political and even linguistic factors.

**Keywords:** restorative justice, victim-offender mediation, lay opinion, criminal justice system, apology.

### Introduction

Restorative justice is a complex and multi-faceted concept, the introduction of which does not happen in a socio-political and economic vacuum. Every society engages with restorative justice in its own distinctive way as it is the society – lay people – that is always on the receiving end of restorative solutions. In this article, I draw on my doctoral research that explores qualitatively how a small number of Polish people understand punishment and justice, and how their narratives inform the viability of restorative approaches to justice in Poland. This publication opens up new

debates on the viability of restorative justice, and this article in particular fleshes out the nature of participants' perceptions of victim-offender mediation, the practice through which the concept of restorative justice was initiated in Poland. In this article, I first briefly introduce the Polish model of victim-offender mediation. I then discuss the nature of the initial responses to mediation based on the participants' knowledge of, support for, and any experience of, victim-offender mediation. This is followed by the discussion on how the participants' views on mediation were articulated in the shadow of the Polish criminal justice system. Next, I explore why the participants viewed mediation as a business-like encounter and finally, I explore the participants' perceptions of apology – something that came up as one of the most interesting findings of the study.

## 1. Methodology

One of the outcomes of “surveying the public mind” is Maruna & King’s observation<sup>1</sup> that “researchers most often describe what the public says it wants without providing information about what underlies the preference”. Considering lay views as social facts like any other, my study was conducted within a constructionist framework that emphasises how knowledge of the studied social reality is subjective, situationally and culturally variable<sup>2</sup>. This particular approach enables researchers to construct knowledge and investigate people’s interpretations which are valid in a given socio-political and economic context. The process of seeking the connection between people’s views and penal issues has emerged as a significant force in the field of criminal policy; however, people’s views have largely been examined through the use of quantitative methods. Contrary to the dominant methodological trends, my study relied on a qualitative approach: 10 focus group and 55 in-depth interviews with 65 lay participants and four mediators that aim to delineate how a number of Polish lay people with different experiences understand punishment and justice, and how these understandings can shed light on the viability of restorative justice in the Polish context.

The sampling strategy was based on theoretical requirements and considerations. Having reviewed the literature on restorative justice and lay people’s views on crime and sanctions, a number of break characteristics needed to be taken into account in order to sample study participants: age, gender, geographic location and prior experience of the criminal justice system, as research suggests these factors could influence the participants’ views on crimes and sanctions. My research was conducted in two settings: one rural, the other urban. The choice of fieldwork locations was

<sup>1</sup> S. Maruna, A. King, *Public opinion and community penalties*, in: T. Bottoms, S. Rex, G. Robinson (eds.), *Alternatives to Prison: Options for an Insecure Society*, Willan Publishing, Cullompton 2004.

<sup>2</sup> A.B. Marvasti, *Qualitative Research in Sociology*, Sage, London 2004, p. 5.

pragmatic (such as geographical familiarity or the existence of a network of people who helped to recruit study participants) and corresponded with the sampling criteria. I set up the following focus groups in each setting: one group of young and one of older participants (unisex) and one group of female-only, and one of male-only participant groups (mixed age). The main fieldwork was carried out between April and September 2013. I began this by conducting focus groups, initially in the rural and then urban locations and then, between July and September 2013, I undertook 41 in-depth interviews with focus group participants as well as additional interviews with people who did not participate in the group discussions. In May and June 2015 additional 10 interviews were undertaken with people who had a significant experience of the Polish criminal justice system. When conducting a qualitative study, it is evident that the sampling technique that is to be used is a non-probability one. Considering the small sample size of this study, the interview data can only suggest possible perspectives and interpretations, not views of the general population in Poland. This process, however, does not preclude observing common themes within and between the group discussions or one-to-one conversations, and all quotations used in this publication aim at reflecting these themes.

## 2. Victim-offender mediation in Poland

The introduction of restorative justice took place at a time of significant modernisation and redesign of criminal justice institutions occurring in the light of a broader post-1989 socio-political and economic change. The Polish Code of Criminal Procedure that was enacted on 6 June 1997 and came into force on 1 September 1998 provided a legal framework that allowed for the use of victim-offender mediation with adult offenders. In Poland, a number of factors drove the introduction of restorative justice. Firstly, one could argue that the first set of interests in victim-offender mediation lies in the fact that Poland, after the fall of communism, not only joined international organisations and implemented recommended legal standards, but also received policy-related advice and assistance from abroad. This “international aspect” of victim-offender mediation is frequently addressed when discussing the origins of the intervention in Poland (see B. Czarnecka-Działuk, D. Wójcik<sup>3</sup>; Płatek<sup>4</sup>; Zalewski<sup>5</sup>). Secondly, it is equally important to acknowledge the contribution

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<sup>3</sup> B. Czarnecka-Działuk, D. Wójcik, *Mediacja w sprawach nieletnich w świetle teorii i badań* (Mediation in juvenile cases in the light of theory and research), Typografia, Warszawa 2001.

<sup>4</sup> M. Płatek, *Wstęp I, czyli o miejscu i roli sprawiedliwości naprawczej w systemie sprawiedliwości karnej*, in: M. Płatek, M. Fajst (eds.), *Sprawiedliwość naprawcza. Idea. Teoria. Praktyka* (Restorative Justice. Idea. Theory. Practice), Liber, Warszawa 2005.

<sup>5</sup> W. Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego?* (Restorative justice. The beginnings of the evolution of the Polish criminal law?), Arche, Gdańsk 2006.

of the advocates of Polish restorative justice and their hopes for victim-offender mediation. Recent scholarship on restorative justice in the West suggests that integrating restorative justice practices may help to “re-civilize criminal justice”<sup>6</sup> or make “criminal justice more restorative”.<sup>7</sup> This is partially in accordance with what was expected of restorative justice in Poland in the 1990s. As a novel solution in the Polish criminal justice system, victim-offender mediation was also associated with a fundamental change of criminal justice philosophy and policy aimed at the rationalisation and liberalisation of criminal law and of responses to offences.<sup>8</sup> Mediation as a “pragmatic solution” brings a third set of interests to the surface. The intervention could also be seen as part of the transformation process, behind which were bureaucratic reasons such as court case overload, duration and delay of criminal proceedings and social costs. Considering the transformation struggle and the sudden increase in recorded crime rates and court cases, victim-offender mediation was believed to be a remedy for the crisis of the criminal justice system, and widely practised (Cielecki<sup>9</sup>; Juszkiwicz<sup>10</sup>; Politowicz<sup>11</sup> 2012).

The Polish model of victim-offender mediation is a legally-based dependent intervention that can be initiated and finally resolved by criminal justice agencies. It is very important to emphasise that Polish mediation is neither a typical alternative out-of-court procedure nor a diversion practice. It is thus probably better to say that victim-offender mediation in Poland came to be seen as an ancillary mechanism to traditional sentencing conventions. Nonetheless, the number of cases referred to mediation in Poland is still relatively small. Between 2004 and 2015, mediation referrals were on average in 3,858 cases per year.<sup>12</sup> For example, in 2013 mediation was ordered in 0.0014% of all criminal cases adjudicated in Polish courts.<sup>13</sup> It is

<sup>6</sup> J. Blad, *Civilisation of criminal justice: Restorative justice amongst other strategies*, in: D.J. Cornwell, J. Blad, M. Wright (eds.), *Civilising Criminal Justice*, Waterside Press, Sherfield-on-Loddon 2013, p. 240.

<sup>7</sup> L. Walgrave, *From civilising punishment to civilizing criminal justice: From punishment to restoration*, in: D.J. Cornwell, J. Blad, M. Wright (eds.), *Civilising Criminal Justice*, Waterside Press, Sherfield-on-Loddon, 2013, p. 373.

<sup>8</sup> M. Nielaczna, *The mediation and restorative justice movement in Poland*, in: D. Miers, I. Aertsens (eds.), *Regulating Restorative Justice: A Comparative Study of Legislative Provision in European Countries*, Verlag für Polizeiwissenschaft, Frankfurt am Main 2012.

<sup>9</sup> T. Cielecki, *Bezdroża mediacji*, in: L. Mazowiecka (ed.), *Mediacja (Mediation)*, Wolters Kluwer, Warszawa 2009.

<sup>10</sup> W. Juszkiwicz, *Reparation as a mitigating circumstance when imposing a sentence – mediation in Poland*, in: *European Best Practices of Restorative Justice in the Criminal Procedure, Conference Publication. 27–29 April 2009*, Budapest 2010.

<sup>11</sup> K.A. Politowicz, *Mediacje w postępowaniu karnym wykonawczym*, in: M. Tabernacka, R. Raszevska-Skałeczka (eds.), *Mediacje w społeczeństwie otwartym (Mediation in an open society)*, Gaskor, Wrocław 2012.

<sup>12</sup> Mediation in criminal cases 1998, Polish Ministry of Justice 1998–2015 Available at: <https://www.mediacja.gov.pl/Statystyki.html> [accessed: 17.01.2018].

<sup>13</sup> K.A. Politowicz, *Mediacje w postępowaniu...*, *op. cit.*

probably safe to say that, with a few exceptions, victim-offender mediation has still been viewed as a “dead institution” in Poland.<sup>14</sup> Undoubtedly, the Polish model has been operating within the limitations imposed by the criminal justice system and is definitely still at the modelling stage. Braithwaite says that: ‘we are still learning how to do restorative justice well’,<sup>15</sup> and Walklate poses important questions<sup>16</sup> that should help contextualise the viability of restorative justice in any given society: what works, for whom, and under what conditions? Such questions foreground a broader perspective on the viability of restorative justice. Since much of Polish academics’ focus to date has been on technical aspects of the subject, the point of departure for my research, including this publication, is to redirect the discussion on so-called “Polish mentality”, perhaps fear of the unknown and the prevailing unwillingness to try new solutions among lay Polish people. In so doing, I would like to draw on the voices of “ordinary” people in order to shed light on the viability of victim-offender mediation in Poland.

### 3. “Alternative medicine and an old herbalist lady”

The review of the literature demonstrates a limited awareness of restorative practices among lay people. In terms of people’s knowledge about restorative practices, focus group research with lay people conducted in England<sup>17</sup> and New Zealand<sup>18</sup> suggests that the concept of restorative justice tends to be poorly understood, as police, courts and prisons are the components of criminal justice lay people are usually familiar with (see Doble, Greene<sup>19</sup>; Roberts, Hough<sup>20</sup>; Tränkle<sup>21</sup>). Due to limited

<sup>14</sup> A. Rękas, *Mediacje w Polsce na tle doświadczeń państw Unii Europejskiej*, in: *Mediacje w krajach Unii Europejskiej i Polsce* (Mediation in Poland and other EU countries), Konferencje i Seminaria, 4(48)04, „Biuletyn Biura Studiów i Ekspertyz Kancelarii Sejmu”, Kancelaria Sejmu, Warszawa 2003. Available at: [http://biurose.sejm.gov.pl/teksty\\_pdf\\_03/kis-48.pdf](http://biurose.sejm.gov.pl/teksty_pdf_03/kis-48.pdf); [http://biurose.sejm.gov.pl/teksty\\_pdf\\_03/kis-48.pdf](http://biurose.sejm.gov.pl/teksty_pdf_03/kis-48.pdf) [accessed: 01.05.2016].

<sup>15</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, Oxford 2002, p. 565.

<sup>16</sup> S. Walklate, *Researching restorative justice: Politics, policy and process*, “Critical Criminology” 2005, no. 13, p. 170.

<sup>17</sup> Her Majesty’s Inspector of Constabulary. *The General Public’s Response to Restorative Justice*, Community Resolution. Somerset 2012.

<sup>18</sup> Ministry of Justice New Zealand *Restorative Justice: A discussion paper 1996*. Available at: <http://www.justice.govt.nz/publications/publications-archived/1996/restorative-justice-a-discussion-paper-1996> [accessed: 10.10.2011].

<sup>19</sup> J. Doble, J. Greene, *Attitudes towards Crime and Punishment in Vermont. Public Opinion about an Experiment with Restorative Justice*, Doble Research Associates, New York 2000.

<sup>20</sup> J.V. Roberts, M. Hough, *Understanding Public Attitudes to Criminal Justice*, Open University Press, Maidenhead 2005.

<sup>21</sup> S. Tränkle, *In the shadow of penal law: Victim-offender mediation in Germany and France*, “Punishment & Society” 2007, vol. 9, no. 4.

knowledge and poor understanding, scholars emphasise that people would be (or would be more) receptive to restorative justice practices if the aims and nature of these practices were made clear (Stalans<sup>22</sup>). It is worth considering whether the “poor knowledge and understanding” relates solely to restorative practice terminology (e.g. mediation, conferencing, circles), lack of universally agreed-upon definition or difficulties in imagining that there are other methods of conflict resolution besides the traditional criminal justice solutions. For this reason, a definition of victim-offender mediation in both interview guides was included in my research and read out to the study participants once it had been established that they did not know what mediation was. Although there are a number of competing definitions of restorative justice, the following definition of victim-offender mediation was read out to all the study participants, as this one was coined by Polish scholars and reflects the nature of the restorative practice currently available in Poland:

Mediation is based on making attempts to reach a voluntary agreement between victim and offender on compensation of caused material and moral damages, with the assistance of an impartial mediator. It is a process of mutual communication that allows victims to express their wishes and feelings, and offenders to assume responsibility for the results of their crime and start the associated actions<sup>23</sup>.

Although there are a number of competing definitions of restorative justice, the main differentiation occurs between “purists” who argue that restorative justice is a process that involves key stakeholders who address the aftermath of crimes (see Marshall<sup>24</sup>; Bazemore, Walgrave<sup>25</sup>) and “maximalists” who say that restorative justice is an option that encourages outcomes aimed to repair the harm caused by the commission of a crime (see Walgrave<sup>26</sup>). Many justice innovations become hybridised, therefore it comes as no surprise that the definition of Polish mediation reflects to a certain extent both the outcome and process-focused definitions of restorative justice. Although the Polish definition envisages the following outcomes: “compensation for material and moral damages” and “assuming responsibility [by the offender]”, as well as “starting the associated actions”, one could notice that, in the first part of the definition, there is a strong and precise emphasis on restitution,

<sup>22</sup> L. Stalans, *Measuring attitudes to sentencing*, in: J.V. Roberts, M. Hough (eds.), *Changing Attitudes to Punishment: Public Opinion, Crime and Justice*, Willan, Cullompton 2002.

<sup>23</sup> B. Czarnecka-Dzialuk, D. Wójcik, *Victim-offender mediation in Poland*, in: The European Forum for Victim-Offender Mediation and Restorative Justice (eds.), *Victim-Offender Mediation in Europe*, Leuven University Press, Leuven 2000, s. 323 [original translation].

<sup>24</sup> T. Marshall, *Restorative Justice: An Overview*, Home Office Research Development and Statistics Directorate, London 1999.

<sup>25</sup> G. Bazemore, L. Walgrave, *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, Criminal Justice Press, Monsey, NY 1999.

<sup>26</sup> L. Walgrave, *Restorative Justice, Self-interest and Responsible Citizenship*, Routledge, London 2008.

also in the form of compensation – something that may have potentially influenced the interviewees' perspectives on victim-offender mediation.

It came as no surprise that the majority of participants knew very little about mediation and only two of them had any experience of mediation. In one case a young urban female participant revealed that she had mediated while dealing with a family matter, but she did not wish to discuss it further. In the other, a middle-aged female rural participant said that on one occasion she had informally acted as a mediator between neighbours, and this experience made her consider mediation as a promising solution. Although a definition of mediation was provided, a number of “native”<sup>27</sup> responses that reflect the unfamiliarity with mediation were captured. For example, one of the youngest participants asked:

*And what is this? The second thing?* [Whispered comment in reaction to mediation in a focus group with young participants]

The lack of knowledge and general understanding of what mediation is about was also indicated by the mediators.

*People come to mediation with no knowledge whatsoever.* [Mediator 3/I]

Another mediator made an interesting comparison between people's knowledge of mediation and of alternative medicine.

*It's like with seeing a doctor and using alternative medicine* [personification of lawyer and mediation services]. *Fine, I'll go to see the doctor. And with this alternative medicine, you never know what will come out in the wash. So if I go to see a lawyer, then it will work, if I choose to see a mediator, it's like seeing an old herbalist lady.* [Mediator 1/I]

Although it is not surprising to observe that my participants did not know much about mediation, the mediators' comments illustrate that even participating in a mediation session does not guarantee that people understand what they are taking part in. Study findings from France and Germany also demonstrate that even if mediators explain the purpose and aims of mediation, many of the participants still do not know what mediation involves and what people's roles are in such an encounter (see Tränkle<sup>28</sup>). Thus, the perception of mediation as an alternative medicine appears to be very legitimate.

<sup>27</sup> By “native” responses I mean pre-definition responses and spontaneous reactions to mediation.

<sup>28</sup> S. Tränkle, *In the shadow of penal law...*, *op. cit.*

#### 4. Negotiated and conditional receptivity

Despite a limited knowledge of mediation, my next research question was to establish the participants' receptivity to this solution. The study participants were overwhelmingly cautious about the applicability of mediation for serious offences, but indicated strong support for mediation for minor offences. Marshall has emphasised that support for restorative practices for minor offences should be seen as a major limitation because restorative justice brings better results when applied in serious offences. This view is shared by Rossner<sup>29</sup> in her study on the processes and emotions involved in restorative conferences. My study participants suggested that mediation is a good idea for first-time offenders and when the crime was committed "unintentionally", as articulated in a group discussion by this 64-year old male in an urban area:

*As I said before, mediation can be applied when a crime was committed unintentionally. Then it can be discussed with him ... he has to be punished. The form of this punishment can be discussed. And you have to be convinced to a certain degree that it will have an effect, right? In these kinds of situations I believe mediation is better than punishment.*  
[FGUM: P33]

Although throughout all interviews the focus was on criminal offences, the discussion on mediation frequently drifted into the context of civil rather than criminal cases. The extract below demonstrates not only the tendency to associate mediation with civil matters both again the participants' poor knowledge – even in the case of two senior lawyers in an urban area:

*P38: Fine. But when I think of mediation I think of civil proceedings.*  
*P39: It is so-called settlement proceeding, correct?*  
*P38: But what is it about if I can ask? [FGUS2]*

According to a Polish Ministry of Justice survey the percentage of people who would favour mediation over court proceedings to deal with an offence rose from 19% in 2008 to 38% in 2011.<sup>30</sup> The Ministry of Justice study overlooks, however, important information that my study illustrates – mediation may be associated more with civil cases, and people's receptivity to mediation may depend on various factors,

<sup>29</sup> M. Rossner, *Just Emotions: Rituals of Restorative Justice*, Oxford University Press, Oxford 2013.

<sup>30</sup> Ministry of Justice, Poland 2011. Wizerunek wymiaru sprawiedliwości, ocena reformy wymiaru sprawiedliwości, aktualny stan świadomości społecznej w zakresie alternatywnych sposobów rozwiązywania sporów oraz praw osób pokrzywdzonych przestępstwem (The perception of the criminal justice system, the evaluation of the justice reform, the current public knowledge of alternative conflict resolutions and victims' right), TNS OBOP, Warsaw. Available at: <http://ms.gov.pl/pl/informacje/news,3682,wizerunek-wymiaru-sprawiedliwosci-ocena-reformy.html> [accessed: 1.03.2014].

for instance the seriousness of the offence. Thus, people's receptivity to restorative justice interventions requires to be carefully contextualised as this study illustrates that it is a negotiated and conditional process.

## 5. In the shadow of the criminal justice system

The paradox of restorative justice is that its worldwide popularity stems from offering an escape from traditional criminal justice mechanisms,; however, the majority of restorative practices still function on the verge of the criminal justice system. This close and “uneasy” relationship between restorative and conventional justice approaches was also vivid in my participants' interpretations of mediation, which were frequently layered within the interpretations of the Polish criminal justice system. Shapland et al.<sup>31</sup> have argued that restorative justice is necessarily situated and operates in the shadow of conventional criminal justice systems, and this makes for an uneasy relationship. I extend this argument by presenting how the perceptions of the criminal justice system can also be projected onto people's understanding of victim-offender mediation, and how in consequence these projections can form a significant obstacle to the development of restorative justice in a given context.<sup>32</sup>

The pragmatic and “economic” side of mediation was expressed in a number of interviews, for example with a 69-year old senior male interviewee from an urban area who praised the solution as a great tool to cut the costs of the criminal justice system:

*I think that this is one of the best ideas in the whole court system. There are a number of reasons. First of all is that these parties do not try to prove they're right, and stick to their opinions. Generally speaking, every conversation makes sense, makes sense in as much as people exchange views, arguments, etc. To say nothing of the economic side of this undertaking, that it doesn't cost as much, because it costs a fraction of the cost of a court trial. Secondly, it doesn't engage as many people, my background is economics, therefore, I easily convert this into benefits, and here I can see great benefits. If this was possible I would send 75% of all cases to mediation. [I52/I]*

Such perception also mirrors Juszkiwicz's<sup>33</sup> observation that one of the main purposes of introducing victim-offender mediation in Poland was pragmatic, namely

<sup>31</sup> J. Shapland et al., *Situating restorative justice within criminal justice*, “Theoretical Criminology” 2006, no. 10, p. 524.

<sup>32</sup> This argument is discussed at length in the forthcoming publication: A. Matczak, *Is restorative justice possible through the eyes of lay people? A Polish evidence-based case study*, in: T. Gavrielides (ed.), *The Routledge International Handbook of Restorative Justice*, Routledge, London 2018.

<sup>33</sup> W. Juszkiwicz, *Reparation as a mitigating...*, *op. cit.*

to lower the court case overload. Similar expectations were observed in England in the 1980s but they were dashed when it was realised that victim-offender mediation was actually likely to be quite expensive (see Rock<sup>34</sup>).

Although the benefits of mediation in the Polish criminal justice system were also acknowledged by an older married couple who were both retired lawyers, their perception of mediation was exclusively instrumental and aimed at mainly acknowledging the benefits for the court system. More interestingly the wife also recalled a similar ancillary-to-the-court system that had been in place in the past:

*P38: We didn't have it before. But it is ... it should be seen positively because it decreases the courts' caseload...*

*P39: In the first place! Exactly!*

*P38: Right? A lot has been said about the excessive length of proceedings ...*

*P39: The lengthiness.*

*P38: ... many, and this always shortens.*

*P39: In general with all these minor offences the courts should not ... we used to have hmm the Boards. I am not sure ... do they still exist?*

*P38: No, we don't have Boards any longer. We have courts.*

*P39: Exactly. And courts deal with these minor offences. In the past they didn't, that was the role of the Boards. [FGUS2]*

Although it is important to emphasise that the institution mentioned here – the Misdemeanour Boards (*Kolegia ds. Wykroczeń*) – was not a form of restorative justice, the remembering of it might have further consequences. The Boards were established under the communist regime,<sup>35</sup> functioned between 1951 and 2001, and served as out-of-court filtering institutions mainly dealing with petty offences. Although the Boards were presided over by lay people, they had powers to impose a similar range of punishments as ordinary courts.<sup>36</sup> Fajst<sup>37</sup> reviewed and discussed the role of such alternative courts alongside the criminal justice system in the Polish People's Republic. All these “special courts” served as substitute institutions and were implemented at different times throughout the communist rule to serve different needs and interests of the Party (State). While Zalewski<sup>38</sup> argued that the purpose of the involvement of lay people in sentencing and justice administration decisions

<sup>34</sup> P. Rock, *Helping Victims of Crime: The Home Office and the Rise of Victim Support in England and Wales*, Clarendon Press, Oxford 1991.

<sup>35</sup> Although Kwaśniewski (1984) offered to translate *Kolegia* as citizens' courts, I decided to retain the term Misdemeanour Boards, as in my view this translation better reflects the functioning of the institution.

<sup>36</sup> *Dziennik Ustaw* [Journal of Laws] (1971), no. 12, item 118.

<sup>37</sup> M. Fajst, *Udział czynnika społecznego w wymiarze sprawiedliwości PRL* (The involvement of lay people in the socialist criminal justice system), „*Studia Iuridica*” 1998, vol. XXXV, no. 35.

<sup>38</sup> W. Zalewski, *Sprawiedliwość naprawcza...*, *op. cit.*

at the time was to increase overall trust in the criminal justice system, Fajst<sup>39</sup> long argued that the subject is more complex as there were a number of rationales behind the establishment of these courts. First, they were to fight political opponents and praise the Party's supporters; then, to bring the justice system closer to the Soviet solutions and reflect Marxist ideology; in the 1960/1970s, to stratify the modes of crime resolution through the establishment of various local commissions; and then, finally, in the 1980s, to be perceived as the State's readiness to accept certain democratic solutions and have a dialogue with society (*ibid*). What is of great interest here is Fajst's<sup>40</sup> observation that the inclusion of words like "social" or "citizen" is a misnomer as the courts' benches were never democratically elected, and their decision making was influenced by politicians to an even greater extent than that of traditional courts. More significantly, Fajst<sup>41</sup> also argued that the experience of the socialist model of "alternative" courts has affected the courts' prestige since 1989 and influenced people's current distrust of other institutions and solutions aimed at informal conflict resolution. This is a highly valuable insight that might also assist to understand the limited use of victim-offender mediation in Poland.

My next point is about the perception of mediators that was also articulated against the backdrop of the Polish criminal justice system. In my study, mediators were not seen as officials, their professional standing was questioned as the following excerpt illustrates. This 30-year old urban female professional said that the informality of mediation could bring about the risk of secondary victimisation:

*But what guarantee do we have that this impartial mediator is really impartial? And how can we be sure that the offender after all will not put pressure on the victim to agree to the proposed agreement? With some cases it would be fine, but there are situations when not everything is so objective and I am definitely against solving all cases this way, because for me it's like sweeping the conflict under the carpet. I think that there has to be a clear message sent to the public that there are some sorts of behaviours and crimes that have to be looked at objectively. And such a mediator should not have entirely the same prestige as an independent judge. [I53/I]*

As in Tränkle's study,<sup>42</sup> it was also apparent in my research that the judiciary is respected more than the profession of the mediator, whose status remains unknown to the majority of population. On closer inspection it might be that the role of the mediator is not as clear and transparent to lay people as the roles of other more traditional criminal justice professionals, commonly discussed and featured in the media. Interestingly, such a view was echoed in my conversations with Polish mediators:

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<sup>39</sup> M. Fajst, *Udział czynnika społecznego...*, *op. cit.*

<sup>40</sup> *Ibidem.*

<sup>41</sup> *Ibidem.*

<sup>42</sup> S. Tränkle, *In the shadow of penal law...*, *op. cit.*

*I think the word mediation ...courts, police, prison these are the kind of words that can be automatically visualised. On the other hand, if I asked the average Joe: shut your eyes and tell me what you think when I say mediation? That would be interesting. [Mediator 1/I]*

Not only lay people's distrust of mediation/mediators might be one of the challenges for further development of restorative justice in Poland, since the unwillingness to practise mediation on the part of criminal justice professionals has also been documented. Mediation is a new profession that has emerged to provide an alternative – competition – to traditional lawyers.<sup>43</sup> Czarnecka-Dzialuk<sup>44</sup> identified a number of barriers to mediation and the prevailing unwillingness from criminal justice professionals is one of them. While Płatek<sup>45</sup> explained that the lack of trust in mediation among criminal justice professionals might be rooted in the fear that mediation could prolong the already significant length of court proceedings, Salwa<sup>46</sup> argued that, among legal professionals (prosecutors in particular), mediation is viewed as an unnecessary institution, another EU recommendation or an exotic *idée fixe*. Wójcik (2010) corroborates this observation and refers to her research with Polish judges in 2004. Among the reservations about mediation, the judges interviewed spoke of the possibility of prolonging court proceedings, inefficiency of mediation, mistrust towards mediators, lack of suitable cases for mediation and limited interest from the parties. Wójcik also suggested that one of the disappointing findings was to hear from the judges that it is “easy” to run mediation and they could actually do it themselves. This observation is also echoed in a quantitative study by Sitarz et al.<sup>47</sup>, which illustrates a rather low interest in mediation among Polish judges and prosecutors. Despite its low sampling size (174 respondents – 110 prosecutors; 64 judges), the study shows a rather pessimistic tendency that the willingness to refer cases to mediation among criminal justice professionals is very low (36% of those who took part in the study referred a case to mediation within three years prior to the time when study was carried out).

<sup>43</sup> D. Roche, *Dimensions of restorative justice*, “Journal of Social Issues” 2006, vol. 62, no. 2, p. 217–238.

<sup>44</sup> B. Czarnecka-Dzialuk, *Wprowadzenie mediacji między ofiarą i sprawcą – polskie doświadczenia i perspektywy*, in: L. Mazowiecka (ed.), *Mediacja (Mediation)*, Wolters Kluwer, Warszawa 2009.

<sup>45</sup> M. Płatek, *Restorative Justice as a mean to effective crime control and alternative to imprisonment. Conflict as property revisited*, “Sociologija Mintis Ir Veiksmas” 2007, vol. 2, no. 20.

<sup>46</sup> T. Salwa, *Mediacja – wyzwanie dla prokuratora*, in: M. Tabernačka, R. Raszewska-Skałeczka (eds.), *Mediacje w społeczeństwie otwartym (Mediation in an open society)*, Gaskor, Wrocław 2012, p. 23.

<sup>47</sup> O. Sitarz, A. Jaworska-Wieloch, D. Lore, A. Sołtysiak-Blachnik, B. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych, cz. II: Opinie skazanych oraz sędziów i prokuratorów (Attitudes towards mediation amongst judges, prosecutors, and parties in the proceedings – a quantitative study. Part II Judges, prosecutors, and serving prisoners on mediation)*, „Czasopismo Prawa Karnego i Nauk Penalnych” 2012, no. 12.

## 6. Mediation as a negotiation of interests

While discussing restorative justice, it is not only important to view crime as a conflict but also to acknowledge and respond to the harm experienced by victims in the form of reparation, as this makes a restorative approach to justice.<sup>48</sup> Braithwaite<sup>49</sup> has proposed a broad view of reparation that falls under the process of restoration – a process that can restore property loss, injury, a sense of security, dignity, a sense of empowerment, deliberative democracy, harmony based on a feeling that justice has been done and restoring social support. Furthermore, Trenczek<sup>50</sup> addresses reparation as a broader element that also includes non-material damages and symbolic actions, while restitution in his view is a narrower idea that means to replace or repair only material damage. The restorative orientation of financial restitutions needs to be explored further by researchers in the field as Daly<sup>51</sup> points out that compensation is already part of sentencing, therefore restitution in the restorative justice setting must incorporate other restorative values. Nevertheless, Shapland et al.,<sup>52</sup> while evaluating the restorative justice schemes in England and Wales, reported that financial reparation was a rare form of outcome. Other research findings suggest that victims perceive an apology, as more, or as equally important, as financial reparation (see Umbreit et al.)<sup>53</sup> My research, however, demonstrates the contrary.

In my study, reparation through the mediation process was more likely to gain people's support when harm falls into the category of property loss or criminal damage rather than psychological injury or death, and the participants' main perception of mediation was as an encounter to decide predominantly on financial restitution. The excerpt from an interview with a 67-year old male clearly demonstrates this:

*Indeed, when the harm that was caused is not, let's say irreversible, where the harm is more of a financial rather than moral nature. When no one lost his life, then it [mediation] could be ok. But in cases where a serious offence was committed, then ... [P35/I]*

<sup>48</sup> D. Van Ness, K.H. Strong, *Restoring Justice*, Anderson Publishing Company, Cincinnati, OH 1997.

<sup>49</sup> J. Braithwaite, *Restorative Justice and a Better Future Dorothy J. Killam Memorial Lecture*, Dalhousie University 1996.

<sup>50</sup> T. Trenczek, *Beyond restorative justice to restorative practice*, in: D.J. Cornwell, J. Blad, M. Wright (eds.), *Civilising Criminal Justice*, Waterside Press, Sheffield-on-Loddon 2013, p. 409.

<sup>51</sup> K. Daly, *Restorative justice. The real story*, "Punishment and Society" 2002, vol. 4, no. 1.

<sup>52</sup> J. Shapland et al., *Situating restorative justice...*, *op. cit.*

<sup>53</sup> M.S. Umbreit et al., *Restorative justice in the twenty-first century: A social movement full of opportunities and pitfalls*, "Marquette Law Review" 2005, vol. 89, no. 2.

The above excerpt presents a view where victim-offender mediation can be perceived as an out-of-court solution that should deal with offences where harm can be somewhat “calculable”. Although Van Ness and Strong<sup>54</sup> have argued that ‘a reparative sanction such as restitution then is one that requires the offender to recompense the victim for the harm sustained (...), restitution is made by returning or replacing property, by monetary payment or by performing direct services for the victims. The narratives of this study’s participants suggest that there is a risk of seeing mediation as a way to decide mainly on financial compensation. Such a perception of mediation does not necessarily reflect the restorative concept, and the following quote from a male interviewee interestingly illustrates this point:

*Where mediation would be effective, for example ... let’s say that the victim agrees to, for example, to get something repaired, the offender smashed through the victim’s fence for example. What I am saying is based on my own experience and what I have seen, and for example, it is not necessary to take the police and court’s time, you know. The offender accepts it: I was driving too fast, my car skidded, I damaged the fence, how much does it cost? ... and someone estimates that 1000zl – here you are, I pay 1000 zl and this is how they sort things out. And in this case they don’t get involved, the police can fine him for careless driving, but neither the prosecutor is involved nor the case is continued, because there are more important things and the case is sorted. [P17/I]*

It is worth looking into how the participants perceived harm and what in their views could be restored, but also how they discussed mediation encounters in general. In their narratives, the subject of money or calculation would be frequently included, and the verb used most commonly to describe the purpose of mediation meetings was to “sort something out” (Polish transl. *dogadać się*). The next excerpt comes from an 80-year old male interviewee from a rural area. His comment was cautiously articulated, however, by using the verb “hustle”<sup>55</sup>, he demonstrated that people might misuse the mediation practice for the purpose of financial gain:

*Yes, there has to be a mediator. One-to-one, why not? But he [mediator] should be there, otherwise it would be like ‘I won’t give him this, I won’t, and this and that ... you know. People can hustle. [I43/I]*

One could argue that such a perception of victim-offender mediation might have been a result of the nature of the definition that was read out to the study participants. However, the perception of mediation as an avenue to decide mainly on financial gain was also mirrored during the conversations with the mediators. One female mediator remarked on how frequently victims came to mediation sessions and demanded enormous financial compensation and how “this attitude” still surprises her:

<sup>54</sup> D. Van Ness, K.H. Strong, *Restoring Justice, op. cit.*, p. 91.

<sup>55</sup> Meaning: making money quickly through illegal means.

[Laugh] *and the other thing is about the victims, hmm oh they are various people. It depends what happened, because it depends on the case and how big is the harm that was caused. But sometimes they smart off, they know that they could be quids in ... What do you think Miss how much I can gain out of it?* [Laugh] [Mediator1/I]

Another female mediator said:

*I couldn't say of which cases there are more, those that you can tell that the parties are content or those when you know we just came, sorted it out but not entirely because perhaps we could have squeezed something better out of this case. That's the way it is sometimes. This is my impression, feeling ...this case; however, it started from big money and ended up with a few thousands, I saw how completely content this person was, the person who got the money. Seriously. So you see it's difficult to tell what was more important.* [Mediator 3/I]

In terms of people's support for restorative practices, research demonstrates that restitution and compensation are key issues that attract significant support among lay people (see Ministry of Justice NZ<sup>56</sup>; Roberts, Hough<sup>57</sup>), however, still little is known about the nature of this support. A similar observation about the view taken by some of this study participants was made by Tränkle<sup>58</sup>, who says: 'the first risk is that the mediation process may be reduced to a simple negotiation of interests (...) some victims try to make money by claiming more compensation than would be appropriate.' This observation is analogous to the one that appears in the report on restorative justice in New Zealand, also based on focus group discussions with lay people.<sup>59</sup> The authors warn that the success of restorative practice can be challenged by the vindictive attitudes of some of the people.

The Polish context provides an interesting avenue to explore possible explanations for the perception of victim-offender mediation as a negotiation of interests. In one of the in-depth interviews, a 30-year old male interviewee living in an urban area said:

*I think that this would be great, but unfortunately in many cases ... with such a strange you know, strange Polish mentality, I don't know, triggered by frustration you know, salary frustration, it could lead to the situation where the victim, despite already having received ... restitution for the damage, somehow still tries to scrounge and ... still stands fast to gain something else ...* [150/I]

This craving for financial gain can be viewed as a consequence of post-1989 political and economic policies and the transformation from a socialist to a market

<sup>56</sup> Ministry of Justice New Zealand Restorative Justice..., *op. cit.*

<sup>57</sup> J.V. Roberts, M. Hough, *Understanding Public Attitudes...*, *op. cit.*

<sup>58</sup> S. Tränkle, *In the shadow of penal law...*, *op. cit.*, p. 402.

<sup>59</sup> Ministry of Justice New Zealand Restorative Justice..., *op. cit.*

society. The nature of the “Polish mentality” and the influence of the post-communist changes was reflected in another interview with a 88-year old female participant from a rural area, who said the following about mediation:

*I48: It'd be good, but you know nowadays people are very bitter, so I am not sure if ...*

*AM: And why do you think this way?*

*I48: This change in general, this change is so enormous! Do you realise?*

*AM: Under the communist rule .../?*

*I48: The change is so enormous! And it is not sure whether this change has changed the people because ... priests are different, and church services are different and the weather is different, and the environment, the whole world is different! And the weather... even the weather has changed! [Laugh] and this influences people, you know, it does, it does influence! [I48/I]*

The above quotation is a powerful illustration of the widespread, multidimensional changes that have been observed by lay Polish people after the collapse of communism. It would have been impossible for ordinary people not to be affected, as the interviewee described they have become “bitter” about their social status. Another 69-year old male participant from an urban area suggested that the post-1989 changes made Polish society “nervous” because of the lack of transparent regulations applied in public administration and the rise of nepotism:

*Because in the administration and in the economy ... being on edge ... nervousness. Because the administration is the economic nervousness (...) another thing is that the way we hire is not through how you call it ... open competition ...but ... through mates, connections and that's all. [P36/I]*

Furthermore, the next excerpt illustrates how significant the financial aspect was in the participants' general accounts. In disbelief, I needed to confirm with this male middle-aged interviewee his observation that “money” is currently doubly glorified as a lifesaver and a means of advancement:

*AM: So this is what you think that having money is so important in the whole criminal justice system?*

*I45: What can you do without money nowadays; I think money is important nowadays.*

*And you could somehow redeem your sins, couldn't you? At least partly. [Laugh] [I45/I]*

Another explanation as to why people see the financial side of the victim-offender encounter was given by a male mediator who indicated lack of work as the predominant force behind such an attitude:

*If this person had a job, s/he wouldn't demand so much money. The issue is ...I often ask, actually I always ask: why do you think this hmm why do you think this particular amount of money would cover your moral damages? Oh because you know, my daughter*

*has told me that. And how would you make a valuation of it? Then he starts to think ... actually it really looks stupid. Two thousand zlotys, would you be able to pay this money yourself? No. Perhaps one thousand? Or maybe another form of compensation? You know the word of apology is also enough in society, can be enough. What do you think about that? Just so. [Mediator 3/I]*

The aforementioned views of the study participants and the mediators have led to an interesting discussion about the financial side of reparation and (mis)perception of the purpose of victim-offender mediation. This theme demonstrates that mediation encounters and the perception of harm do not happen in a social vacuum. Walklate<sup>60</sup> has argued that some socio-economic conditions might facilitate restorative justice, while others might not. It was evident in my study that victim-offender mediation might be approached by some people as an opportunity to “channel their economic insecurities”.

Another line of interpretation lies in the concept of restorative justice as a “traveling concept” discussed by Karstedt<sup>61</sup>. The very first idea of mediation as a restorative practice came to Poland from Germany, and Miers and Aertsen<sup>62</sup> have observed that in Germany the generic term for victim-offender mediation translates as “offender-victim” settlement. This would also resonate with the finding that the study participants frequently associated mediation with civil rather than criminal matters. Therefore, the idea of “settling” cases rather than “discussing” them might be one of the consequences of the policy traversed to Poland from Germany in the first place. The case may well be that, as Braithwaite<sup>63</sup> cites Clifford Shearing: ‘restorative justice seeks to extend the logic that has informed mediation beyond the settlement of business disputes to the resolution of individual conflicts that have been traditionally addressed within a retributive paradigm.’ Nevertheless under the guise of interest in restorative practice, such as mediation, there is a risk of pursuing individual intentions to perceive mediation in Poland more as a practice to gain compensation and perhaps seek a degree of economic justice.

A similar remark was made by Fellegi<sup>64</sup> in the context of the Hungarian system of mediation. She observed that cases with no financial loss are rarely referred to victim-offender mediation, and the Hungarian authorities underestimate the significance of non-material reparation. This study also suggests that there is a risk in perceiving mediation as a mode to decide on compensation rather than restore

<sup>60</sup> S. Walklate, *Researching restorative justice...*, *op. cit.*, p. 174

<sup>61</sup> S. Karstedt, *Durkheim, Tarde, and beyond: the global travel of crime policies*, “Criminal Justice” 2002, vol. 2, no. 2.

<sup>62</sup> D. Miers, I. Aertsen (eds.), *Regulating Restorative Justice...*, *op. cit.*, p. 523.

<sup>63</sup> J. Braithwaite, *Restorative Justice...*, *op. cit.*, p. 10.

<sup>64</sup> B. Fellegi, *The Restorative Approach in Practice: Models in Europe and in Hungary. European Best Practices of Restorative Justice in the Criminal Procedure. Conference Publication*, Ministry of Justice and Law Enforcement of the Republic of Hungary, Budapest 2010.

“non-calculable” harm – a perception that is rather distant from the main principles of restorative justice. Although the majority of study participants had no experience of mediation, their views indicate what sort of attitudes and expectations people may come to mediation sessions with, as was demonstrated in the mediators’ accounts.

## 7. Apology

Apology is a speech act uttered by a wrongdoer to acknowledge responsibility for the offence and request forgiveness (Tavuchis<sup>65</sup>). Roberts et al.<sup>66</sup> observed that when ‘someone steps on your toes, or bumps into you on the underground, your reaction will be quite different depending upon whether they apologize or not’. From the restorative justice perspective, Braithwaite<sup>67</sup> has argued that apology is one of the elements that helps to evaluate the restorativeness of justice processes. Roberts et al.<sup>68</sup> reviewed a number of studies that suggest that people attribute less blame to people who commit minor offences and apologise, and in brief apologies decrease the severity of punishment. The fact that offenders’ apologies are viewed with scepticism is also reflected in the evaluation of restorative justice practices in England and Wales (see Shapland et al.,<sup>69</sup> where the authors argued that apology in serious cases or with adult offenders should become a more complex and evidenced act addressed to several audiences. Therefore, one of the questions put to the study participants concerned the issue of apology and whether it matters when dealing with offenders. Although the participants’ opinions on the importance of apology varied widely, overall the practice of apologising did not lie at the heart of their views. The strongest point as far as the importance of apology is concerned was whether it is genuine or heartfelt.

In the individual interviews, some study participants pointed out that offenders sometimes become disconnected from their actions and as a result unaware of the consequences of committing a crime. This corroborates the argument on techniques of neutralisation presented by Sykes and Matza.<sup>70</sup> They have argued that delinquency is ‘based on unrecognised extension of defences to crimes, in the form of justifications for deviance that are seen as valid by the delinquent but not by

<sup>65</sup> N. Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation*, Stanford University Press, Stanford 1991, p. 17.

<sup>66</sup> J.V. Roberts, M. Hough, *Understanding Public Attitudes...*, *op. cit.*, p. 134.

<sup>67</sup> J. Braithwaite, *Restorative Justice...*, *op. cit.*

<sup>68</sup> J.V. Roberts, M. Hough, *Understanding Public Attitudes...*, *op. cit.*, p. 134, 135.

<sup>69</sup> J. Shapland et al., *Situating restorative justice...*, *op. cit.*

<sup>70</sup> G.M. Sykes, D. Matza, *Techniques of neutralization. A theory of delinquency*, “American Sociological Review” 1957, vol. 22, no. 6.

the legal system or society at large.<sup>71</sup> This theory is perfectly echoed in the following excerpt that comes from an interview with a 71-year old retired widow:

*You see, there are a handful of people, that can't even say a word or show compassion, don't even say I am sorry, it's so hard for them that the words stick in their throat. But I think it is normal, that they should ... if he feels guilty, he should apologise to the victim, their families or, or ... he should. But it depends on his character, upbringing. He might have never said sorry in his life, he doesn't know what it is and what it's for. It happens like that too. He has never apologised to anyone, and suddenly he has to, for what? Well, it is him who made a mistake. [P1/I]*

Furthermore, Shapland et al.<sup>72</sup> have offered a psychological perspective on apology, suggesting that restorative justice interventions may bring a “feeling of closure” enabling the parties involved to move on. Any encounter between the interested parties can prevent victims and communities from retaining the destructive effects of unresolved feelings of anger and revenge. This view was also echoed in two interviewees’ narratives that mirror the importance of an apology from the victim’s perspective; in one of them, a 65-year old female teacher said:

*Well, I think it's rather important. Maybe at the beginning when ... well, it depends what it is all about, cos if someone steals something and apologises then it's definitely much easier to swallow. But someone commits a more serious crime; I think that despite the time lapse it's still important for the victims that someone apologised. I don't know. It seems that some things have to be closed even after many years. It will never be possible to strictly close it but ... it's perhaps important that this offender understands something. [P34/I]*

The above comments reflect the argument that apology can be perceived as a mechanism to trigger remorse in the offenders or break their neutralisation techniques. However, the participants’ overwhelming scepticism about the power and sincerity of apology has led to exploring a number of potential interpretations of this finding.

The perception of apology among the study participants as less meaningful may be a consequence of interpreting apology within the framework of the conventional justice system, where the expression of apology is limited and frequently managed by lawyers. Some interviewees in my study interestingly pointed out that making an apology is “just” an act; it is just an etiquette to follow, especially if it is within a court setting. Below is a comment made by a male interviewee that shows how the importance of apology can be perceived through the lens of court settings:

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<sup>71</sup> *Ibidem*, p. 666.

<sup>72</sup> J. Shapland et al., *Situating restorative justice...*, *op. cit.*

*Apologies, remorse. No, this is just etiquette. That's what I think, he showed remorse, no remorse – perhaps it works in a way. Today I have seen a case of a Polish couple who beat their child in England<sup>73</sup>, they didn't show any remorse. It's not only that it's a very serious crime, but not showing remorse is like the last nail in their coffin in this case. So probably yes, it's important though. [P35/I]*

This observation resonates with Gruber's<sup>74</sup> point made in *I'm Sorry for What I have Done*,<sup>75</sup> where the research findings suggested that apology serves as a ritualised formula that can influence the defendant's sentence. Therefore, Shapland et al.<sup>76</sup> encourage to differentiate court- and "other" settings-based apology and argue that: 'in restorative justice situated within criminal justice system there are at least two audiences for these apologies, so apologies are an even more complex task, needing to reach out in two directions, to the victim and to the court/society'.

Furthermore, the quotation below that comes from a discussion with two senior participants (lawyers) illustrates again how the act of apologising is undermined by the participants who are also criminal justice professionals:

*P38: Apologies have to be genuine.*

*P39: Exactly!*

*P38: And sometimes they are not genuine so the court does not pay attention to them. When you have a trial in criminal proceedings then the court should of course take remorse as a mitigating factor, right? Then the lawyer tells the person ...//*

*AM: Show remorse.*

*P39: Yes! Eat humble pie!*

*P38: What to say? – well, that you regret and you say sorry. And then such a hoodlum stands up and says boldly that he is sorry for what he has done. And deep down ...*

*P39: With face that he will go out and do the same. Most of the time it is like this.*

*P38: This is why the court has to look at what is the nature of this apology (...)*

*AM: Do you recall any case where someone very genuinely showed remorse?*

*P38: Somehow I don't recall it. [Laugh]*

*P38: Perhaps it happened but I didn't pay attention to it. [FGUS2]*

The above comment relates to the contention presented earlier that the participants' views of victim-offender mediation were expressed in the shadow of the Polish

<sup>73</sup> The interviewee referred to Daniel Pelka's case, whose parents were found guilty of murder in July 2013 at the Birmingham Crown Court. More information available at <http://www.bbc.com/news/uk-england-coventry-warwickshire-24106823> [accessed: 5.06.2016].

<sup>74</sup> M.C. Gruber, *I'm Sorry for What I Have Done. The Language of Courtroom Apologies*, Oxford University Press, Oxford 2014.

<sup>75</sup> The author examined a variety of US-based allocutions – a formal speech directed at the judge by the defendant prior to sentencing.

<sup>76</sup> J. Shapland et al., *Situating restorative justice...*, *op. cit.*, p. 514.

criminal justice system – something that resonates with Tränkle's<sup>77</sup> observation that mediation participants stick to the logic and principles of a penal procedure and project courtroom procedures onto mediation sessions. Therefore, when discussing the role of apology within other (restorative) settings, the perception of apology through the court lenses might limit its importance among lay people.

Next, it is important to acknowledge that apology is also culturally constructed. Roberts et al.<sup>78</sup> suggest that 'apologies for reprehensible conduct are expected in most cultures and have an effect on public perception of fairness and sentencing preferences.' Even though the notion of apology is discussed in the literature as having the same meaning around the world, it is worth examining the extent to which apologies are used and if the meaning they have is the same in every society.<sup>79</sup> For instance, South Africans strongly expect a gesture of apology and remorse as they believe this is essential for a victim's process of healing.<sup>80</sup> However, Hickson<sup>81</sup> gives the example of Iran where apologies are frequent but the purpose of making them is actually to excuse the offender from responsibility. The unimportance of apology in the Polish context was illustrated in one focus group with young participants from an urban area (born after 1989) by a 22-year old female:

*I don't think people often apologise to each other ... that's what I think (...) they wouldn't speak to each other, no one says sorry and that's fine. [FGRY:P8]*

The limited confidence in apology was also interestingly discussed in an interview with a 39-year old female participant who said that Polish people just do not know how to apologise:

*We don't know how to apologise, but perhaps we don't know how to forgive so this would be, because I suspect that if one was to apologise this had to be in someone's presence. Whether there is a probation officer or someone else who is supervising this person who committed the offence, as proof. So I think ... that these apologies that people say it, this wouldn't be natural because this person has to apologise and the other has to say ok. How do I forgive you? ... go and sin no more<sup>82</sup>. [Laugh] so I don't know. [P4/I]*

<sup>77</sup> S. Tränkle, *In the shadow of penal law...*, *op. cit.*

<sup>78</sup> J.V. Roberts, M. Hough, *Understanding Public Attitudes...*, *op. cit.*, p. 134.

<sup>79</sup> A. Dundes, *Apologies: A cross-cultural analysis*, in: M. Gibney, R.E. Howard-Hassmann, J.M. Coicaud, S. Nilaus (eds.), *The Age of Apology. Facing up to the Past*, University of Pennsylvania Press, Philadelphia 2008.

<sup>80</sup> J.L. Gibson, *Truth, justice and reconciliation: judging amnesty in South Africa*, The annual meeting of the Midwest Political Science Association, Chicago, 2001.

<sup>81</sup> L. Hickson, *The social contexts of apology in dispute settlement: A cross-cultural study*, "Ethnology" 1986, vol. 25, no. 4.

<sup>82</sup> These are the words from the Bible when a woman caught and charged with adultery was brought to Jesus. The crowd wanted her to be stoned to death. Then Jesus said to the crowd: "go ahead... but let the person without sin throw the first stone." When the crowd resigned and walked away he said to the woman: "Neither do I condemn you; go and sin no more" (John 8: 3–11).

A similar remark was made by one of the mediators, however, in his narrative, lack of support for apology is contextualised against difficult Polish history, socio-economic changes as well as the pressures of globalisation:

*Taking into account our past 300 years, it's difficult to say whether Poles know how to reconcile, at least we have been trying to have a culture of reconciliation based on norms and standards, that we, and them, can be in control of or influence it at the very least. And do we know how to reconcile? It seems to be that yes. But simple "sorry" seems to be the hardest word to say. For starters, it's so obvious in mediation (...) we have to start talking to one another at home. Well, the economy, society is developing, we have to keep up with the rest of the world, and without changes in our thinking or attitude this won't be possible. Someone else will outdo us again. We will be like with the quality of road infrastructure rankings, just behind Chad and other African countries. It's like with the culture of family life. It is different in Germany, different in France, and in England it is different. In every single country it will be different. And in Poland it is different. It's the same if let's say we go to Belarus to find people who want to be mediators and expect to see hands in the air. [Mediator 3/I]*

At this point, it is worth recalling the observation made by Shapland et al.<sup>83</sup> that 'restorative justice is not a ready-made package of roles, actions and outcomes', and although in the light of the restorative justice literature the restorative encounter can be seen as ritualistic, these rituals may vary across societies. Perhaps a more restorative form of apologising in the Polish context of mediation would be a handshake, as mentioned in three interviews and echoed in my discussions with the mediators:

*I always aim for the parties to shake hands. For me it is the gesture. Be as it may, it's a shame, shake your hands and look into each other's eyes. Because mediation is also about this. [Mediator 1/I]*

I would also like to turn to the Polish scholarly literature and Leder's observation<sup>84</sup> (that the mindset of Polish society as a proud and haughty nation is rooted in the mentality of *Sarmacja*<sup>85</sup> (Sarmatism). He has argued that this part of Polish history has helped to create the culture of humiliation where people often display antipathy towards others – something that may not enhance their confidence in apology.

Last but surely not least, the inter-cultural component of cross-linguistic analyses seems to be of considerable importance. For example, in research on speech

<sup>83</sup> J. Shapland et al., *Situating restorative justice...*, *op. cit.*, p. 507.

<sup>84</sup> A. Leder, *Przeżniona rewolucja. Ćwiczenie z logiki historycznej* [A dreamed revolution: an exercise from the historical logic], Wydawnictwo Krytyki Politycznej, Warszawa 2014, p. 100.

<sup>85</sup> Sarmatism functioned as the dominant lifestyle, culture and ideology of the *szlachta* (nobility) of the Polish-Lithuanian Commonwealth from the 15th to the 18th centuries.

acts Wierzbicka<sup>86</sup> demonstrated that Polish linguistic norms prefer directness, and this is deeply embedded in the Polish culture, compared to English norms. The next quotation illustrates that people might prefer actions rather than emotional or symbolic gestures when it comes to the act of apology:

*We could give it a try. And what kind of result it would bring who knows, I seriously don't know, because it can be the same like with these apologies (...) as you see [Laugh] I am not good with these wordy things, I prefer actions. [P4/I]*

The above quotation provides another avenue for the interpretation of apology that could be explored in the sociolinguistic and cultural fields of study. Although a more thorough exploration is beyond the scope of this study, it is important to acknowledge that the viability of restorative justice might also depend on linguistic prerequisites. Wierzbicka<sup>87</sup> has observed that English speakers tend to think that the concepts of anger, fear or contempt are universal categories. However, every culture has its own “cultural linguistic scripts” which suggest to people how to express their feelings and how to think about other people’s feelings.<sup>88</sup> For that reason, Wierzbicka has emphasised that the classification of emotions depends largely on the language through the prism of which these emotions are interpreted, and argued that emotions should also be studied cross-culturally. In contrast to the English language, in Polish there is a greater use of “straightforward” and “confrontational” expressions, as Poles expect people to be direct with emotions, views and reactions. The Polish “cultural linguistic” script reflects a tendency to spontaneous emotional expression without trying to analyse, shape or suppress them.<sup>89</sup> Whereas in English there are many common speech routines that encourage the demonstration of “positive emotions”, even if displayed “artificially”.<sup>90</sup> The significance of this finding is that the bulk of restorative justice research was carried out in contexts where people speak English as a native language, and the English language phrases might not have equivalents in other languages (cultures). Wierzbicka<sup>91</sup> has pointed to the fact that Anglo-cultural scripts encourage people to be careful, considerate, and thoughtful to avoid hurting other people’s feelings as the focus is on the feelings of the other person. On the other hand, Polish cultural scripts have no equivalents, and the focus is not on the feelings of the addressee but on those of the speaker. The participants’ ambivalent view of apology and Wierzbicka’s research in particular show that lin-

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<sup>86</sup> A. Wierzbicka, *Cross-Cultural Pragmatics: The Semantics of Human Interaction*, Mouton de Gruyter, Berlin 1985.

<sup>87</sup> Eadem, *Emotions across Languages and Cultures. Diversity and Universals*, Cambridge University Press, Cambridge 1999.

<sup>88</sup> *Ibidem.*

<sup>89</sup> *Ibidem.*

<sup>90</sup> *Ibidem.*

<sup>91</sup> *Ibidem.*

guistics might in the future contribute to the cross-disciplinary study of emotions, and in consequence restorative justice.

## Concluding remarks

The aim of this paper is to argue that the viability of restorative justice should be approached as a process that is influenced by broader socio-economic, political and linguistic factors. Although the Polish model of victim-offender mediation was inspired by the restorative justice concept, the narratives of my lay participants suggest a number of socio-cultural obstacles for further development of restorative justice in Poland. Despite a limited knowledge of victim-offender mediation among the study participants, it is clear that support for mediation is negotiated and conditional. Although victim-offender mediation was mainly perceived as not a punishment, the role and purpose of this practice was discussed against the background of the Polish criminal justice system. Given the close and inseparable relationship between the two, I argue in my research that the ways in which lay people perceive the criminal justice institutions affect their perceptions of alternative conflict resolutions. Then, as it emerged in my fieldwork, the study participants' perception of harm suggests that mediation might be seen as an avenue to focus on the financial side of the reparation, and as result might achieve something other than restorative goals. The narratives of my study participants also explore the difficulty of acknowledging apology as a genuine element of the restorative encounter. This could be due to looking at apology through the lens of court apology, sociolinguistic or cultural reasons.

It appears that there have been some actions undertaken to introduce victim-offender mediation to the Polish public and enhance its use amongst criminal justice users. My research brings to the surface the value of lay opinion when it comes to the viability of restorative justice. Dzur<sup>92</sup> has highlighted that the value of lay people's views is central to the financial aspect of punishment and justice, as the functioning of those social institutions is financed by lay people – the taxpayers. The author argues that lay people's involvement in criminal justice decision making should be regarded through their rights, duties and membership as individuals in a nation-state. Such an approach indicates a more active role for lay people. According to Dzur, people's views should be communicated through "everyday talk" that sensitises them to the ways their ideals and sensibilities clash with the practice of criminal justice institutions.<sup>93</sup> This publication fleshes out some of the ideas that lay Polish people

<sup>92</sup> A. Dzur, *Repellent institutions and the absentee public: Grounding opinion in responsibility for punishment*, in: Ryberg J., Roberts J.V. (eds.), *Popular Punishment: On the Normative Significance of Public Opinion*, Oxford University Press, New York 2014.

<sup>93</sup> *Ibidem*.

may have about mediation, and the next endeavour would be to clash them with the actual practice of victim-offender mediation in Poland.

Braithwaite<sup>94</sup> has rightly indicated that ‘we all are still learning how to do restorative justice well’. The question whether a perfect restorative justice programme is ever possible remains open, however, this study broadens the range of factors (as well as the means by way of which we explore those factors) that may possibly play a role in the success of restorative justice in various socio-political, economic and linguistic realities.

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<sup>94</sup> J. Braithwaite, *Restorative Justice...*, *op. cit.*, p. 565.

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