

Exploring the Practice of Victim-Offender Mediation, to Proceed or Retrieve: The Case of Ghana

Peter Apuko Awuni

Institute of Paralegal Training and Studies (IPLS), Accra, Ghana

Email: awuniapuko@gmail.com

ORCID: <https://orcid.org/0009-0006-2223-2939>

and

Nana Ama Agyapong

University of Professional Studies (UPSA), Accra, Ghana

Email: nanaama.arthur26@gmail.com

ORCID: <https://orcid.org/0009-0005-4607-4288>

Abstract

In contrast to the State-centred perspective, which is based on criminal jurisprudence and holds that crime is committed against the State rather than the victim, the primary party. Victim-Offender Mediation (VOM), also known as restorative justice or transformative justice, aims to resolve some criminal offenses amicably. It appears the State is ignoring the victim's needs, restoration, interests, fears, and desires in order to proceed with the prosecution as it sees fit to settle its disputes in the strict criminal justice system. Outcomes sometimes appears unsatisfactory to victims, offenders, families, and the public. The paper conducts a theoretical and historical examination of VOM from a global as well as a Ghanaian viewpoint. Despite a few minor difficulties, it notes that VOM has been embraced by many states all over the world because the benefits far outweigh the drawbacks. Additionally, it has been noted that Ghana's judicial system supports the use of VOM. In particular, the Courts Act, 1993, the Alternative Dispute Resolution Act, 2010, and the Court-Connected ADR Practice Manual, 2010 call for the encouragement, promotion, and facilitation of amicable settlements of offenses that do not amount to felonies and do not qualify as serious offenses. The practice of

VOM in Ghana has not only helped victims receive restorative justice and emotional healing, improving access to justice for the poor and vulnerable, but has also contributed to reducing the load and pressure of cases placed on the courts, which causes the wheel of justice to turn grind slowly. As a result, rather than eliminating VOM in Ghana, efforts must be made to strengthen and institutionalize it.

Keywords: Offence, Victim-offender mediation, ADR, Reconciliation, Ghana.

Introduction

In carrying out the discussion, the paper would begin by looking at the historical and theoretical perspective of Victim-Offender Mediation (VOM). Attention is given to its Ghanaian perspective and the legal basis or rather the legal instrument making room for its practice in Ghana. The paper also looks at the merits and demerits of VOM and comparative analyses. The paper ends with drawing a conclusion under the subject matter under review, the researcher establishing a position flowing from the literature review, and analysis as well as proposed recommendations.

Jurisprudence, Historical and Theoretical Perspective of Victim-Offender Mediation

The criminal justice system's jurisprudence seems to regard crime as having been committed against the State rather than the direct victim or the community at large. This makes it seem as though the victims' preferences and requirements are ignored during the prosecution and sentencing of those responsible for the crimes against them¹ (Ravinsky,2015). Mediation is one of the methods used by Alternative Dispute Resolution (ADR) mechanisms to settle disputes. Some criminal cases are settled through a type of mediation called VOM. Mediation between victims and offenders is also known as restorative or transformative justice. Restorative practices aim to handle criminal justice problems by putting less emphasis on punishing offenders and more on repairing the harm done to victims and relationships² (Rossi, 2018; Wachtel, 2017; Zehr, 1990). According to Kaul (2019), therapeutic VOM fits

¹ Ravinsky Laura. *Reducing recidivism of violent offenders through victim-offender mediation: a fresh start*. Cardozo J. Conflict Resol. 17 (2015): 1019.

² Wachtel. T., *History. Defining restorative*. International Institute for Restorative Practices., 2017. <https://www.iirp.edu/defining-restorative/history> ; *Ibid* (n10)

into a specialized area of the conventional criminal justice system and has a high potential for rehabilitation of criminal offenders by giving them the chance to make amends and right their wrongs through alternative dispute resolution³. Kaul (2019) states that: Ideally, any judiciary's opinion about restorative justice depends on their belief of how much potential a criminal offender to rehabilitate himself, and whether the level of seriousness of his crime even gives him access to this method of mediation⁴

According to McCold (2006)⁵, the Victim-Offender Reconciliation Program (VORP) began as an experiment in *Kitchener, Ontario, Canada* in the early 1970s, when a youth probation officer convinced a judge that two youths convicted of vandalism should meet the victims of their crimes. After the meetings, the judge ordered the two youths to pay restitution to those victims as a condition of probation. Within that jurisdiction, the program became a probation-based or post-conviction sentencing alternative inspired by a probation officer's belief that victim-offender meetings could be helpful to both parties. The program got support from Churches as well as the government.

Based on the Canadian experience, the United States of America also launched its first VOM program⁶ in Elkhart, Indiana in 1978. It has been estimated that 400 VOM programs exist in the U.S. alone, and similar numbers in Europe. In the case of *People v Moulton*⁷, the US Court of Appeal granted an exception to the general rule that victims should not have a significant say in determining the severity of penalties. It is important to note that, regardless of the judgment and sanction made by the mediator in criminal cases in the United States, the sanction imposed must first be approved by a government official. This demonstrates that victim-offender mediation may be an option, but it is reasonably regulated by the government with the welfare of the populace in mind.⁸

³ Kaul Tulika. *A Guide to Victim-Offender Mediation: An Alternative to the Criminal Justice System*. Ct. Uncourt 6 (2019): 19.

⁴ Ibid (n2)

⁵ McCold Paul. *The recent history of restorative justice: Mediation, circles, and conferencing*. Handbook of restorative justice: A global perspective (2006): 23-51; Ibid(n1)

⁶ Hansen Toran, and Mark Umbreit. *State of knowledge: Four decades of victim-offender mediation research and practice: The evidence*. Conflict Resolution Quarterly 36.2 (2018): 99-113.

⁷ 182 Cal. Rptr 766 (1982) (California Court of Appeal Decisions)

⁸ Ibid (n2)

Delvigne (2005)⁹ provides that in Belgium, a study on “mediation for redress” in 1993 revealed the questioning of victims of their non-involvement in the resolution of serious violent crime. This brought about reforms and legislation in 2005, of which the current position of VOM in Belgium empowers each person, involved in a criminal procedure, with the possibility to ask for mediation as well at the police level. Apart from the State, non-profit organizations with the assistance of the Department of Justice assist parties in mediation. In the case of Hungary¹⁰, VOM has been introduced in fulfilment of the legislative duty under the European Union Council Framework Decision 2001/220/JHA on the Standing of Victims in Criminal Proceedings. It has also amended the Code of Criminal Procedure and the Criminal Code, providing rules to regulate VOM. Detailed rules on VOM can be found in the Act on Mediation in Criminal Cases (2006/123) among other supporting decrees. Poland¹¹ has also efficiently provided for VOM as contained in their Preamble which states that the advantage must be given in any case to the victim’s interests and needs, to fix the harm caused to him and to forestall further harm.

In the English Jurisdiction¹², the Victim's Position in History Early ideas of justice in medieval England allowed for personal retribution for offenses. Prior to the victim's rights movement in the 1960s, when the victims' roles had been reduced to those of witnesses in criminal trials, criminal laws had evolved over time to establish the exact opposite when it comes to punishing offenders in the name of the state with little involvement by victims. Rossi (2008) provides that:

The victim rights movement brought forth significant changes in the victim's role, including legislative and constitutional initiatives requiring notice, eligibility for compensation, fair treatment, victim input at various stages, return of property, and more. However, advocates of restorative justice argue that such rights have not been enough. They contest the state's

⁹ Delvigne, A. *Boundaries in victim-offender mediation: Reflections on mediation in certain cases and crimes*. 7th International Conference on Conferencing, Circles and other Restorative Justice Practices, Manchester England. (2005).

¹⁰ FellegiBorbala, Edit Törzs, and Edit Velez. *Restorative justice and victim-offender mediation in Hungary*. A comparative study of restorative justice legislation in Europe. Frankfurt am Main: Verlag fürPolizeiwissenschaft.

¹¹ Rossi Rachel Alexandra. *Meet Me on Death Row: Post-Sentence Victim-Offender Mediation in Capital Cases*. Pepp. Disp. Resol. LJ 9 (2008): 185.

¹² Ibid (10)

need for an equitable response to crime under the law must be balanced with the victim's need for emotional and material reparation. VOM is part of this ongoing effort to include victims in the process and to provide emotional and material healing, goals which have been overlooked when the focus is mainly placed on the punishment of the offender.

In Ghana¹³ VOM appears to be well established with the necessary legislation provided for the practice of VOM under the Courts Act 1993 (Act 459) and the Alternative Dispute Resolution Act, 2010 (Act 798). Brobbey (2000)¹⁴ brings to light the concept of ADR (VOM) in 1998 as espoused by the Wood, GT., JA¹⁵ where it was expressed as an approach that has gained recognition worldwide. The use of informal procedures, which is less expensive, and meeting the emotional needs of parties among others were the advantages. Adjei and Ackah-Yensu (2021) show that the jurisprudence underlying VOM is based on the conviction that is consistent with the idea of individualism that rules contemporary society. Since the offender may end up residing in the victim's community, the central idea is that the criminal justice system should be centred on the victim rather than the State. It is also important to take into account the victim's feelings in order to restore and transform both parties so that they can continue to live in social peace and harmony¹⁶. According to Lord Bingham of Cornhill, in supporting the transformation of the procedure of the courts stated that conventional litigation processes and ADR are not enemies, but partners. Neither can ignore the development of the other, therefore more complementary. These principles though enunciated with civil justice in mind, are equally applicable to the criminal justice system when it comes to VOM¹⁷. Which has since spread through the United States, Europe, Africa, and far and near across the globe as a complement to the traditional criminal justice system.

¹³ Fiadjoe Albert. *Alternative dispute resolution: a developing world perspective*. Routledge-Cavendish, (2013) p.106-115

¹⁴ Stephen Alan Brobbey. *Practice and Procedure in the trial courts and tribunals of Ghana*. Blackmask. p.448-449

¹⁵ Chief Justiceemeritus, Ghana, a stout advocate of ADR

¹⁶ Adjei Dennis Dominic and Ackah-Yensu Frances Barbara. *Alternative Dispute Resolution*. Buck Press. Accra. (2021)p.106

¹⁷ Ibid (n13)110

Principles of a Credible Justice System

Fiadjoe (2013)¹⁸ provides the general elements underpinning a credible justice system as established by Lord Woolf to include the following: being fair and being seen to be so; procedure and cost should be proportionate to the nature of the issues involved; should deal with cases with reasonable speed; be understandable to those who use it, thus citizens; and responsive to the needs of those that use it. Others include providing much certainty as to the nature of particular cases allowed; should be effective, adequately resourced, and organized. The growing interest of VOM across many jurisdictions must therefore be viewed as advancing the course of these principles of a good and credible justice system satisfactory to citizens.

Legal Basis for the Use of Victim-Offender Mediation in Ghana

Many jurisdictions as pointed above have enacted specific enabling legislation. In Ghana, the provisions are contained in two main Acts of Parliament that enable victim-offender mediation as an option in the settlement of some classes of criminal offenses. These include: i. Courts Act 1993 (Act 459) and ii. Alternative Dispute Resolution Act, 2010 (Act 798)

Courts Act 1993 (Act 459)

The Court Act, 1993 provides under section 73 for the reconciliation of criminal cases. It states that: *Any court, with criminal jurisdiction, may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offense not amounting to felony and not aggravated in degree, on payment cases of compensation or on other terms approved by the court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person.* A court with criminal jurisdiction is therefore empowered when confronted with a criminal case that appears to the presiding judge as non-aggravated nor a felony to stay the proceeding and direct that the case undergoes VOM. This may be done under the judge's own motions or by the request of the parties. This was the legal basis for VOM until 2010 when the mother Act was promulgated.

¹⁸ Ibid (n13) 109

Alternative Dispute Resolution Act, 2010 (Act 798)

Section 64(1) provides that: *A court before which an action is pending may at any stage in the proceedings if it is of the view that mediation will facilitate the resolution of the matter or a part of the matter in dispute, refer the matter or that part of the matter to mediation.* Not as in the case of the Courts Act, 1993 which specifically provides criminal matters (VOM) under section 73 and section 72¹⁹ for civil matters. When it comes to the ADR Act, 2010, it appears it has not specifically mentioned either criminal or civil cases, this, therefore, appears to represent the two positions²⁰. However, section 64 must also be invoked with section 73 of Act 459 in order to determine matters which can undergo VOM with respect to their gravity

Cases that Cannot Undergo Victim-Offender Mediation

Even though the list of cases that cannot endure VOM is not included in Act 459's provision. The national or public interest, the environment, the enforcement and interpretation of the Constitution, or any other issue that by law cannot be resolved by an alternative dispute resolution method, are all cases that cannot be resolved through ADR, according to Section 1 of Act 798. Also, the Court-Connected ADR Practice Manual²¹ outlines clearly cases that cannot be under ADR as follows: Child custody cases such as sexual, physical, mental, psychological, or verbal abuse issues, Disputes arising out of the constitutional interpretation, human rights, public law, and order issues, Civil disputes having to do with fraud²², forgery, or stealing, and aggravated assault and disputes pertaining to jurisdictions.

Advantages of Victim-Offender Mediation

The development and adoption of the concept of the VOM are based on some positive reasons underpinning an effective criminal justice system. Some of the reasons include:

¹⁹ Section 72 - Courts to Promote Reconciliation in Civil Cases.

²⁰ My humble Opinion: it must be construed for both criminal and civil cases

²¹ p.3

²² *Westchester Resources Ltd v. CAML Ghana Ltd and CP Construction Pioneers Baugesellschaft Anstalt (CPConstruction) v. Government of Ghana*, both cases the issues had to with allegations of fraud. The court reasoned that where a party alleges fraud such as issue is not arbitrable, hence is an issue to be determined by only the court. It is *"incapable of being settled by arbitration or the arbitral award was induced by fraud or corruption"*. Just as such cases are not amenable to arbitration similarly, they cannot undergo mediation (VOM).

Unsatisfactory Nature of the Criminal Justice System

It appears the present criminal justice system is not unsatisfactory in many ways, leaving the victim, accused, family members, and the public seemingly dissatisfied with the outcome of criminal cases disposed of by the court system. According to Kaul (2019)²³ the fact that the restorative justice system makes room for the human factor component in the course of delivering justice, is significant in benefitting the victim hence the need for VOM. It enables victims to recuperate from the deep, traumatizing effects of the crime, mentally and emotionally. This approach allows the victim and offender to sit face-to-face at intervals convenient to them facilitated by a mediator. Zehr (1990)²⁴ in a study revealed that victims expressed the need to actively participate in the trial process as well as the end result of the trial; participating consciously and reasonably; and making room for the expression of remorse for emotional rebuilding. Others include monetary compensation as well as the procedures being semi-formal in nature. Victims desire to have access to these needs taken into consideration in a criminal justice system. Therefore, for a criminal justice system to meet the threshold of a good justice process from the victims' perspective, meeting these needs and interests expressed by victims is significant to meet their definition of justice, short of this, may fall below their standard of being served with justice.

According to Umbreit (2000), it has become evident that VOM processes humanize the criminal justice experience for parties. It makes the offender accountable to the victim, active involvement of the victim and other stakeholders such as mediators and support persons in the justice process, and this reduces further criminal behavior of offenders²⁵

Acceptable Resolution of the Offence by Parties

A judgment from the victim's perspective and indeed the offender's point of view would be assumed to be just if it affords the parties the ability to understand the processes by way of simplicity in procedure and language than to be engulfed by the traditional mystifying and complex litigation

²³ Ibid (n3)

²⁴ Zehr Howard. *Changing lenses*. (1990).

²⁵ Umbreit Mark S. *Guidelines for victim-sensitive victim-offender mediation: Restorative justice through dialogue*. US Department of Justice, Office of Justice Programs, Office for Victims of Crime, 2000; Umbreit Mark S., Robert B. Coates, and Betty Vos. *The impact of victim-offender mediation: Two decades of research*. Fed. Probation 65 (2000): 29.

processes and procedure coupled with the seeming legal terminologies, difficult to comprehend. The processes are mostly led by the prosecutor and defence lawyer. It becomes very disappointing to parties at the end, not really knowing what really happened or was said on their behalf, in some cases, the parties even feel, that the arguments by prosecution and lawyer may well not be a true representation of the true facts of their case. VOM appears to provide a much simpler mode of resolution led by a neutral and unbiased third party who facilitates a discussion between the victim and the offender. This approach gives each party personally the opportunity to tell his/her own story and not through the prosecutor or lawyer; define what amounts to a just resolution of the offense, negotiate an acceptable compensation package, expression of remorse, regret, and apology. The parties are also empowered and the probability of compliance with the settlement agreement or final judgment is high, including undergoing remedial proceedings.²⁶

Traditional Litigation System not Appropriate for all Criminal Offences

The traditional criminal justice system has provided strict procedures and processes for various offenses with the accompanying charges along with their punishments which may range from the death penalty, imprisonment for life or a period, fines and compensations, or reparation. However, it must be noted that some offenses which are non-aggravated in magnitude may appear trivial to be made to undergo conventional litigation. These kinds of cases not only appear to delay the precious time of the court but overburden the court when it comes to the number of case-count before the court and the rate of disposing of them since such cases could have easily been resolved amicably through VOM. Unfortunately, as discussed above when even finally resolved by the court parties do not appear to be satisfied with such judgments. For example, considering a non-aggravated spousal relationship offense that finds itself before the court, and leads to the imprisonment of the offender, may not serve the interest of the victim, because it may not have been in the contemplation of the victim as the end result. This custodial sentence would therefore bring about regret, disappointment, and seeming public dissent. It also brings about overburdening of the already congested prisons with the high cost of maintenance. It may also expose such offenders, especially young offenders to crude criminals who may nurture them to become

²⁶ Ibid (n23)

hardened criminals upon their release. VOM, therefore, provides an alternative when it comes to resolving minimal criminal offenses avoid the above-mentioned challenges whilst facilitating amicable resolution satisfactory to the victim and the offender.

The principle of Recidivism or Reoffending

Recidivism has to do with repetition in the commission of crime or relapse into committing criminal offenses, making a victim develop the fear of revictimization. According to Kaul (2019), the VOM approach reduces the fear of revictimization coming from the same offender or even a different person in the future. While recidivism may be best regarded as an indicator of society's overall response to juvenile and adult offenders, it is a traditional measure used to evaluate the long-term impact of justice programs. Nugent et al (2001) in a study discovered 32% lower VOM as compared to non-VOM. It was also discovered that the few got into reoffending, involved in lesser offenses as compared to non-VOM offenders. This position is supported by a host of research suggesting that VOM impacts positively in reducing reoffending as compared to non-VOM approaches such as custodial sentencing.

Disadvantages of Victim-Offender Mediation

Notwithstanding the many advantages outlined above as supporting the introduction of VOM in many jurisdictions; VOM is not without challenges. Below include some of the shortcomings of VOM.

The Inequality between the Victim and the Offender

van Schijndel (2009)²⁷ indicates that the position that parties find themselves play a significant role when it comes to mediation between a victim and an offender. The inequality existing between the parties as far as power relations are concerned becomes very critical when the mediator is facilitating the discussion or negotiation between them which ordinarily would require that the parties have equal bargaining power. But it appears right from the beginning the parties have unequal power, one of the parties who is the offender is guilty, and the other, the victim, is not guilty, basically creating a power imbalance, making the mediation process appear to not be fair (Rossi, 2008). It appears the offender has his hands tied, and must therefore just play along to the demands of the victims and

²⁷ van Schijndel, Renske Anne Maria. *Confidentiality and victim-offender mediation*. Maklu, 2009.

advisers as the only way to benefit from the purported benefits of VOM. Where the offender tries to be a hard negotiator on the terms of the settlement is likely to lead to a breakdown of the VOM. It is observed that for the process to really go smoothly the victim would have to give out more concessions than expect from the victim, or even if none is given out by the victim. This appears to defeat the main concept of the mediation as win-win negotiation between consenting parties. At this stage, VOM appears to compel the parties to the process and not on any voluntary basis. Field (2004)²⁸ complains of gender-related power imbalances and neutrality or biases of mediators. VOM is seen as an approach bordering on power-based participation, this makes women and particularly young women based on their special needs to be disadvantaged when it comes to effective participation and consequently can result in unjust outcomes from the process. It, therefore, requires a mediator in the exercise and facilitation of the process to exercise equity and not equality as the parties may not be on the same scale. Balancing the powers of parties as and when observed.

Ethical Standards of Mediators

A successful mediation is one that meets the needs and interests of parties founded on upholding ethical standards in conducting the mediation process by the third-party neutral called the mediator. Fiadjoe (2013) states that interests-based mediation is referred to as...*a style of mediation in which the mediator facilitates communication between the disputants to focus on their interests. In an interest-based mediation, the parties are encouraged to focus on the underlying interests, goals, and needs rather than on the perceived outcome of litigation.* This is contrary to the rights-based approach in which disputants are assisted by the mediator on their rights and positions upon a careful evaluation of the dispute. The concept of VOM is an interests-based approach where the mediator facilitates a dialogue between the victim and the offender. Ethical standards are meant for providing a standard measure of conduct, bringing about excellence as well as imbue confidence in the area of practice. Delvigne (2005) mentions the boundaries of deontology²⁹ as an ethical challenge; that neutrality and

²⁸ Field Rachael. *Victim-offender conferencing: issues of power imbalance for women juvenile participants.* eLaw Journal: Murdoch University Electronic Journal of Law 11.1 (2004): 1-19.

²⁹ Deontology is an ethical theory that uses rules to distinguish right from wrong. Deontology is often associated with philosopher Immanuel Kant. <https://ethics>

confidentiality of the mediator form the basic principles of mediations. This is more critical as mediators do not produce any report but only the settlement agreement.

The other element indicated had to do with voluntary submission to mediation that *"nobody can be forced to mediate, and the offender will go to trial anyhow, so the mediation can't be used as a way to escape trial"*. Act 798³⁰ establishes the following ethical standards, independence, impartiality, and non-personal or financial interest³¹, this is to avoid conflict of interest and partiality. Other elements include a faithful and honest disclosure³² by the mediator when it comes to the real likelihood of bias in course of the mediation. In the conduct of VOM, the mediator is empowered³³and therefore required to be independent and impartial in assisting the victim and offender to resolve the dispute amicably. Mediators, therefore ought to be highly skilled facilitators, carefully screened out from those who become too emotional and lack the power of self-control (Idornigie, 2020). However, as a human institution, it may be easier said than done based on a number of factors such as inadequate training and competence of mediators, difficulty in upholding confidentiality, and disclosures, since VOM makes room for other relevant stakeholders such as legal representation, relative (third-parties). The presence of these third parties in the mediation process may frustrate the anticipated smooth running of VOM as well as make it difficult for the mediator to facilitate the process. This interference ends up transforming VOM into a quasi-judicial adjudication outside the corridors of the court since these non-neutral third parties may participate directly or indirectly which would impact the final outcome, making the settlement agreement between the victim and the offender adulterated and not confidential. Based on this fact, what is claimed as VOM may only be an illusion rather than a reality, hence in a real sense, what is practiced is a form of *"quasi-judicial adjudication"*³⁴ facilitated by a purported third-party neutral.

unwrapped.utexas.edu/glossary/deontology#:~:text=Deontology%20is%20an%20ethical%20theory,Don't%20cheat.%E2%80%9D

³⁰ Alternative Dispute Resolution Act, 2010 (Act 798)

³¹ Ibid (n28) at section 67

³² Ibid (n28) at section 68

³³ Ibid (n28) at section74

³⁴ Humble opinion of the researcher

The Role of the Victim and Offender in the Conduct of VOM

The concept of VOM is based on the willingness of disputants (the victim and mediator) to undergo the mediation process, implying that when both or any of the parties is compelled into the process; they may not really cooperate in utmost good faith and honesty; but may end up frustrating the success of the mediation process as VOM supposed to be based on voluntary, personal interests, emotional healing, and restorative justice. But the question for observation is, what amounts to justice to the victim, and to the offender, and what would amount to just punishment; is it retribution, compensation, validation, vindication, recognition, apology, remorse, etc (Idornigie, 2020). It may be very difficult to identify what would satisfy the victim's definition of justice as well as the offender's definition of punishment or atonement. Implementation of the settlement agreement may therefore not be performed as expected leading to breach or failure of the resolution based on these issues that may not have been taken into consideration (Rossi, 2008). Of essence is therefore the proper preparation of the victim and offender before going into the mediation process, by providing relevant adequate information as to the setting, expectations on both positive and negative, potentials hazards, in order to avoid events that may appear to spring surprises to parties (Kaul,2019). This criminal law principle has its roots in the Holy Bible. Which provides that *"not even the devil knows what is inside a man's head"*. It appears relevant to be mentioned. It is therefore very difficult to establish with a good margin of certainty that the victim and offender have been properly adequately prepared or otherwise, the parties or a party may just be pretending or going through the process and not really interested in using it as a medium to resolve the dispute. It is not therefore the case that VOM is always fruitful, some end up becoming even more traumatized upon review as was discovered. Some of the reasons were based on the seeming lack of authority, insufficient discipline as well as the unsatisfactory outcome, or inadequate level of punishment (Kaul, 2019). In the end, this may well be a waste of the court's time, since, upon the failure of resolving the disputes amicably, the case is required to be referred back³⁵ to the court to take its normal course from the stay of proceedings. VOM may therefore be challenged when victims and offenders are not adequately prepared to have a dialogue with the other party.

³⁵ Ibid (n28) at section 64, Reference to mediation by court: Sec 64 (6)- Where the reference does not lead to a settlement, the court shall continue with the proceedings from the point where the reference was made.

The Role of Institutions in the Criminal Justice System

The VOM procedures and practices are led by various institutions and stakeholders within the criminal justice system. These institutions include the court system, the police system, legal representation, the department of social welfare, guardianship representation, the mediator³⁶, Civil-Society Organisations (CSOs), the public and public policy system, etc. According to Fellegi (2015)³⁷ elements such as “*competent experts, training; concrete and visible experiments in restorative justice; and personal experiences of actors of criminal justice systems with victim-offender mediation are still making the reforms difficult*”. These are significant for creating the enabling environment for conducting successful mediation between victims and offenders. Similarly, Umbreit (2000) mentions funding inadequacy, ensuring proper referrals; building a community support system, and in the justice system as well as eliciting victim participation (Umbreit, 2000). Non-governmental organizations (NGOs), Churches among others also play a critical role but have challenges when it comes to credibility, and therefore need to continuously work on improving it. It is imperative to indicate that an institution can make or unmake mediation processes by frustrating the process, and therefore weak institutions may possess as a stumbling block to the efforts of the mediator in facilitating an amicable resolution between the victim and offender. For example, a prosecutor who is anti-VOM or incompetent in the area of VOM, directed by the court to proceed to VOM, may at the very onset develop a negative mindset that the offender needs to be meted with retributive punishment and that VOM is merely a waste of time. This mindset has the highest probability of translating into frustrating the process in a conscious or unconscious manner in justifying his orientation. On the other hand, a lawyer who is versatile in litigation may well feel comfortable operating in his traditional comfort zone. In this instance, the competence, efforts, and innovations of the mediator and the desire of the victim and offender to have a dispute resolve their VOM would fail. It is therefore submitted that institutions and systems mandated to regulate the VOM process may possess as a threat to a successful mediation.

³⁶ More especially mediators under the Court-Connected ADR trained by the Judicial Training Institute of Ghana

³⁷ Idornigie. P. O., Mediation in criminal matters: scope, challenges, and prospects under Nigeria’s criminal law jurisprudence, NIALS, Abuja, 14 October 2020

Conclusion

Considering all the literature cited and discussed above shows clearly that the Victim-Offender Mediation has been developed following the rigor, harshness, and weaknesses of the criminal justice system; just as it was for the development of equity in mitigating the rigor and harshness of the common law system in the English jurisdiction. The call for victim-offender mediation as a restorative justice system has the attention of North America, Europe, and Africa, and growing interest across the whole world. Umbreit (2000) indicates that during the early 1980s, it was “questioned whether crime victims would want to meet face-to-face with their offenders”, overwhelming empirical research, data, and experience revealed that the majority of victims who engaged in mediation and dialogue, voluntarily engaged in the process ranging from 60% to 70 %. VOM provides very high levels of satisfaction as opposed to litigation; reformation of offenders especially juvenile offenders from recidivism hence opening a wide net for social control mechanism; considerably cost-effective, including amicable resolution acceptable to parties which comes with the high likelihood of compliance. Notwithstanding the benefits and innovation that VOM brings to the criminal justice system and jurisprudence; the challenges include ethical and deontology issues confronting mediators, the seeming existence of inequality among victims and offenders, and the power imbalance between females. The orientation and preparation of the offenders and victims as well as the institutions regulating VOM may also possess stumbling blocks.

Comparatively, it is observed that notwithstanding the challenges that come with VOM, the approach has indeed come in to mitigate the rigor and harshness of the criminal justice system. Umbreit (1998) submits that there appears to be growing public interest and support for the restorative justice system and practice (Clark 1985; Gottfredson and Taylor 1983; Public Agenda Foundation 1987; Public Opinion Research 1986; Thomson and Ragona 1987)³⁸. It is based on its positive outlook that most jurisdictions have enacted various legislations to regulate VOM. Ghana has enacted the Alternative Dispute Resolution Act, 2010 as the parent Act, supported by other legislations such as the Courts Act, 1993, among others. It must be noted that VOM is still in its embryonic developmental stage, growing in a steady manner as Forkosch (1963) indicates “*law, is a*

³⁸ Umbreit Mark. *Restorative justice through victim-offender mediation: A multi-site assessment*. *Western criminology review* 1.1 (1998): 1-29.

living organism, growing, modifying, changing”³⁹. Finally, to confront the essay question “Reasons for not recommending the Victim-Offender Mediation System for Ghana” head-on, on the strength of the cited literature and statutory provisions discussed thoroughly in this paper, there has been the mention of challenges and shortcomings, however, not for once did any of the multitudes of the studies considered in this paper, was it recommended for the abolition or rather recommending for countries to avoid the continuation or introduction of VOM in their jurisdiction as a better option in mitigating the harshness and rigor of the criminal justice system and development. Victim-Offender Mediation as a legal instrument is law, a tool for social control, engineering, and development; coming with various challenges and lacunas, which need to be nurtured as a living organism to grow, modify and change to become fit for purpose, and not simply “throwing the baby out with the bathing water”.

On the contrary, it is recommended that Ghana should continue with the practice of VOM and take steps to fix the teething challenges confronting the current practice of VOM. As this is evidently carried out by the various Chief Justices of Ghana, who build on the efforts of their predecessors. Establishing a National ADR Secretariat which is headed by a Justice of the Court of Appeal⁴⁰ and the institution of the Annual National ADR Week Celebration⁴¹ in promotion of the Court-Connected ADR Programme. Her Ladyship Justice Irene-Charity Larbi, during the 2021 Celebration stated that “Alternative Dispute Resolution was instituted in the year 2005 as an intervention to ease pressure on the regular court system and to create a platform that would offer disputants the opportunity to play a key role in resolving their disputes. To promote and entrench this intervention, a one-week in every legal year term is set aside to sensitize the General Public. It has a lot of benefits that support quality justice delivery over conventional litigation are privacy, helping parties to willingly comply with agreements, providing a healthier method for resolving disputes, decongests the courts, reducing the backlog of cases, and financial and emotional relief to parties, cost down as compared to the cost to litigation and thereby makes justice more accessible to a greater number of people. It also empowers parties due to flexibility, beneficial to lawyers in the sense that they tend to have happier clients, greater

³⁹ Morris Forkosch. D., *Constitutional Law*. Foundation Press, 1963.

⁴⁰ Currently headed by Her Ladyship Justice Irene-Charity Larbi, is Justice of the Court of Appeal and Judge-in-Charge of ADR

⁴¹ At Bolgatanga in the Upper East Region of Ghana, dated Monday, 19th July, 2021

professional satisfaction and broader problem-solving skills than litigation and to make quality justice real and accessible to all, especially the poor and vulnerable". This is appearing to be the position of Ghana when it comes to VOM and ADR is the general. It is therefore advocated that based on the many positive contributions that VOM has offered to the traditional criminal justice system, special attention should be placed on it by the relevant stakeholders to improve and entrench its practice within all courts in Ghana. Particularly, according to the National ADR Directorate,⁴² 32,698 cases was presented before its 132 Courts connected ADR programme were resolved out of 72,355 cases, amounting to 45% settlement rate between 2007 to 2022 which is remarkable.

Recommendation

It appears there is little if not an absence of empirical research in the area of VOM in Ghana, which assesses the about seventeen (17) years of the practice of VOM in Ghana. This therefore paper calls for a study to assess the impact of victim-offender mediation on stakeholders in Ghana.

References

- Adjei Dennis Dominic and Ackah-Yensu Frances Barbara. *Alternative Dispute Resolution*. Buck Press. Accra. (2021) p.106
- Delvigne, A. *Boundaries in victim-offender mediation: Reflections on mediation in certain cases and crimes*. 7th International Conference on Conferencing, Circles and other Restorative Justice Practices, Manchester England. (2005).
- FellegiBorbala, Edit Törzs, and Edit Velez. *Restorative justice and victim-offender mediation in Hungary*. A comparative study of restorative justice legislation in Europe. Frankfurt am Main: Verlag fürPolizeiwissenschaft.
- Fiadjoe Albert. *Alternative dispute resolution: a developing world perspective*. Routledge-Cavendish, (2013) p.106-115
- Field Rachael. *Victim-offender conferencing: issues of power imbalance for women juvenile participants*. eLaw Journal: Murdoch University Electronic Journal of Law 11.1 (2004): 1-19.
- Hansen Toran, and Mark Umbreit. *State of knowledge: Four decades of victim-offender mediation research and practice: The evidence*. Conflict Resolution Quarterly 36.2 (2018): 99-113.
- Idornigie. P. O., *Mediation in criminal matters: scope, challenges, and prospects under Nigeria's criminal law jurisprudence*, NIALS, Abuja, 14 October 2020

⁴² Judicial Service of Ghana

- Kaul Tulika. *A Guide to Victim-Offender Mediation: An Alternative to the Criminal Justice System*. Ct. Uncourt 6 (2019): 19.
- Ravinsky Laura. *Reducing recidivism of violent offenders through victim-offender mediation: a fresh start*. Cardozo J. Conflict Resol. 17 (2015): 1019.
- McCold Paul. *The recent history of restorative justice: Mediation, circles, and conferencing*. Handbook of restorative justice: A global perspective (2006): 23-51; Ibid(n1)
- Morris Forkosch. D., *Constitutional Law*. Foundation Press, 1963.
- Rossi Rachel Alexandra. *Meet Me on Death Row: Post-Sentence Victim-Offender Mediation in Capital Cases*. Pepp. Disp. Resol. LJ 9 (2008): 185.
- Stephen Alan Brobbey. *Practice and Procedure in the trial courts and tribunals of Ghana*. Blackmask. p.448-449
- Umbreit Mark S. *Guidelines for victim-sensitive victim-offender mediation: Restorative justice through dialogue*. US Department of Justice, Office of Justice Programs, Office for Victims of Crime, 2000
- Umbriet Mark S., Robert B. Coates, and Betty Vos. *The impact of victim-offender mediation: Two decades of research*. Fed. Probation 65 (2000): 29.
- Umbreit Mark. *Restorative justice through victim-offender mediation: A multi-site assessment*. Western criminology review 1.1 (1998): 1-29.
- van Schijndel, Renske Anne Maria. *Confidentiality and victim-offender mediation*. Maklu, 2009
- Wachtel. T., History. *Defining restorative*. International Institute for Restorative Practices., 2017. <https://www.iirp.edu/defining-restorative/history> ; Ibid (n10)