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Victim – Offender Mediation:
an Institution of the Postindustrial Society

Conference paper

The 3rd Annual Conference of the European Society of Criminology

Helsinki, 27-30.08.2003

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The beginnings of the idea of mediation are connected with solving penal conflicts through the settlement of case through negotiation between victim and perpetrator, families, kins or whole tribal communities in primitive societies without the state organization. Apart from reaching the justice on the peaceful way, conflicts between kins were handled by bloody vengeance which intended to avenge harm by harming even greater evil. The establishment of the state organization resulted in the decline of the old ways of execution of law which included mutual aid, mediation of ancestral authorities and revenge of kin or tribe in favour of the specialized apparatus of justice. Initially, the ancestral vengeance was limited by statutory compulsion of reconciliation and acceptance of ransom by victim, in that way intensifying the elements of consensualism in solving the penal conflict. However, at the same time it limited the discretion in administering sanction by the parts. In the Middle Ages complete move away from consensual forms of settlement the penal conflict, which was continued in modern law, occurred (Sojka – Zielinska, 1993).

The consolidating state took over the entitlements in range of occupation of crimes from victims, resulting in replacement the victim – criminal relation by the state – criminal one. The duty of prosecuting the delinquency and crime prevention was taken over by the state which was not followed by the duty of compensation while the system of justice was directed to the criminal with passing over the victim, which was accurately defined by Nils Christie (1982) as the steal of conflict. Much earlier John Locke (1992) indicated in the concept of the state of nature that in spite of the impossibility of avoiding the situation, in which people were judges in personal case, the exposing of punishment and crime prevention to centralized state authority is not necessary.

From the middle of the 20th century, when the postindustrial society started to arise, the development of victimology taking into consideration the feeling and requirements of crime victims is observed. According to the new approach to justice, the victim should receive compensation for damages from the perpetrator in the course of penal process already and if it is not possible they should receive it from the state in the place of victim. The introduction of the new means alternative to imprisonment particularly having as a purpose the direct satisfaction to crime victims is undoubtedly the result of influence of various concepts, from diversion which is directed rather to the offender until the concept of "civilizing" penal conflicts with more evenly arranged stresses (Kulesza, 1995). The issues of the return of contemporary society to the idea of

consensual solving of penal conflicts will be presented in this paper on the background of the three waves theory by the American futurologist Alvin Toffler (1997).

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According to the concept of the three waves of civilization, three waves of changes have appeared in the history of the world. Each of them annihilated old cultures and civilizations while introducing on their places the manner of life which would be uncomprehended for people who lived earlier.

The agricultural revolution which began about 8000 BC and dominated till 1650 – 1750 AD was the first wave. In the course of that period, people who lived earlier in small roving groups and mainly kept picking, fishing, hunting and shepherding began the settled mode of life. They assembled in villages and settlements and concentrated on the cultivation. Civilization of the first wave was and it still is inseparably related to the land.

The industrial revolution in Europe initiated the second wave of global changes. Common employment of the steam-machine, building of the first factories, moving of peasants to the cities, propagation of new ideas – progress, human rights, separation of Church and State, election of representatives by nation are the most important features of it. Mass approach to individual domains of life ensued. Mass production, consumption, communication, education required formation of specialized institutions for their needs and attendance. The changes appeared also in the structure of the family, where multigenerational unit was replaced with small family unit characteristic for the industrial society.

The third wave, which the human civilization has presently been standing face to face with, started in USA in about 1955, when the number of the staff of administration outnumbered the number of workers. It is to change social and economic relations existing so far, to eliminate standardization, synchronization and centralization as well as concentration of energy, money and authority. Assembly line production is substituted by the new methods of production. The diverse and renewable sources of energy and mental resources are becoming the base of life and development. In the sphere of economy the unified ventures on big scale are given up in favor of short series of products adapted to strictly definite requirements. Mass marketing gives way to market segmentation and selective promotion. General retreat from the mass society created by the second wave is being observed. The new pattern of family life based on

new miscellaneous models as single-parent families, childless families, re-marrying couples, singles, informal relationships and homosexual relationships is formed. Homogeneity of society characteristic for the second wave evolves towards the heterogeneity of the third wave civilization (Toffler, 1996).

The basic foundations of the theory of three waves are reflected in evolution and development of penal law and criminal procedure. It is difficult to present one characteristic model of the first wave law, because of the long (about 10000 years) period of duration of the agricultural civilization as well as the existence of several social and politic formations from primitive society to feudalism in this time. Such law was initially characterized by the lack of written regulations and the organ which would make it, whereas common law was in use. In the tribal – ancestral system all conflicts were eliminated within the confines of the kin and making use of its power and authority. The formation of the State resulted in separation of state apparatus from society which took over hitherto existing competences of tribe in range of judging the disputes and punishment as well as making law. The law of that time had the casuistic character, it did not distinguish infringements of private laws, which cause presently the duty of compensation only, from crimes that is infringements of penal law, which entail punishment of perpetrator. Few criminal actions violating the interest of the whole and exposed to public judgement, were initially adjusted to sacral regulations and the punishment was in the form of the donation in order to please the gods. Common interest was identified with the interest of the ruler in the later period, while crime threatened the majesty of State and monarch. The catalog of punishments was diversified with superiority of capital punishment, mutilate punishments, outlawing, banishment and confiscation of the property. Imprisonment was rare, because retribution for crime and deterring the perpetrator as well as the society from committing it once again in the future were the aim of the punishment. The principle of formal truth dominated in front of the court or proper officer (Sojka – Zielinska, 1993).

The above-mentioned features co-play with the nature of the first wave society, living dispersed in small groups and for which centralized apparatus of justice was useless, just as distinction of private law from public law and what follows compensation from criminal punishment. It was connected with self-sufficiency of agricultural population, more interested in the protection of its ownership and property than abstract interest of the State or the ruler. The interest of the ruler was actually divergent to the interest of subjects. It was observed that before industrial times the poor often were in their relatives' care, criminals were punished with forfait, flogging or

expelling from the family village, the family or the whole village took care of madmen. All the above confirms the thesis of dispersion of particular categories of people in the society. The lack of specialization of agrarian society had a bearing on the manner of the proceeding devoid of the elements of professionalism created by contemporary professional judges, public prosecutors, barristers and process assistants (Toffler, 1997).

The second wave brought the array of new principles which were the consequence of separation of function of producer and consumer. Standardization, specialization, synchronization, concentration, maximization and centralization affect, to a certain degree, each domain of life of the industrial society, introducing by the way the advanced bureaucracy (Toffler, 1997). The above principles also influenced, with some resistance, the law. The 18th century idea of codification of law presents a classic example of standardization and concentration as processes of adjustment for the requirements of developing capitalistic society. The creation of comprehensive codes of law of homogeneous character and standard procedure was extracted by the diversity of spheres of life and human activity being subject to the legal regulation, the increase in the number of persons interested in the knowledge of regulations as well as the need of faster and more efficient access to the regulations. Particularisms concerning individual territories or social groups were covered (up) in favour of homogeneous law in the whole state or at least at the federal level as far as federal states are concerned. Placing bigger number of convicts at one place, i.e. in prison, was the practical aspect of concentration, while maximization, which assumed the increase in production capacity and the decrease of unit costs did not render service to the idea rehabilitation of criminals. Individual attitude towards each convict that is required for successful rehabilitation is possible in the small groups of people only. Specialization and what follows professionalization, as well as centralization resulted in forming professional justice the officers of which has received exclusive rights to the arbitration of disputes. They in fact left no room for reaching an agreement between the parties without participation of professionals. Synchronization has stiffened the procedure, eliminating the option of adjudicating and affecting positively the observance of rights of participants of process at the same time. However, significantly advanced formalization, in particular restriction of majority of process activity with strictly specific time limits and other conditions of their validity, has extended criminal trial as well as it has often limited an access to justice actually.

The present system of penalties with predominant imprisonment and fine in favor of the state is also a product of the second wave ideology, which assumes

domination of interests of the state and society as the homogenous integrity and leaves not too much room for individualization of penal sanction according to the requirements and feelings of parties of strictly define conflict. In most cases resignation from traditional ways of reaction on crime could bring more desirable results from the point of view of individual interests and limit the application of criminal law to the essential minimum. Compensation for victims of crimes established together by parts of conflict is, for example, a mean that could decrease the sphere of operation of criminal law. However, in literature there is a focus on too reserved application of compensation in the industrialized countries. Three factors are the most important reasons of the above-mentioned state. Firstly, societies inhabiting such countries are based on specialization, so they need experts to solve any problem, including the problem of delinquency. It often turns out that social institutions based on specialists are kept by power of tradition and because long ago they were brought into existence for the sake of their usefulness. Such institutions usually exist presently only to serve other interests. Potentially frequent impossibility of obtainment of compensation is the second factor. The offender should have the capability of compensation which can be problematic in case of his or her poverty. Services in the form of making use of offender's leisure instead of unproductive wasting time in prison is the best solution in such a situation. That is why it is shown that it is not the lack of capability but the lack of proper organization only that the problem lies in. The fear of serious abuses at stating the way, kind and height of compensation as well as enforcing it in case of disproportion between social and property status of the offender and the victim is the third problem. In addition, the threat appears that the victim and his or her relatives looking for justice on their own would apply the vengeance. So would the offender and his or her family if they find compensation imposed by the opposite part unjust and unfounded (Christie, 1982).

The character of postindustrial society based on servicing can be expressed by new unknown phrases such as antimass-produce, adhoccracy and prosumption. These three are the most important if we take the position of victim – offender mediation in the third wave trial into account.

According to the current trend of unified production on a large scale, the second wave has created the mass society. Mass production becomes an anachronism in the economy of the third wave based on mental resources (Toffler, 1996). Contemporary criminal trial is also a mass institution. Tribunals in bigger cities, far from the average citizen, examine a multitude of similar at first sight cases employing the same procedures and making similar decisions. The anonymity of process participants, which

results from the lack of the direct acquaintance of them by the process organs and other persons involved in the trial, as well as a superficial contact of process organs and parties, being in fact limited to some process actions, especially evidentiary ones, and being the subject to strict rigor of the process formalism, they do not allow to satisfy completely the expectations of individual units neither the whole society. The decisions reached in the trial resemble the mass production products in the above-mentioned context. They are aimed to satisfy the requirements of the average client – the process participant. Victim – offender mediation has a chance to make deep changes and to adapt at least partly criminal trial to the reality of the third wave civilization. First of all, it allows to infiltrate into the basis of the conflict between offender and victim, and thereby to understand motives of operations of the parties and to solve it in the way that satisfies both parties. Mediator as a person who lives in specific local community and who understands its problems during mediation is a "co-producer" of a unique article adjusted to the expectations of an individual client. This type of decisions is all the more valuable, that the subject who co-creates them is not in most cases the element of justice.

The collapse of bureaucracy and the creation of a new model of management are clear and the most significant from the point of view of theory of management changes connected with the third wave. As a product of the industrial economy the bureaucracy is based on three assumptions: the individual always occupies exactly specified position in the system of the division of labour, vertical hierarchy exists and the individual finds his or her connections with the organized social structure as something permanent. Acceleration of the rate of changes in organizational structures has resulted in creation of the new model of management based on so called „adhoccracy". Such management is based on ad hoc teams of periodic nature called upon to solve specified short-term tasks. They are dissolved after the realization of the task and their members come back to their previous duties or become members of new teams to solve next tasks. Unlike the traditional bureaucratic structure, where individual departments have permanent nature, ad hoc teams are planned as temporary. It has a serious influence on the manner of work of individual member of organizational structure. Carrying on his or her activity, a bureaucrat constantly solves similar problems based on experience and strictly definite regulations while an adhoccrat continuously faces new problems and is forced to the permanent improvisation (Toffler, 1998). Against the background of the above-mentioned remarks mediation with participation of the parties and an impartial mediator is just the creation of such an ad hoc team to solve specific problem. Having finished

the mediation the team is dissolved; however the mediator becomes the part of the next team at the next mediation. Victim, offender and mediator are not as bureaucratic strictly formalized traditional justice much restricted by formal procedures but they should be ready to employ experimental and not commonplace solutions. Mediator is transformed from meticulous guard of procedure into a creative innovator. Moreover, one should be aware decentralization is the main condition of proper working of the new anti-bureaucratic model presented above. Mediation centers or even individual mediators should function in structure of each basic unit of local government or city district. They should have a real autonomy as far as the ways of solving interpersonal conflicts are concerned.

In the first wave civilization people were self-sufficient, they used what they produced themselves. They were not producers neither consumers in the present-day meaning and both of these functions remained inseparable. In order to describe that duality the terms „prosumption" and „prosumers" were coined. Along with the second wave the society passed on from production for personal use to production for exchange, and reduced the significance of prosumption to a minimum in that way. In the third wave society production and consumption have been transformed again into prosumption which often involves a consumer in the production process by his or her participation in one of many mutual – aid movements (Toffler, 1997). Victim – offender mediation with its tendency to be part of voluntary – like structures, independent on formal judiciary system perfectly fits in the prosumption model. The majority of mediation programmes is based on the initiative and the activity of grass-rooted victim help organizations which were established by the crime victims, their families or people who feel threat with the growing crime. Mediation process is a kind of service for the parties of the conflict in which they are active participants. These parties create a profitable solution for themselves. It means that they are producers of service which will be consumed by them later.

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Mediation is surely not a universal manner of solving the conflict between offender and victim resulted from the commission of crime. It is impossible to apply it commonly for some reasons. Firstly, because quite often the degree of escalation of conflict is too high. Secondly, there is no social consent to the negotiation manner of search for sanction as far as certain offences (e.g. a crime of murder) are concerned. The

striking thing is that changes of rules and judiciary system connected with the spirit of the third wave happen much more slowly than changes in other spheres of life which is, among other things, the result of lawyers' conservatism and resistance of people who mentally stick in the second wave. It causes the delay of the third wave in justice with reference to the third wave in economy and management. The first victim – offender mediations were carried out in the 70s of the 20th century within 20 years after the symbolic date of the beginning of the third wave changes.

The threats to the development of mediation are particularly visible in the countries of Central and Eastern Europe undergoing the system transformation, which are just beginning the building of the third wave society. The main problems beside these shown above are: low society awareness of the existence and rules of operating of mediation systems; the far-going punitivity of the society; the traditionalism of human relationship with predominant strong family ties, where the loyalty towards the informal group that the family or the clan is, is much higher than towards all the local community and the state, which is not conducive to the construction of the civil society based on consensus; populism in social life and politics, which is a denial of rationalism and pragmatism and thereby impinging on the lack of confidence in the new attitude towards the fight against crime.

The objections of the ethical nature, the matter of good and conscience including, are not less important than the above-mentioned barriers. As John H. Hallowell (1993) claims, people accept the specific procedure only if they can see any good in it, coming from something external to the very procedure. The capability of mediation depends not only on the existence of mediation procedure but also on the people's consent to subordination to the common interest. Without the regard of community of values and interests, without the acceptance of resignation from certain particular interests in favour of the common good, mediation is impossible.

Summing up, the development of consensualism in criminal procedure is inevitable in the context of present changes of civilization.

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