



THE RELATIONSHIP BETWEEN RESTORATIVE AND CONSENSUAL PROCEDURES

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ABSTRACT

The paper shows how restorative justice fits in with consensual procedures satisfied with procedural justice based on confession of guilt. In our view, the protection of the interests of victims, the establishment of truthful facts and the enforcement of social justice are all objectives that must guide the legislation and the application of law in the 21st century. Although the Hungarian Code of Criminal Procedure has considerably broadened the combinability of consensual procedures, the dangers of the eclipse of material justice cannot be ignored. More specifically, the contradiction that the more effective restorative justice is, the more pressure is put on the defendant to participate in it, trading the possibility of total victory for the certainty of avoiding total defeat. And although the institutions of the plea agreement and the confession in the preparatory session may compete with the mediation procedure, the latter is the one that can provide the most complete reparation for the victim.

KEYWORDS Restorative justice, consensual procedures, mediation procedure, plea agreement, confession in the preparatory session

1. Introduction

The second book of Moses says that *“if a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep”* (King James Bible, n.d., Exodus, Chapter 22 Verse 1). This ancient law shows that the idea of restorative justice has long been present in legislation. Restorative justice aims at reparation, which may in certain cases take precedence over or replace

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retributive sanctions. The question is to what extent are legislators and practitioners today able to apply this approach?

In 1927, Ferenc Finkey, a prominent authority on Hungarian criminal law, wrote: *“For thousands of years [...] the aim of criminal procedure has always and everywhere been explicitly and emphatically the search for justice and the enforcement of justice”* (Finkey, 1927, p. 1). These ideas have now been pushed into the background, as legal solutions to avoid punishment and criminal liability often override the legislative and judicial objectives of material justice. Finkey also stressed that *“[the] more educated a society is, the more general [...] is its conception of the purpose of criminal procedure in the pursuit of justice”* (Finkey, 1927, p. 4). However, legislation has nowadays moved towards simplification and acceleration, which in most cases results in satisfaction with the truth of the procedure rather than the establishment of true facts.

In modern criminal procedure, however, the interests of the victim should not be overlooked.

Although victim redress has received increasing attention in the second half of the 20th century thanks to the international victim movements (Barabás, 2017, p. 74), it is only in the last decade that the victim has become a focus of criminal proceedings (Sántha, 2020, p. 39). However, sometimes it may be more important to compensate the victim than to impose retributive consequences. In what follows therefore, we will show how restorative justice fits in with consensual procedures satisfied with procedural justice based on confession of guilt. In doing so, we won't lose sight of the fact that the scale of Justitia has two pans, which must always find the balance at the intersection of several interests. Finding a balance between restorative justice and modern criminal procedure is, in our view, key. The protection of the interests of victims, the establishment of truthful facts and the enforcement of social justice are all objectives that must guide the legislation and the application of law in the 21st century.

2. The goal of restorative and retributive justice

Putting the idea of restorative and retributive justice in the pans of Justitia's scale, the question arises: how can these be balanced, and which should take precedence? Is it conceivable that, given the diversity of the crimes and their defendants, both can coexist?

Restorative justice seeks to restore, not only the rule of law, but also the harm to the victim and the community, and to reintegrate the offender, creating an opportunity for the victim and the offender to reconcile and for the offender to avoid criminal prosecution (Barabás, 2020, p. 40). This approach emphasises dialogue and reconciliation between victims and perpetrators, creating

opportunities for acceptance of responsibility, apology and restoration of community relations, thereby reducing re-offending (Kelly, 2021, pp. 244-246). Pursuant to Act XC of 2017 on the Code of Criminal Procedure (hereinafter referred to as “CCP”), this can be achieved through the mediation procedure within the framework of Act C of 2012 on the Criminal Code (hereinafter referred to as “CC”). According to the explanatory memorandum of the CCP, the aim is to reach an agreement and reconciliation with the voluntary participation of the suspect and the victim, which will facilitate the suspect’s future law-abiding behaviour.³ According to Klára Kerezsi, this is a “win-win situation” where both the perpetrator and the victim can be satisfied (Kerezsi, 2006).

The aim of retributive justice is to repair the damage to the rule of law caused by the crime through retributive punishment. This approach emphasises the infliction of the same amount of pain on the offender as on the victim, thereby doubling the suffering through the punishment imposed on the offender (Sümegei, 2019, p. 66). The drawbacks of retributive justice include that it leads to excessive and harmful punishments, stigmatises and excludes convicts, ignores social and psychological factors, reduces empathy for offenders and perpetuates social injustice (Kelly, 2021, pp. 238-240 & 247).

The fundamental difference between the two approaches is therefore in their goals: restorative justice seeks to redress grievances, while retributive justice seeks to restore law and order. According to Barabás (2020), mediation is:

“[...] a voluntary agreement between the victim and the perpetrator of a crime that the perpetrator will make reparation to the victim in a form and to a degree agreed by both parties, and as a result, the perpetrator will be partially or fully exempted from the consequences of the liability that is otherwise customary in the society in question.” (p.42.)

While the benefits of restorative justice can be significant, the dangers of the marginalisation of material justice cannot be ignored. In this way, legislators and practitioners must strike a balance between protecting the interests of victims, establishing the truth of the facts and ensuring social justice.

3. The dangers of the eclipse of material justice

By placing material and procedural justice in the pans of Justitia’s scale, the need to establish the truth of the facts is nowadays considered “easy” to simplify and accelerate criminal proceedings.

Finkey claimed that “[for] us criminal trial lawyers, justice is the highest and only measure of value. [...] The criminal judge must always determine ex officio the true,

³ See the explanatory memorandum to § 412 of the CCP.

the historically certain facts [...]” (Finkey, 1927, pp. 17-18). While these statements may now be debatable and ironclad, our experience is that it is never wrong to condemn the person who has committed the crime and to condemn them for what they have done. However, discarding the main blocks of the pavement leading to material justice is undoubtedly difficult for practising judges with decades of judicial experience. At the same time, we must be aware that traditional principles do not always apply in today’s legislative and judicial context, and their content needs to be updated (Csák & Czebe, 2023a, p. 218). Tibor Király also pointed out that “[...] *absolute truth does not belong to the truths of criminal judgment*” (Király, 1972, p. 175).

By procedural justice, we must accept the truth of a judgment without proof, recognizing that sometimes we cannot reach a different result by a full evidentiary process. According to Ákos Farkas, “[c]riminal justice is rational if it is useful, efficient and at the same time legitimate [...] The most appropriate means of its realization is the simplification and acceleration of the procedure within reasonable limits” (Farkas, 2002, p. 98). In many criminal proceedings with full evidentiary procedures, we see that the court often runs in vain after the material justice (Csák & Czebe, 2023b, p. 27). A further problem is whether consensual procedures based on the confession of the defendant compete with mediation procedures? The CCP has considerably broadened the combinability of consensual procedures (Vida, 2020, p. 13).

Since the legislator encourages the defendant to confess by offering a lighter penalty, it may be more attractive for the offender to accept a quick conclusion and a lighter penalty than the mediation procedure itself. Defendants without sufficient liquidity are likely to have interests in this direction. However, if the possibility of avoiding court proceedings and the disadvantages associated with a criminal record are also taken into account, there will be a greater interest on the part of the offender in mediation and compensation for the victim. It could be said that the more effective restorative justice is, the more pressure is put on the defendant to participate and agree to the proposed restorative requirements (Lanni, 2021, p. 656). Although there is a greater risk of non-execution in consensual procedures, these procedures also ensure reparation for the victim’s prejudice.

4. Mediation procedures

The thought of apostle Paul in his letter to the Ephesians that “[r]edeeming the time[...]” (King James Bible, n.d., Ephesians, Chapter 5 Verse 16) is an apt motto for the evaluation of the legal institution of mediation. If the defendant recognises the importance of this and the victim supports it, the compensation

for the damage may be a diversion, which may even lead to a lack of prosecution and re-offending, reducing the burden of justice.

Restorative justice, in the context of diversion, gives the victim and the offender an active role in resolving the conflict. On the one hand, it gives the victim the opportunity to voice their experiences and influence the outcome of the conflict. This process can help the victim deal with the trauma and regain control over their life. On the other hand, the perpetrator can face the consequences of his actions and understand the suffering of the victim. This understanding is key on the road to repentance and reparation (van Ness & Strong, 2015, p. 47).

The basic conditions of the mediation procedure are regulated by the provisions of the CC on active repentance. Mediation is only possible in the case of listed offences (against life, physical integrity and health, human freedom, human dignity and certain fundamental rights, property or intellectual property, or traffic-related). For misdemeanours or felonies punishable by not more than three years of imprisonment, the proceedings may be terminated, while for offences punishable by not more than five years of imprisonment, the punishment may be reduced without limitation. This requires a confession of the offence before being indicted and reparation for the harm caused in a manner and to the extent accepted by the aggrieved party during a mediation procedure. In cases outside the scope of the above offences, the defendant can only use other consensual procedures, while the aggrieved party can pursue his or her civil claim (CC, § 29).

The question is whether the admission is sufficient to cover the facts of the case, or must it also cover the confession of guilt? For our part, we take the latter view, because it is pointless to talk about restorative justice without the confession of guilt. Otherwise, the mediation process would become a civil dispute focused on litigation prevention (Schmidt, 2020, pp. 315-316). This position is also supported by the ministerial explanatory memorandum of the Act amending the active repentance legislation, which states that the confession must also include a confession of guilt, because a factual admission does not in itself express the offender's sincere regret.⁴ If the perpetrator is unwilling to honestly acknowledge his or her actions and the harm caused, the victim will not be able to process the trauma and move on. This can lead to greater frustration, anger and fear, which can increase the victim's vulnerability and risk of re-victimisation (Umbreit & Hansen, 2017, p. 101).

The basic aim of mediation is to restore the situation before the offence, divert the person from the judicial process and resolve the conflict through communication (Garai, 2022, p. 129). The framework of the procedure is

⁴ See the explanatory memorandum to § 6 of Act LXXX. of 2009.

established by the CCP, according to which the mediation procedure is a procedure facilitating the conclusion of an agreement between the suspect and the aggrieved party, the reparation of the consequences of the criminal offence, and the future law abiding conduct of the suspect, which may be conducted upon the motion by the suspect or the aggrieved party, or with their voluntary consent (CCP, § 412 para. 1). Hungarian legislation in this context has evolved along the lines of the European Council Framework Decision 2001/220/JHA and Directive 2012/29/EU.

The mediation procedure complements or partially replaces the traditional criminal justice system, providing alternative solutions, while maintaining the enforcement of the state's criminal claim for more serious offences. In the words of Herke (2023), the mediation procedure is a procedure for handling disputes arising from a criminal offence, the aim of which is:

"[...] to reach a written agreement, independent of the court (prosecutor), involving a third party (mediator), to resolve the conflict between the aggrieved party and the defendant, to make reparation for the consequences of the offence and to promote the future law-abiding behaviour of the defendant." (p. 21)

Statistics show that the mediation procedure is successful: between 2007 and 2023, a total of 85.807 cases were mediated and 80-85% of the completed cases reached an agreement, with 85-90% of the cases being fulfilled (Fővárosi és Vármegyei Kormányhivatalok, n.d.). Nevertheless, the disadvantages of mediation and the possibility of its failure should not be overlooked. The goals of restorative justice can be in conflict, especially if the defendants do not admit their responsibility while confessing. Renáta Garai pointed out that the failure of mediation procedures is often due to the failure to reach an agreement or to non-fulfilment. Nevertheless, mediation can be considered a success story, because *"[...] although it does not guarantee an agreement between the parties, it can help suspects to comply with the law in the future"* (Garai, 2022, p. 147).

5. Confession in the preparatory session

Another success story – and perhaps the most exciting innovation in the CCP – is the introduction of the "prosecutor's measured motion", which aims to encourage the defendant to confess to the charges in the indictment. If the defendant waives his right to a trial and his confession is accepted by the court, the proceedings can end immediately with a conviction, avoiding a lengthy evidentiary procedure (Horgos, 2022, pp. 16-17). This legal instrument is therefore a means of simplifying and speeding up criminal proceedings, which is duly borne out by the statistics.

The jurisprudence-analysis of the Curia of Hungary (*Kúria Büntető Kollégiuma, 2023*) shows that between July 2018 and July 2021, 73-82% of cases resulted in a successful prosecution motion. In such cases, the court is bound by the prosecutor's motion, which makes the expected sanction more predictable for the defendant (*Szomora, 2021, p. 401*) and the court often acts as a "quasi-notary" to authenticate the agreement between the prosecution and the defence. During the period under review, 79-80% of the defendants confessed at the preparatory session, and the acceptance rate was 91.8%.

Although the rights and reparation claim of the victim deserve special attention in the proceedings, there is no possibility of a settlement between the victim and the defendant: only a civil claim can be filed (CCP, § 55, para. 3; CCP, § 56, para. 1 sub-para. a & b). The court notifies the aggrieved party about the date of the preparatory session (CCP, § 500 para. 3), who can ask the defendant questions regarding the civil claim, but this not constitute an agreement (CCP, § 502 para. 6). If the court accepts the defendant's confession and immediately sentences him or her, it will also consider the aggrieved party's civil claim, which is subject to appeal (CCP, § 583 para. 2) and may result in a delay in the proceedings. The civil claim can be satisfied voluntarily or by judicial enforcement, i.e. not under criminal substantive and procedural rules (CCP, § 555 para. 1).

Accepting a confession can present many difficulties and challenges, especially if there are reasonable doubts about the confession. Refusal to admit may be justified, for example, if the explanation given for changing the confession is not admissible, if further evidence is needed to clarify criminal liability, if the legal classification requires further proof, or if the defendant has not waived his or her right to trial. Several errors can also arise from the unlawful admission of a confession, for example if the confession is unclear, if the defendant did not admit guilt as charged, if there was a substantive defence at the preparatory hearing, or if the defence's motion for evidence cast doubt on the confession (*Csák, 2023*). These mistakes illustrate the responsibility involved in making a judgment based on the admission of a confession and in adjudicating the civil claim of the aggrieved party.

It can be problematic if there are several defendants in the criminal proceedings. These situations often have to be resolved by judicial interpretation, because the legislator is unfortunately unable to get rid of the rigid concept of adapting the criminal procedure law to the acts of a single defendant. Of course, in the case of many defendants, the acceptance of a confession is not excluded for some defendants, while a trial is held for those who deny it (*Polt & Bodony, 2021, p. 395*). However, it can be particularly difficult for the defence of the denying defendant if a final and binding conclusive decision is made against the

confessing joint offender. In such cases, the defence lawyer must represent the defendant on the basis that there is already a final conviction for the offence, which “indirectly” applies to the denying defendant’s act. Of course, this may still result in an acquittal decision (ground for retrial), but the burden of proof may be made more difficult by the changed procedural position of the confessing defendant (witness) (Gellér & Bárányos, 2019, pp. 307-308). The legal solution is of course to separate the cases of those defendants whose confessions have been accepted by the court. The aggrieved party’s position can also be secured by a civil claim, although it may be difficult to seek satisfaction only against the defendant convicted based on the confession, while the universal obligation can often only be enforced after the conviction of the other defendants.

The role of the prosecutor in the preparatory session is a “mind-influencing factor”, since the facts of the charge and the motion for the sanction have a significant impact on the defendant’s decision to confess. However, the role of the judiciary is relegated to the background, because the court is essentially exercising “judicial oversight” in the procedure in question (Fantoly, 2021a, p. 79). In addition to the optimistic overtones, attention should therefore also be paid to the risk of procedural violations. A confession accepted in the preparatory session without the legal conditions is now an absolute procedural violation, i.e. a procedural violation leading to an automatic setting aside, which can also be challenged in a review procedure.

As outlined above, the acceptance of a confession and the underlying procedures present several challenges that require careful application of the law and a thorough assessment of the evidence to ensure a fair judgement (Németh, 2022, p. 51). A judgment based on a confession made at the preparatory session, with the trial being abandoned, may be a counter-trigger to the mediation procedure if the interests or financial means of the defendant require a quicker conclusion of the proceedings. However, the Hungarian procedural system allows for a quick compensation decision if the prosecutor does not agree to mediation. The legislator has therefore ensured the victim’s right to compensation in this procedure as well, albeit with considerably fewer guarantees than in the case of mediation.

6. Plea agreement

The plea agreement is a consensus-based legal instrument of Anglo-Saxon origin that simplifies and speeds up criminal proceedings, similar to the confession made in the preparatory session. Namely, the prosecution service and the defendant, before the indictment, may enter into an agreement on the confession and consequences of guilt regarding the criminal offence committed

by the defendant, including compensation for the aggrieved party's damages (CCP, § 407 para. 1).

According to the explanatory memorandum of the CCP, the plea agreement enhances the cooperation of the accused, as the procedure benefits both parties: the state saves time and money, the accused can expect lighter sanctions, the victim receives certain reparation and society can be sure that the perpetrator of the crime will be held accountable.⁵ The question is, however, to what extent can victim reparation prevail compared to mediation? After all, the victim is not the initiating party in this procedure either (CCP, § 407 para. 2).

The advantages of a plea agreement include the fact that it can be used for any crime, that it is a quick and efficient way to enforce the state's criminal claim (Polt, 2020, pp. 432-433), that it increases the rights of the defendant and his or her defence (Fantoly, 2020, p. 83) and that it provides faster compensation for the victim (Gulyásné-Pápai-Tarr, 2019). However, this legal instrument has its drawbacks. A plea agreement is not the same as an Anglo-Saxon plea bargain, as only the sanction can be bargained for. The facts and the classification of the offence are determined by the prosecution. Since the defendant can only decide to admit these, it is not negotiable what is to be included in the indictment (Fantoly, 2021b, p. 102). If a plea agreement is successfully reached during the investigation phase, the court may still refuse to accept it after the indictment (CCP, § 734 para. 1).

If the plea agreement process is unsuccessful, a swift compensation of the aggrieved party is only possible if the admission made at the preparatory meeting is accepted. If this is not successful, the court can decide on the civil claim after a full trial with evidentiary procedure. Possible elements of the plea agreement may include the fulfilment of other obligations undertaken by the defendant (CCP, § 411 para. 1 sub-para. e), such as compensation for the victim's damages (CCP, § 411 para. 5 sub-para. b). In such cases, the main safeguard for the victim is that the court cannot reject the civil claim if the plea agreement is accepted (CCP, § 736 para. 4). If the court refuses to approve the plea agreement or subsequently sets it aside, the plea agreement is no longer binding on the prosecution or the defendant (CCP, § 737 para. 3 sub-para. a). If the defendant fails to perform his obligations in the plea agreement, for example by not compensating the aggrieved party, the court can refuse to approve the plea agreement (CCP, § 734 para. 1 sub-para. d). In the plea agreement, the defendant may also agree to participate in mediation procedure, failing which he or she will face similar consequences (CCP, § 411 para. 5 sub-para. c).

⁵ See the explanatory memorandum to § 407 of the CCP.

Comparing the plea agreement with the mediation procedure, it can be concluded that victim reparation is guaranteed and strongly regulated in both legal institutions. In addition, the plea agreement also ensures the enforcement of the interests of the aggrieved party, or more precisely the completion of compensation as a condition for the successful conclusion of the proceedings.

Finkey once described as “anachronistic” the fact that in Anglo-Saxon proceedings, the judge is obliged to give a guilty verdict without consulting the jury in the event of a confession (Finkey, 1927, p. 18). Today, we live with this, and we only hope that the fears of the American defendants will not take root in the minds of the Hungarian defendants. According to The National Registry of Exonerations, 48% of subsequently exonerated defendants plead guilty and enter plea bargains in the United States primarily to avoid the possibility of a more severe sentence (The National Registry of Exonerations, 2023, p. 11). In other words, the defendant exchanges the possibility of total victory for the certainty of avoiding total defeat (Jolly & Prescott, 2021, p. 1059). In Hungary, this is almost certainly avoided by a legal solution that makes it the task of the prosecution service to determine the facts of the case and the classification of the charges, thus excluding the possibility of an actual plea bargain. While there will always be dangers and procedural irregularities, one thing is certain: the enforcement of consensual legal institutions is unbroken in Hungarian criminal procedure.

7. Conclusion

According to Solomon’s proverbs, “[s]mite a scorner, and the simple will beware: and reprove one that hath understanding, and he will understand knowledge.” (King James Bible, n.d., Proverbs, Chapter 19 Verse 25). This quote highlights that, while punishment is important and often unavoidable in order to enforce the state’s criminal claims, there are cases where a confession of guilt, the rehabilitation of the offender and compensation for the victim’s damages may be sufficient to achieve the objectives of criminal law.

To protect the interests of the aggrieved party, the victim’s claim for damages must be recognised, and it may be important to satisfy it before the full criminal proceedings have taken place. Based on the overview of the above legal institutions, it can be concluded that the mediation procedure is the most fully capable of ensuring victim reparation, but the legislator has also created the possibility for this in consensual, accelerated and simplified procedures, albeit with fewer guarantees and influenced by the will of the defendant. As a result, the chances of actual compensation may be lower and may also be delayed in time.

However, even in a trial with a full evidentiary procedure, the aggrieved party may still enforce a civil claim. To this end, the CCP ensures that the victim can enforce a civil claim in the court procedure as a civil party and can declare his or her intention to do so during the investigation, as well as declare the pecuniary loss at any time (CCP, § 51 para. 1 sub-para. h; CCP, § 51 para. 2). The aggrieved party can also request the sequestration of the defendant's assets to secure his or her civil claim (CCP, § 324 para. 1; CCP, § 324 para. 3 sub-para. b; CCP, § 325 para. 1). On the whole, therefore, other consensual procedures are not necessarily in competition with mediation, especially in criminal cases where mediation is not possible anyway. After all, the legislator has decided when retributive and restorative justice is appropriate.

The need to accelerate the procedure and to balance the principles and the needs of the victim with the social expectations of punishment are important considerations. According to Tóth (2022):

"[...] with the new rules of the plea agreement and the measured motion we have made a rather big concession in principle in order to create predictability and guarantee for the defendant with the encouraged confession." (p. 136)

However, in order to accelerate and simplify the procedure, the legislator has overwritten a number of fundamental principles, such as the principle of immediacy and the division of procedural tasks, which may make the application of the law more arbitrary. In fact, the judge only has a veto on the merits in the case of a plea agreement if the case file does not provide a basis for the defendant's confession. Szabó has aptly pointed out that *"[...] restorative techniques may even delay victim compensation, despite their purpose"* (Szabó, 2020), which may be especially true if the criminal proceedings lead to a faster verdict than the mediation process.

In the view of the Hungarian Constitutional Court, encouraging confessions may serve a constitutional purpose, since:

"The waiver of trial [...] in addition to the rules ensuring a fair trial, is a suitable means to contribute to the adjudication of the state's criminal claim within a reasonable time and to the proper and efficient administration of justice, not only in individual cases, but also on a societal scale." (422/B/1999. ABH, Chapter III. Point 3.2.)

The European Court of Human Rights – comparing the normative practice of the Council of Europe member states – has held that two conditions must necessarily be met in order to ensure the legality of a waiver: On the one hand, the waiver must be completely voluntary, with full knowledge of all the facts of the case and the legal consequences. Second, the content of the waiver and the

fairness of the agreement between the parties must be subject to appropriate judicial review (Natsvlishvili and Togonidze v. Georgia, 2014, § 62-75; Kisekka, 2020, p. 19).

In summary, the legislative instruments expressing the will of the legislator to simplify and accelerate the criminal procedure have proved to be workable. In these proceedings, material justice is replaced by procedural justice, and if not evolution, a kind of reformation has taken place in the role of the participants in the proceedings. The following lines by Finkey (1927) may also serve as a guideline for the acceptance of procedural justice:

“The criminal judge should never approach the conduct of a criminal trial with the despondent thought that he will not be able to achieve justice, so it is enough to approximate it. Here, too, a strong will is more certain to triumph than hesitation or compromise.” (p. 24)

Or as we can read in the third book of Moses:

“Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour.” (King James Bible, n.d., Leviticus, Chapter 19 Verse 15)

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