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VICTIM-OFFENDER MEDIATION – AN ALTERNATIVE, AN ADDITION OR NOTHING BUT A RUBBISH BIN IN RELATION TO LEGAL PROCEEDINGS? [1]

In Finland as well as internationally the development of mediation has reached a new phase which also seems to mark a turning point. As a result of a co-operation agreement between the Finnish Ministry of Social Affairs and Health and Ministry of Justice, a broadly-based working group was set up in Finland in early October of 2001 to deal with nation-wide financing and co-ordination of mediation, the scope of mediation and the regulation of relevant procedures. The working group continues the earlier work done on nation-wide organisation of mediation in Finland (Iivari 2001a). On the European level, a co-operation conference of 10 European countries, 'European Support Service for Restorative Justice', convened by the Belgium Minister of Justice during the Belgium EU Presidency, was held in Leuven, Belgium, on 26 October 2001 to discuss the promotion of European co-operation in penal mediation. A common, more far-reaching objective of these two initiatives is to widen the scope of mediation, to make it more permanent and to give it a more structured basis. In other words, they are both concerned with the institutionalisation of mediation in one way or another.

It is becoming increasingly evident that some kind of "system" is needed. One observation that can be made of the development of mediation both

[1] I thank especially Martin Wright for commenting and correcting this paper.

historically and internationally is that the different models for organising mediation have very different origins and differing objectives. Another even more important observation is that these initiatives have been launched in the absence of any precise regulation on their relation to the formal system: the field has been open to testing various pilot schemes and favourable to spontaneous action. Along with the positive aspects of this historical development, its negative aspect is that the interrelationship between the two systems has become blurred. This has given reason for scepticism from two different points of view. At the extreme ends this scepticism can be expressed as follows: (i) Mediation is an uncontrolled procedure wherein lay people are engaged in settling even serious crimes without expertise and with the risk of endangering the legal safety of the parties involved.[2] Moreover, as the activity is based on confidentiality, it cannot be assessed by transparent, commonly agreed criteria. This type of criticism is voiced in countries where the interrelationship between mediation schemes and the formal system of criminal justice is not regulated - as is the case in Finland. (ii) Others are sceptical in that they see that the role of mediation in relation to the formal criminal justice system is that of a mere errand boy. This type of criticism is voiced in countries where there is a tendency to see mediation as part of various diversionary measures. The leading Austrian mediation researcher Christa Pelikan writes in her recent article as follows:

The danger I perceive lurking in the tightly woven web of regulations is that the very special nature of the mediation procedure and its potential for furthering self-activity and democratic participation is set aside, smothered, by a diversionary measure that consists in the establishment of some secondary and second-rate criminal procedure. (Pelikan 2000, p. 150-151)

[2] The first time this issue was officially paid attention to in Finland was as early as 1987, when it was brought up in the report of a working group that dealt with alternatives to imprisonment. See *Vankeusrangaistuksen vaihtoehdoista*, 1987 p. 74-79. The debate has now been resumed by the Prosecutor General and the issue has also been under discussion in the advisory committee on legal safety.

An increasing need for regulation

The dual criticism that has revolved around mediation has given rise to different types of regulation needs and demands for more specific regulation: co-operation and division of labour between mediation schemes and the criminal justice system should be specified, the position of mediation should be strengthened by creating a code of practice, and mediation activities in general should be given a greater autonomy by improving legislation. Accordingly, rapid developments took place in the regulation of mediation in the late 1990s. A recent comparison made between 12 European countries (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Holland, Norway, Poland, Slovenia and Spain) indicates that mediation legislation was adopted in a majority of the countries under observation in 1998–2000 (Miers 2001). In nine of these countries, there are specific legislative provisions concerning the prosecutor. In the case of three countries, there are general provisions on the prosecutor's role in the mediation process, which means that it is at the discretion of the prosecutor to decide whether mediation is initiated and taken into account. The regulation of victim--offender mediation has advanced furthest in Norway, where a special Mediation Act (Lov Om Megling) has been adopted that contains provisions on organising mediation and on the content and relevance of mediation.

An alternative or an additional system?

Increasing regulation in the field of mediation has also led to two approaches to the definition of the role of mediation in relation to the criminal justice system: on the one hand mediation has been given a clearly alternative role in relation to court proceedings, on the other hand it has been regarded as complementary to court proceedings.

Giving mediation an alternative role also gives emphasis to its institutional nature: First of all, the purpose of mediation is to strengthen the principle of addressing the needs of both parties and the principle of active participation.

At the same time, efforts are made to create the necessary preconditions for mediation to function as an independent sub-system within the judicial or social welfare system, whereby the court would no longer – except when unavoidable cases – have power over the outcome of mediation. When cases suitable for mediation are selected by certain general criteria and the parties agree to mediation, the mediation outcome produced by the parties and the mediator is the final settlement of the conflict. This is precisely what the Norwegian Mediation Act (LOM) is about. The Act also clearly defines mediation as a criminal sanction.

The complementary role of mediation becomes evident when a criminal case is taken to court despite mediation and mediation is given a certain function[3] in that connection. When mediation is used in this way and its implementation is regulated to some extent, the problem of legal safety can be regarded as being addressed more appropriately. The institutionalisation of mediation can also be furthered by regulating referral of cases to mediation, training of mediators, qualification requirements, guarantees for clients' legal safety etc. It can be assumed that institutionalised mediation safeguards the rights of both parties in the best possible way, since such mediation activities can be assessed against the safety provided by courts of justice or against the background of other professional standards (Marshall 1988, p. 36, 38).

However, efforts towards institutionalisation have also been severely criticised: freedom and innovation will be lost; mediation will be perverted into a mere adjunct to justice, i.e., a new authority that only serves to further widen the coercive network of society, as stated by the early mediation critics Stanley Cohen (1985) and Sturla Falk (1991, p. 12–16). They maintain that these new alternatives will be harnessed to serve the objectives and ideology of the criminal justice system. Are these alternative judicial forums thus only new forms of social control that neutralise and ruin opportunities for collective action? This criticism does not seem to be quite

[3] See later section "… and on alternative to crminal justice system even in serious crimes involving violence

unjustified in view of the developments in Central Europe, where the judicial system has been prone to adapt the different forms of mediation so as to make them contribute to the attainment of various diversion objectives of the formal system.[4] This criticism is to be taken seriously, while at the same time paying attention to the evolution of diversion within the judicial system. The formal system of criminal justice also wants to shift the processing of cases towards more informal forums and instead of emphasising diversion alone give more weight to addressing the needs and safeguarding the participation rights of both parties. To some extent this European trend is also to be seen in Finland in the form of new practices and experiments such as community service, juvenile punishment experiment[5] and commitment to treatment as an alternative to punishment. As a matter of fact, the 1993 reform of dispute settlement procedures at courts is indicative of the same development.[6] This Anglo-American evolution, referred to as restorative justice, can in fact be regarded as a new school of criminal policy. It strongly emphasises the participation rights of the parties and solutions with concrete restorative effects in place of sentencing and punishment. Under the concept of restorative justice, there is an increasingly lively debate going on in many Western countries (but not in Finland) concerning the nature and definition of the alternatives and their position in relation to the conventional system of criminal justice (Pelikan 2001).

[4] Penal mediation has been organised in Belgium, for instance, in such a way that it is for the public prosecutor to refer suitable cases to mediation and to supervise mediation activities. Mediation itself is carried out by social workers (assistants for penal mediation) and criminologists who work in the prosecutor's office. They contact the parties, take care of practical arrangements and report to the prosecutor. In addition, each court of appeal has an assistant adviser who assesses, co-ordinates and supervises penal mediation. The procedure seldom involves any real mediation sessions. The main emphasis is on the implementation of various forms of compensation and community service as an alternative to imprisonment. Aertsen 2000, p. 170,177.

[5] Comprising training courses and community services not more than 60 hours instead of conditional sentencing.

[6] In the preliminary preparation of a dispute, it will be determined, among other things, whether there is scope for settlement. If the case is amenable to out-of-court settlement, the court should endeavour to persuade the parties to settle the case. In order to further the settlement the court may also present its own suggestion for settling the case amicably, taking into consideration the wishes of the parties, the nature of the case and other circumstances (Code of Judicial Procedure: 5:19 § 1/4, 5:26 § 1,1, 5:26 § 1,2). On the implementation of the procedure, see Arponen 1999, p. 290-295.

Mediation and the problem of differentiated control

The need to look for alternatives does not necessarily derive from the "Machiavellian" state. Within the realm of the formal judicial system such efforts often reflect judicial bodies' inability to react to citizens' increasingly complex needs. By contrast, as regards mediation in penal matters, these efforts stem from the need of the users of mediation, that is, offenders, victims and mediators, to solve certain problems in a way that is both more humane and responds better to the actual needs of the parties. The great number of initiatives and their differentiation also raises the question whether the civil society uses these initiatives to create a new concrete 'social community', where people themselves can resolve social and judicial problems without official systems. If this holds true, the recreation of 'social communities' might contribute to the development of our societies towards differentiating social interaction systems that could give a greater autonomy to both individuals and social groups in conflict settlement in particular. Of course, this kind of action, based on the empowerment of citizens in the resolution of their own conflicts, is only taking its first steps and subject to criticism. Nevertheless, the action is undeniably becoming more widespread, which makes the issue interesting from the societal point of view. Accordingly, this is not merely a question of a struggle within criminal policy, but the struggle also concerns the democratic rights of citizens and their participation in decision-making in matters that affect them.[7]

The existence and growth of these new "extra" conflict settlement models raises the question of the differentiation of society with its sub-systems that create their own systemic regulation models. Accordingly, the fundamental reason for the existence of judicial alternatives is not the wretchedness of the court system but a deeper trend relating to the development of social

[7] It is also to be noted that the domain where this struggle takes place is not even necessarily unconventional in view of the history of informal justice; cf. Bonafe-Schmitt 1989 p. 184.

regulation systems.[8] Apparently, there is thus a need to reassess the contents and significance of 'the juridification of society and the socialisation of justice'. It is to be noted that the judicial mechanism has never had the exclusive right to conflict settlement, as shown by the history of informal justice. To some extent, various communities have always made legal decisions without any formal mechanism.

How should mediation be organised in order that it could be used more extensively as an alternative to court proceedings, sentencing and even imprisonment? An underlying principle of the recommendation adopted by the Committee of Ministers of the Council of Europe in 1999 is that "mediation in penal matters should be available at all stages of the criminal justice process", also in connection with the court proceedings of the case (Recommendation of the Council of Europe 1999, p. 3). In addition media - tion saves costs if it is a diversion from the criminal justice system, but not if it's added to criminal justice measures.

Building mediation into the system …

Recently, the mediation debate in Europe in particular has stressed the importance of giving mediation a more autonomous position and strengthening its role (Victim-Offender Mediation in Europe, 2000). One particular concern has been the need to clarify the relationship, division of labour and co-operation between mediation schemes and the judicial system. Among other things, there are fears that the core of mediation will be wrecked and that these activities will be perverted to a mere adjunct to the judicial system or its 'rubbish bin'.[9] In addition to these more general points

[8] Günther Teubner has described this development in his numerous works as the reflexive development of justice. See e.g. Teubner 1988. On mediation as a reflexive right, see Iivari 1991.

[9] The recommendation of the Committee of Ministers of the Council of Europe (1999) emphasises that mediation services should be generally available to ensure equal access and the quality of services. The recommendation therefore requires that the Member States should further mediation programmes as generally available services – public or non-governmenral. This implies that the Member States at least should officially recognise mediation - be it public or non-governmental – as an alternative or at least an addition to conventional criminal proceedings. This kind of programmes should normally be financed from the state's and/or the local authority's budget, and public authorities should somehow be

of departure, a number of practical-ethical justifications for some degree of regulation on some level can be put forward in Finland:

- Mediation is not a generally available service on the national level, which forms an obstacle to equality of opportunities.

- Non-uniform criteria are applied when cases are referred to mediation by criminal justice authorities, policemen and prosecutors. The creation of a common code of practice on this level would help to increase the predictability and uniformity of the activities – and to decrease their arbitrariness.

- The legal safety of mediation, which has been questioned, will presumably improve when mediation is governed by a uniform code of practice and operating principles.

- Legal regulation of mediation could also enable the alternative nature of these activities to be increased in certain types of crime and its complementary role to be reinforced in relation to justice in some other types of crime.

Instead of considering and talking over whether mediation should be regulated or not, I find it more relevant to give careful consideration to what the appropriate level of regulation would be and how detailed it should be. At the preparatory stage it would surely be beneficial to examine, for instance, the recommendation of the Council of Europe concerning mediation in penal matters (or, say, in Finland the code of practice drawn up by the Finnish Bar Association[10]).

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responsible for them. The recommendation does not, however, go so far as to describe mediation as 'a right'. Mediation should be seen as a judicial option to be considered by criminal justice authorities.

[10] More on mediation activities by the Finnish Bar Association, see Taivalkoski 1999, p.286-289.

… and an alternative to the criminal justice system even in serious crimes involving violence

From the perspective of mediation one purpose of institutionalisation is to increase the importance of mediation in the legal process itself. By way of example, this could be done by giving mediation a greater weight as an alternative to legal proceedings. This would also give mediation a more autonomous role: emphasis would be placed on problem solving wherein the procedure and outcome are determined by the needs of the parties. The criminal justice system could then mainly act as an 'overseer', to make sure that 'everything is going all right".

However, to say that mediation gets more autonomous does not mean that it would be detached from the criminal justice system into an actor on its own. On the contrary, there are many reasons why it will become necessary to agree on or even regulate co-operation between mediation organisations and the conventional judicial system. This can be justified by the fact that these systems increasingly interact with each other – in a sense they need each other.

First, (i) the question of guilt and particularly that of evidence in penal matters can hardly ever be settled once and for all by a mediation organisation; the investigation methods and authority of the formal system are needed herein.

Second, (ii) if problems occurs in the implementation of an agreement (the binding force of the agreement), separate information on existing provisions of contract law and specific guidelines on measures to be taken by authorities to implement these provisions are needed.[11] It might also be necessary to revise existing provisions with regard to any special needs of the implementation of mediation agreements.

[11] Of course, more restorative methods should be tried first first, sucvh as mediation or a conference

Third, (iii) as regards the way in which cases are referred to mediation from the formal system and the criteria applied therein, there is also a need for regulation to clarify the procedures, or at least the principles should be agreed on.[12] This would rationalise mediation work and support the efforts of the formal system to promote diversion. Cases suitable for referral to mediation include those in which the formal system's own resources and operating principles do not work satisfactorily or the consideration of which within the formal system would be otherwise inappropriate.[13] Another related benefit to the formal system would be the release of resources. This kind of procedure, however, may imply the risk of mediation being harnessed by means of legislation to concern only such criminal cases where the values of "professional lawyers" determine the suitability of the case for mediation. This is clearly to be seen when assessing mediation pracrtice in certain countries: there has been a tendency to *a priori* exclude acts of violence from mediation (see Weitekamp, 2000, 110). In order to exert more profound influence on the formal system the scope for referring even more serious crimes to mediation should be assessed . This issue will be explored here in more detail, since there has been an animated debate going on in different countries in Europe.

According to Finnish legislation it is possible and fully acceptable that the complainant and the defendant seek to reach an agreement on compensation of damage even in cases of serious violence that are subject to public prosecution. In such cases the parties can also agree on dropping the charges. This is what has already happened occasionally: victims have dropped their charges even in different types of serious crimes subject to public prosecution. This practice, of course, has not prevented the prosecutor from exercising his right to institute criminal proceedings. Finnish legislation thus allows the parties to agree on compensation also in serious

[12] It is, of course, possible for cases to be self-referred directly to mediation service, without involving the criminal justice system, especially in cases where the two parties know each other. The offence has often arisen from a dispute.

[13] Even with regard to conclusion of agreements, completely normal dispute settlement processes include matters that courts do not take up for a decision. For instance, courts have refused to confirm agreements that concern the internal organisation of family life. See Kangasluoma 1999, p. 258.

criminal cases. This benefits both the victim and the offender and the judicial system in several ways: in most cases the victim will thereby be compensated for the damage caused. Agreeing on compensation also benefits the court, which will not need to spend its precious time on settling compensation matters after an agreement has been reached. It will suffice that the court check the validity and reasonability of the mediation agreement and, on request, confirm the agreement. Naturally, a precondition for this procedure is that the agreements that have been reached in mediation are presented in court for confirmation. Reaching an agreement also benefits the offender, since the penal code prescribes that grounds for aggravating or mitigating the punishment should be taken into account in the assessment of punishment. Grounds for mitigation include efforts made by the offender to eliminate or alleviate the effects of the crime. Reaching an agreement and compensation can well be regarded as such efforts (see Iivari 2001b).

It should be borne in mind that it is always for the prosecutor and the court to bring charges against and to punish the offender in cases subject to public prosecution, as mediation does not interrupt the criminal justice process.

Violent crimes are being mediated

As already mentioned above, mediation in violent crimes is under debate in other countries as well. In recent times, cases of serious violence have increasingly often been referred to mediation even elsewhere in Europe and in the United States. A few examples might be useful here: in **Austria** a crime may be subjected to diversion measures – including mediation – if the punishment that may be imposed on the offence does not exceed five years' imprisonment – or in the case of a young offender tens years' imprisonment. The diversion procedure may thus be applied even to cases of extremely severe violence. However, diversion is not permitted if the crime results in the victim's death, such as in manslaughter (Miers 2001, p. 7). In **Poland** mediation is applicable to all crimes in which the maximum imposable penalty is less than five years' imprisonment. This implies that even violent crimes can be mediated, as crimes suitable for mediation are not explicitly

categorised (Miers 2001, p. 50). In **Slovenia** the prosecutor may, if the victim agrees, allow the agreement reached between the offender and the victim to lead to different types of diversion measures (financial compensation for damages, payment of a contribution to an institution, community service or payment of alimony) in crimes where the maximum penalty does not exceed three years. Even violent crimes can be referred to mediation (Miers 2001, p. 54). In **Canada** victims of sexual assault and attempted murder and in the case of murder the victim's family meet the offender in some mediation programmes, usually after the offender has been imprisoned. Mediations have been regarded as successful. The researchers state that when sensitively handled "it is clear that the principles of restorative justice can be applied in selected cases of severe violence" (Umbreit et al. 1999, p. 340). Even in the **United States** some mediation programmes accept cases of serious violence, such as homicides and sexual offences (Miers 2001, p. 75). Among the Nordic countries, **Norway** launched a pilot scheme for mediation in cases of severe violence in early June of 2001 (Takala 2001, p. 24). The pilot project is being implemented in Bergen. In addition to these, it is to be mentioned that cases of domestic violence are mediated in the United States, Austria, Poland, **Denmark** and **Finland.**[14]

On the right to mediation

Experience gained from different mediation practices in different countries suggests that mediation could respond to various needs of the clients of the judicial system even in more severe offences. One could ask then if there are any fundamental obstacles to offering the parties an opportunity to mediation even in such cases liable to public prosecution where the parties themselves regard mediation as feasible and where there are matters to be mediated as regards compensation in particular. It does not necessarily pose

[14] A development and research project on 'Meeting Family Violence in Mediation" was launched in Finland on September 1, 2001. This two-and-a-half-year project is implemented by the Federation of Mother and Child Homes and Shelters, the Rape Crisis Centre, the Finnish Organisation of Voluntary Mediators and the National Research and Development Centre for Welfare and Health.

problems to define the boundary between cases with respect to their seriousness. The problem that remains in this case is the same as in the present situation – the significance given to mediation by the formal system. Mediation is hardly possible as an alternative procedure in serious criminal offences threatening the victim's life and health and other aggravated or outrageous crimes, since in such cases there is a need to emphasise the general prevention effect of the penalty.[15] Nevertheless, the suitability for referral to mediation should primarily be assessed case by case if the parties themselves wish mediation. Will this result in a sharp conflict with the principle of equality in the criminal justice system? That may be the case. The problem can hardly be solved in any other way than by accepting the differentiation of justice even in areas which conventionally have been under the strict control of the criminal justice system, within the co-operation framework established between the formal system and mediation schemes. It should also be remembered in this connection that not even the present criminal justice system is able to treat all of its clients totally equitably in assessing penalties for similar offences in different parts of the country. Legal equality will also often turn out to be an illusion as persons summoned to court are not equally able to pay for legal aid services or when the prognosis for an accused young person is poorer than that of another young person accused of a similar offence.

Mediation as a challenge to prevention thinking

Finally, mediation can be seen to challenge and/or elaborate the penalty theory of the formal criminal justice system. In general, penalty is said to have two chief effects pertinent to prevention: a general and specific prevention effect. As is known, society punishes offenders by subjecting them to specific measures, to a formal condemnation of the violation of norms. Another function of penalty is to influence the person to be punished in such a way that he or she will learn from the sanctions imposed and

[15] In the United States, it has been proposed within the framework of initiatives focusing on the reinforcement of restitution that imprisonment should be applied only to murders and rape offences. Weiekamp 1991, p. 9.

subsequently act as a social citizen. General prevention in turn means that norms that have been violated by crime are reinforced by society among the general public by imposing a penalty. The general prevention effect of penalty is also tied to an assumption of a deterrent effect: one should be careful not to behave in the same way as the offender in order to avoid penalty. (I do not claim that this is an accurate formulation of these concepts, but the idea has obviously been described properly).[16] These concepts of prevention are now to be redefined from the perspective of mediation.

In the context of mediation

specific prevention is realised through social learning, based on the internalisation of norms and thus the social integration of the offender

From the viewpoint of mediation, an important indicator of specific prevention is an individualised treatment of offenders that minimises the notion of the action as a punishment and that pays attention to the offender's individual needs, to the need to increase the offender's understanding of the consequences of his or her offence, to matters pertaining to acceptance of responsibility and to actions necessary for reintegrating the offender into society. These processes are believed to involve such social learning that will help the offender to get reintegrated in society more effectively than what punishments would do.[17]

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[16] As Martin Wright posed in his comment, courts e.g. hope that punishment will deter crime, but there isn't much evidence yhat it does.

[17] The specific prevention effect of mediation would naturally best become evident if incontestable evidence could be produced that mediation prevents reoffending. Research findings in this matter, however, are inconsistent. In Finland, for instance, Mielityinen (1999) has found that reoffending among those who have participated in mediation did not notably differ from that observed among the reference group. In Germany, in turn, Dolling and Hartman (2000) report that reoffending among those who have participated in successful mediation was three-fourths of that of the reference group. Weitekamp (2000, 112) points out that studies measuring the impact of mediation on reoffending are generally not reliable: "we need better sduties, in order to find out more about this important aspect. Research on this topic is usually based on too small samples and time period for recidivism is usually too short as well". See even Umbreit et al. (1999) and Strang (2001), who emphasise the need to use comprehensive research material and to study the long-term effects of mediation.

In the context of mediation

general prevention is realised through a process in which reparation made to the victim reconfirms the validity of norms, thus restoring public peace undermined by the offence in the community

From the viewpoint of general prevention, it should be possible for mediation to create and reinforce a conviction among the general public of mediation being capable of restoring public peace and the value of the norms that have been violated. As a preventive method mediation should promote conflict settlement with the aim of making amends to the crime victim.

The general prevention effect of mediation is more difficult to realise in view of the basic principle of mediation that mediation sessions should be confidential and held with closed doors. Unlike ordinary sessions of the court, which are even covered by the media (the more outrageous the crime, the more visibly it will be covered), mediation sessions are not open to the public. However, experiences gained from mediation as a provider of compensation to the victim are encouraging. In this sense, mediation has been able to restore peace between the parties of the conflict. But can this also satisfy the criminal justice system and signify that peace has been restored in the community and that norms have thus been strengthened?

Essential is thus to what extent the general prevention effect produced by mediation is accepted among the general public. In order for the general prevention to be effective, action should be public [18] and the citizens should be aware and convinced of that any violations of the law will be reacted to in such a way that the victim will also be granted reparation. A criminal act

[18] In commenting this paper Martin Wright posed that e.g. in conferences the offender's and victim's families are usually present and same in sentencing circles in Canada where some members of the public are present. According Wright public mediation session would be problematic. Another possibility would be to publicize the outcome but not the proceedings.

would thus be condemned by making the offender practically accountable to the crime victim within specified limits. It is exactly this type of values that have been referred to in connection with the mediation schemes in the United States: justice is done when the offender assumes responsibility for his or her behaviour, when the victim gets over the victim experience when the matter is remedied, and when anxiety in the community where the offence was committed is reduced (Haley 1991).[19] In cases where the community is the 'crime victim', compensation can be made through various services to the community, work contributions etc.[20]

I am aware of the difficulties encountered in trying to launch this kind of thinking in systems built on traditions – not least for the reason that such ideas are often dismissed out of hand as hopelessly idealistic. Nonetheless I will further continue a while with the new interpretation of prevention thinking.

The transfer of the power of decision to the parties involved in the conflict can also be seen from the perspective of efficiency thinking: reaching an agreement builds up the kind of confidence and credibility with regard to reparation that is seldom gained by a mere decision of the court. Confidence simply cannot be built by coercion in court. It is also to be noted that imposing a punishment reduces the offender's opportunities to make amends to the victim (Marshall & Merry 1990, p. 126). The principles of equality and equity in turn become visible in that the offender's and the victim's participation in decision-making on reparation/compensation guarantees the best expertise in finding a feasible solution – with the support of the

[19] Compensation order for damage caused by crime has also been seen to challenge the traditional penalty theory. Compensation for crime damage can be seen as (i) a penalty, as it represents a negative sanction imposed by the state in the form of the loss of rights and property. Compensation order also represents (ii) a realisation of the deterrent effect as it inherently includes a negative sanction; through compensation order the offender "gets his just deserts". Compensation order is also linked with (iii) a rehabilitation objective, which is required from specific prevention, as the offender is required to work within the civil society and to take the responsibility for making amends to the victim. See Weitekamp 1991, p. 3, 7.

[13] All offences of course do not cause damage to individual victims or communities (such as endangerment offences), but even in such cases the offender could be made accountable by compensation obligations that serve the public good.

balancing work of the mediator. However, the ultimate power to decide on the content of the agreement cannot perhaps be transferred to the parties in all cases. If necessary – in view of the legal safeguards – the agreements negotiated between the parties can be assessed in court, whereby it is regarded as important to maintain some ties with the judicial system, too.

The 'prevention effect' of mediation described herein can be further elaborated from the perspectives of the more tangible needs of the offender, the general public and society: When the offender wishes to make reparation for the damages caused and also fulfils this obligation, the reparation can be regarded as a sanction. The general public in turn should perceive the offender's action as an expression of his or her change of mind, which as such should reduce the need for punishment. To leave the offender unpunished is in turn of immediate benefit to the victim: when no punishment is imposed, the offender's opportunities to make reparation to the victim increase (Marshall & Merry 1990, p. 126). The state could play a role in the implementation of the prevention effect in connection with the confirmation of the mediation agreement by a court or some other authority.

When this broad outline for prevention thinking in the context of mediation is compared with conventional prevention thinking in the context of criminal justice, the objectives as such are the same. The difference lies in that in the context of mediation prevention thinking is given a new interpretation and content. Moreover, as the principle and application of specific prevention were at least officially abandoned in Finland for the very reason that specific prevention did not work, the development of mediation systems can now contribute to the restoration of the objective of specific prevention in Finnish criminal policy. [21]

[21] The principle of specific prevention was officially abandoned in Finland in connection with the revision of the 1975 Act on the Enforcement of Punishment. In practice, however, reinstatement of specific prevention in the enforcement of punishment has gradually been taking place as a kind of 'back-door' process through the development of alternatives to imprisonment, such as community service, juvenile punishment, treatment as an alternative to punishment and particularly a method of cognitive therapy in the enforcement of punishment during imprisonment.

A pertinent question for the new millennium is whether all offences need to be punished in addition to mediation.

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