

# Comparing the Court Mediation in Hungary and the State of Indiana in the Midwest

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*In Hungary, court mediation has been used in criminal cases since 2007, during which it is possible for the offender and the victim of a crime to come to an agreement on their own case with the help of a facilitator and resolve their conflicts together, thus avoiding the traditional criminal justice procedure and its consequences. In the United States of America, state of Indiana, this process is called mediation, during which the parties involved can communicate with each other with the help of a third, neutral party about how they can jointly repair the harms caused by the conflict. The purpose of the article is to analyse the legal framework and practical application of court mediation in Hungary and mediation in the state of Indiana, highlighting the similarities and differences that may arise by comparing the nature of the cases, the qualifications of the mediators, and the parties taking part in the process.*

**Keywords:** restorative justice, restorative methods, court mediation, Hungary, Indiana

## Introduction

Many countries around the world use the method of mediation or more specifically court mediation in certain criminal offence cases. This is true for Hungary, where victims and offenders can take part in court mediation since 2007 and also for the state of Indiana in the United States of America (USA), with a third, neutral facilitator helping the parties at conflict. The aim of this article is to analyse both the legal framework and the practical application of mediation and restorative practices in Hungary and in Indiana by examining the similarities and differences when looking at the nature of the cases and certain characteristics of the mediators as well as the victims and offenders. The state of Indiana is around the same size as Hungary, however, about 2.9 million fewer people live in Indiana than in Hungary.

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The article will first highlight the legal framework for mediation both in Hungary and in Indiana before focussing on the practical application of it: In what cases might court mediation be used? How often is court mediation used? What can we tell about the victims and offenders taking part in the process? What qualities do the mediators have?

Restorative justice, according to Tony Marshall, is a process whereby following a crime, all affected parties come together to come up with a solution collectively on how to repair the harm caused.<sup>3</sup>

In 2006, the Hungarian Criminal Code was changed, which now allowed mediation (a form of restorative justice) to be used in criminal offence cases.<sup>4</sup> The act of active repentance was introduced as a reason for eliminating criminal liability and a prerequisite for mediation to take place.

In Indiana, mediation can be defined as an alternative dispute resolution process whereby a third, neutral, party helps the other parties reach an agreement.<sup>5</sup> Restorative practices are used to resolve conflict between offenders and victims in certain cases.

## **The legal framework**

This section will explore the legal framework of mediation in Hungary and Indiana and highlight the similarities and differences.

### ***The legal framework of court mediation in Hungary***

Since 1 January 2007, mediation can be used in criminal cases in Hungary.<sup>6</sup> This was made possible by Act LI of 2006 that amended the Criminal Code (old Act No. 13) and a new law abolishing criminal liability in the case of active repentance was introduced in the Criminal Code, allowing mediation to take place.<sup>7</sup>

Another important piece of legislation related to mediation, which in addition to criminal regulations must be mentioned is “Act CXXIII of 2006 on Mediation in Criminal Cases”, which regulates the activities and duties of mediators and related practical issues. According to this law, in criminal (or from 2014 also misdemeanour) cases, trained probation officers could act as mediators. Currently, due to organisational transformations, these mediators perform their tasks within the framework of the capital and county government offices. The Minister of Justice

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<sup>3</sup> MARSHALL 1996: 21–43.

<sup>4</sup> Act C of 2012 on the Criminal Code.

<sup>5</sup> Indiana Rules of Court 2021.

<sup>6</sup> HATVANI 2010: 13–26.

<sup>7</sup> Act XIX of 1998 on Criminal Procedures; Act IV of 1978 on the Criminal Code.

is responsible for the professional management of the activities of probation officers and the professional management powers are exercised by the state secretary responsible for judicial relations.

In addition, after an amendment in 2007, lawyers can now act as mediators as well, if they take part in the relevant training and are added to a centralised register of mediators.<sup>8</sup> In these cases, the procedure itself is the same.

The regulations around mediation have constantly been evolving over the last fifteen years and it seems that the legislator wanted to help unfold a developing opportunity.

On the basis of Act C of 2012 on the Criminal Code, the place and applicability of active repentance have been broadened (§ 29, paragraph 3).<sup>9</sup> According to this, this is applicable in the cases of an offence against life, physical integrity and health, human freedom, human dignity and certain fundamental rights, against traffic offences, property or intellectual property rights offences and/or in cases that are punishable by no more than three years. In addition, according to the legislation, there is no obstacle in the way of mediation if other crimes closely related to the crimes defined in paragraph (1) or a compound crime (that is not punishable by a more severe penalty) have also been committed. Furthermore, it is justified that in cases where there are no victims but the prosecutor is entitled to initiate a lawsuit, the prosecutor or another state authority (consumer protection or environmental protection) can also be put in a bargaining position and mediation can take place. In other words, the applicability of mediation has broadened in this sense, as well.

The law also contains exclusionary reasons for the nature of the crime and the perpetrator in which cases mediation cannot take place.

In case of adults, if the mediation process is successful then the criminal liability of the perpetrator is ceased and the prosecutor terminates the criminal proceedings. In all other cases, when the process is not successful, the prosecutor files the charges.

In case of an offence that is punishable by no more than three years, the prosecutor can postpone the indictment for a period of one to two years, if the suspect has begun to fulfil but has not completed the agreement. If the above crimes are punishable by more than three years but not more than five years and all the other legal conditions are met, then after a successful completion of mediation, the penalty can be reduced indefinitely. In the case of juveniles, the five-year penalty is the maximum possible sentence (Criminal Code, § 107). It is important to point out that the legal institution of active repentance is not limited to monetary reparation and is only available if both the victim and the perpetrator agree to a mediation process.

From the very beginning, the criminal procedure provided the framework for the enforcement of active repentance. The new Criminal Code, based on positive experiences, opened wide the applicability of mediation in criminal cases.<sup>10</sup>

<sup>8</sup> Act CLXIII of 2007 on Alternative Dispute Resolution Procedure in Criminal Proceedings, Article 3.

<sup>9</sup> Act C of 2012 on the Criminal Code.

<sup>10</sup> Act XC of 2017 on Criminal Procedures.

The mediation procedure was put in the same place as a series of other reasons for suspensions applicable during the investigation and it can take place in cases of more serious crimes and other crimes that are not listed in the current legislation. The goal of the process is reparation for the victim and the improvement of the suspect's behaviour. The amendment does not affect the limitation in material law that the termination of criminal liability or the reducing of the penalty cannot be applied in case of more serious crimes. As a result of this change, the mediation process becomes available within the framework of the agreed procedure so the accused can make restitution even in the case of a more serious crime, in exchange for a specific type and amount of punishment agreed upon. In addition, the legislation preserves the effective basis of the mediation process, so that it can only be carried out on a voluntary basis from both sides, in the case of probable reparation, provided that the reduced penalty does not conflict with the principles of imposing a punishment or not conducting a proceeding.<sup>11</sup>

In addition, the legislator's intention to expand the use of mediation is clearly visible outside of criminal proceedings. The inclusion of two new areas in the application of mediation was a sign of this in recent years. One of them is the amendment of the Criminal Code, based on which from the 1<sup>st</sup> of January 2014, mediation can also be used in misdemeanour cases.<sup>12</sup>

We can find the possibility of mediation also in the new Penal Executive Code, where, according to § 171, paragraph (1), the person exercising the disciplinary power can terminate the proceedings initiated against a prisoner due to a disciplinary violation against another prisoner and the execution of a punishment may be suspended if the prisoner takes part in mediation.<sup>13</sup> Although these were relatively small steps, they still gave rise to hope.

## ***The legal framework of mediation in Indiana***

Alternative dispute resolution (ADR) is a process with the aim of encouraging settlements outside the traditional enforcement process. ADR methods that are recognised are: settlement negotiations, non-binding arbitration, mediation, conciliation, facilitation, mini trials, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocations, and negotiated rulemaking.<sup>14</sup>

There is no governing or regulatory body for mediation in the USA. However, there are associations, such as the American Bar Association or the American Arbitration

<sup>11</sup> Act XC of 2017 on Criminal Procedures.

<sup>12</sup> Act II of 2012 on Minor Offences, Offence Procedures and the Registration System of Offence which was amended by Act CLXXXVI of 2013.

<sup>13</sup> Act CCXL of 2013 on the Enforcement of Penalties, Measures, Certain Coercive Measures and Detention for Misdemeanours.

<sup>14</sup> Indiana Rules of Court 2021.

Association or in Indiana specifically the Indiana Association of Mediators that provide standards and guidelines and most states have individual laws that govern mediation. Mediation is available in various contexts but over 2,500 separate state statutes affect mediation proceedings in some way and therefore sometimes the parties are unsure about which laws apply to their case (especially in a case where multiple states are concerned).<sup>15</sup> Several states have tried to solve this problem by adopting the Uniform Mediation Act that “standardises the mediation process and establishes a privilege of confidentiality for mediators and mediation participants”.<sup>16</sup> There are 13 states where this Act has been enacted but Indiana is not one of them. In Indiana, the “Indiana Rules for Alternative Dispute Resolution” are adopted to bring some form of uniformity into ADR. According to the Rules, the court can refer a civil or domestic relations case to mediation on its own or because either party has asked for it.<sup>17</sup> Then, the parties may object but ultimately the court will determine whether the litigation should be mediated or not. Most court-mandated mediation expects parties to attend with settlement authority, to submit a pre-mediation memorandum on their position, as well as participate in good faith.

Upon a case going to mediation, the parties have the opportunity to choose a mediator either from the Indiana Supreme Court Commission for Continuing Legal Education Registry or agree that they choose someone who is not a registered mediator but is approved by the court and serves with leave of court.<sup>18</sup> In civil cases, the registered mediator must be an attorney in good standing with the Supreme Court of Indiana.<sup>19</sup> In domestic relations cases, the registered mediator must either be an attorney in good standing with the Supreme Court of Indiana or a person who has a bachelor’s degree or advanced degree from an institution that is recognised by a U.S. Department of Education approved accreditation organisation.<sup>20</sup>

Additionally, registered mediators are also required to have undertaken training in mediation. The Resolution, Rule 1.5. also states that a registered or court approved mediator shall “have immunity in the same manner and to the same extent as a judge in the State of Indiana”. Therefore, they are protected from most civil liability for wrongdoing during the mediation process.

Additionally, mediators can practise in private settings in any state without being licensed, certified or listed on the registry.

In cases of criminal offences, there are certain types of restorative justice services, such as the Victim and Offender Restoration Program (VORP) or the Shoplifting and Theft Education Program (STEP) that can be offered to parties in Indiana. These programs are supported by the Juvenile Probation Departments, Adult Probation services, the Prosecutor’s office, and the Public Defender’s office. For example,

<sup>15</sup> Uniform Law Commission 2001.

<sup>16</sup> Uniform Law Commission 2001.

<sup>17</sup> Indiana Rules of Court 2021: Rule 2.2.

<sup>18</sup> Indiana Rules of Court 2021: Rule 2.3. and 2.4.

<sup>19</sup> Indiana Rules of Court 2021: Rule 2.5.(A).

<sup>20</sup> Indiana Rules of Court 2021: Rule 2.5.(B).

a non-profit organisation, Community Justice and Mediation Service (CJAM) in Bloomington, Indiana, offers restorative justice services in cases of burglary, vandalism, harassment, minor assault, shoplifting, criminal recklessness or theft, among other offences.<sup>21</sup> Mediators and restorative justice facilitators working on these cases can be volunteers with all kinds of background, who have completed a 40-hour basic mediation and restorative justice training and then shadowing with a more experienced mediator.

### ***Summary of the similarities and differences***

By examining the legislation of mediation and restorative practices in Hungary and in the state of Indiana, USA, we can see that there are differences even in the definition of the processes. Mediation is a more widely used term in Hungary, that covers processes that are called restorative justice in the USA. In Indiana, when there is a facilitation between victims and offenders in a criminal offence case, then the process is called restorative justice and not mediation.

In terms of the legislation, it can be observed that Hungary has stricter legislation around mediation as the Criminal Code and the Penal Code both include paragraphs around the applicability of mediation in certain cases. In Indiana, there is no federal legislation but only rules that are applied state by state. However, these rules determine what cases can be referred to mediation and who can serve as a mediator. Restorative justice is facilitated by non-profit organisations that are contracted by the different counties in a state on an annual basis.

In Hungary, mediators are trained probation officers but there are certain lawyers trained in mediation who can also facilitate mediations. In Indiana, registered mediators are mostly attorneys, but parties may also agree upon any other person to serve as a mediator if they are approved by the trial court. Mediators in Indiana can have a variety of backgrounds but they still need to complete training in mediation and restorative practices.

In summary, there are many differences in terms of the legislation around mediation and restorative justice in Hungary and in Indiana but let us examine what happens in practice, how these laws and regulations are applied.

### **The practical application of mediation**

This section of the article will focus on how mediation and restorative justice occur in practice, the types of cases that go to mediation, the prevalence of using mediation,

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<sup>21</sup> Community Justice & Mediation Center 2023.

what characteristics mediators and victims/offenders have who take part in the process.

### ***The practical application of mediation in Hungary***

The use of mediation is a success story in Hungary. According to the official statistics, in its first year of application, more than one percent of all victims were involved in mediation and more than two thousand and four hundred mediation proceedings were conducted by the judiciary offices.<sup>22</sup> At the time, it was the courts who referred a significant number of cases to mediation and according to some critical voices, this was a way for them to get rid of their dormant cases. Despite this, the parties and the professionals must have been able to gain some positive experiences as from this point, the number of cases increased continuously. Later on, the prosecutor's office referred more cases and the majority of cases were diverted to mediation at this early stage. This coincided with the legislative will that mediation at the court phase should only be initiated if it could have happened at the prosecution phase but for some reason did not take place.<sup>23</sup>

Later on, these findings from the previous examinations did not change considerably.

Examining the data from the year 2020, there were 6,694 mediation cases that is about 9% of all the cases which is a smaller number than what we see in previous years.<sup>24</sup> In the majority of the cases, the participating offenders are adults, while in less than 10% of the cases, the offenders are juveniles. Among those cases involving adults, the offences are typically crime against property, traffic offence or crime against life, physical integrity and health and there are some cases where the offence is a crime against human dignity and other fundamental rights, a crime against intellectual property rights or a crime against human freedom. Where the offender is a juvenile, the crimes are mostly crime against property as well but there are also a number of cases where there is a crime against life, physical integrity and health, a crime against human dignity and other fundamental rights or a traffic offence (this is a low number of cases, probably due to the low age of the offenders). Interestingly, around 76% of the adult cases and 79% of the juvenile cases end with a fulfilment of an agreement.

It should also be mentioned that there were another 1,035 mediation cases in a misdemeanour that were completed in 2020.

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<sup>22</sup> Data available from the Hungarian Prosecution Service.

<sup>23</sup> BK Opinion of the Curia on Act C of 2012 and Act XIX of 1998.

<sup>24</sup> National Data Collection Programme (OSAP) 2020.

## ***The practical application of mediation in Indiana***

At the non-profit organisation, CJAM, in Bloomington, Indiana, all restorative justice referrals are directed to a case manager and they are the ones who determine whether the case is appropriate for mediation and who to assign the case to. Then, the mediators (preferably more than one) will send out a letter to the parties with a set date and time of when they will be calling them. It is also a brief letter explaining what the organisation is and does.

After the phone call, the mediator(s) will have an initial interview with the parties again to determine the appropriateness of the case and also to explain the process sufficiently. In mediation cases, participation is completely voluntary, and so is it in restorative justice cases; however, there might be severe consequences of not taking part in those so it needs to be explained to the clients in detail what happens if they say no. Support services and legal support might also be recommended to clients, if appropriate.

In terms of statistics, in Bloomington (which is located in Monroe county of Indiana), CJAM completed 20 victim-offender (VORP) cases in 2022 (until October of that year), out of which 18 involved juvenile offenders. The offences were personal aggression cases and property crimes. In comparison, there were 9 VORP cases in 2021 only.

Their STEP cases served 25 offenders in 2022 and these cases were mostly pre-trial diversion cases and only four of them involved a juvenile offender. The crimes were thefts from department stores, theft of groceries, hardware and lumber or theft of a local store. In comparison, there were 35 cases completed in 2021 (10 more than in the following year).

When we look at the community mediation cases of CJAM, there were 402 cases referred in 2022 with the majority of these cases being eviction court cases (around 76% of them). These cases are mostly landlord-tenant disputes (86% of the cases) and only a couple of other cases like family, neighbour, roommate or workplace conflicts. Out of the 402 cases, around 63% of the cases were mediated with an agreement reached between the parties.

## **Conclusions**

Just as there are differences in terms of the legislation, we see many differences when we observe how restorative practices and mediation are used in Hungary and in Indiana. First of all, mediators in Hungary are all government officials who are also probation officers trained in mediation or in certain cases attorneys that have also completed mediation training. Contrary to this, in Indiana, mediators can be attorneys with relevant training experience but also people with various backgrounds who have completed training but are not on a centralised registry.

In Hungary, there are certain cases where co-mediation can be observed, but most likely due to the high case load, most cases are mediated by only one mediator. However, we see at CJAM that they prefer to have more than one mediator on one case and in some cases more than two mediators who might be volunteers who have completed the training and are in the process of shadowing more experienced facilitators. This is useful in terms of supervision as the mediators can discuss the challenges they come across but it can also mean that mediators can give each other feedback on their work during the proceedings.

The process of mediation is different in how it is prepared and managed and this is likely to be the case because of the high number of cases we observe in Hungary. In Hungary, the mediators send out a letter to the parties in which there is a set date and time when they have to come into the government offices for mediation to take place. There are no preparatory phone calls or meetings beforehand. At CJAM, mediators send out a letter with a date and time of when they will call the clients. During the phone call they go through the basic concept of restorative practices but then also decide on another date and time to discuss the case and how mediation could be helpful. If the client needs more than one meeting one-on-one with the mediators, then they have the opportunity to do so. In Hungary, the prosecutor's office sets a very strict deadline on when the mediation case should be completed (with or without an agreement) and this puts pressure on the mediators to finish cases as soon as possible with the absolute minimal number of meetings required. However, especially in serious and complex cases, we believe it is necessary to meet with the parties separately first in order to get an overview of the case and what can be achieved by going through restorative justice and mediation.

Today, mediation is common in both civil and criminal offence cases. Mediation is widely relied upon to ease the burden on the courts and as a means to more cost-effectively resolve disputes between the parties than litigation. The public policy benefits of reducing the backlog of cases on the courts' dockets are substantial. However, more importantly, it is an effective way of empowering and giving victims back their voices but also for the offender to take accountability and responsibility for their actions and the harms they caused.

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