Mediation in criminal cases in Finland

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1 Introduction

The roots of modern mediation in criminal cases go back to the early 1970s in the United States where the development of mediation services first begun. Mediation in criminal cases has since become established practice in many European countries as well. Mediation services in Europe were first provided in Norway, Finland, Germany and the United Kingdom.[1]

In Finland, mediation began as a trial and research operation under the Academy of Finland in 1983. The city of Vantaa established mediation as part of the duties of the city's social welfare office in 1986, after which services became established and gradually spread to other big cities as well.[2] At first, the pioneering cities in mediation provided training to other organizations and municipalities launching mediation services until the National Board on Social and Health Affairs started to finance the first part-time mediation consultant on 1 September 1990. The consultant's duties included setting up and providing mediation services and advice related to training.[3]

Prior to 2006, mediation in criminal cases was not regulated by legislation in Finland. In practice, it was governed by a handbook for mediators named "Rikos- ja riita-asioiden sovittelijan opas", published in 1999 by the National Research and Development Centre for Welfare and Health. Even before the development of legislation on mediation, Finland could however be considered a pioneering country in developing mediation in criminal cases.

By international standards, the Finnish mediation system was highly advanced already before 2005 and mediation had also become well-established in our society.[4]

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1 HE 93/2005 vp: Hallituksen esitys Eduskunnalle laiksi rikosasioiden sovittelusta (Government proposal to Parliament for an act on mediation in criminal cases), p. 4.

2 Iivari, J. (ed.): Rikos- ja riita-asioiden sovittelijan opas 2007. p. 9.

3 Steering group examining the transfer of mediation services in criminal cases.: Rikosasioiden sovittelupalveluiden siirto oikeusministeriön hallinnonalalle. (Transfer of mediation services in criminal cases to the administrative branch of the Ministry of Justice.) Reports and guidelines of the Ministry of Justice 2021:10, p. 17.

4 HE 93/2005 vp, pp. 4–5 and 9.

Other countries are therefore interested in the experiences we have of mediation. Finland has worked in cooperation with others in the international arena in the European Forum for Restorative Justice, founded in 2000 with Suomen Sovittelun Tuki ry as one of the founding members, and in the Nordic organization (Nordiskt forum för medling och konflikthantering). They have focused particularly on criminal mediation.[5]

This article examines mediation in criminal cases in Finland. The second chapter of the article looks at the development of mediation in criminal cases and legislation. The third chapter examines the relationship between mediation and the criminal procedure and court mediation. The fourth chapter explores the role of criminal mediation and the legal debate in addition to the challenges that have emerged. Finally, summary conclusions are presented.

2 Development of Mediation in Criminal Cases and Legislation

Mediation in criminal cases is a procedure for deciding matters related to crimes and fairly minor civil cases. The procedure is parallel or complementary to court proceedings. In mediation, the parties work with a mediator to try to reach a mutually satisfactory agreement on compensation for damages or a similar way to make amends to the injured party. The main goals of mediation are making amends to the victim of the crime and the offender actively taking responsibility for his/her actions. Prior to 2005, mediation services in Finland were mainly provided in criminal cases and offences committed by children and young people in particular. Mediation has given young people a valuable opportunity to develop a sense of responsibility, prevent recidivism and break the cycle of crime early on.[6]

From the perspective of organizing services, mediation has been positioned between three sectors. First of all, it has been closely connected to the social services and social work, although mediation has not been included in the legislation on social welfare. In addition to this, mediation services have played a significant role in the legal proceedings of criminal and certain civil cases, and thirdly, they have been connected to civic society through volunteer activities. One of the key elements of organizing mediation services has been the cooperation between these sectors under fairly broad legislative obligations and frameworks.[7]

Prior to 2005, mediation services in Finland were limited to specific regions. The mediation offices in the cities of the capital region (Helsinki, Espoo and Vantaa) dealt with more than a third of all cases mediated in Finland. The manner of organizing

[5] Iivari 2007, pp. 13–14.

[6] HE 93/2005 vp, pp. 4 and 9.

[7] Iivari 2007, p. 9.

mediation services also depended on the municipality. Some municipalities had established their own mediation office, some opted for outsourced mediation from another municipality or an organization, whereas some municipalities had officials who would provide mediation services along with their other duties.[8] Back then, the idea was to develop mediation services as professionally run volunteer activities, and actual mediation was typically performed by trained volunteer mediators.[9] Mediation was usually initiated by the police or the prosecutor, who were the initiators in more than 90 percent of all the cases brought to mediation. The expenses incurred by volunteer mediators in performing their duties were covered. Of the cases referred to mediation, the vast majority (95 percent) were criminal cases and the majority of these were crimes subject to official prosecution. The most common types of crimes referred to mediation were assault (45 percent), criminal damage (one fifth) and theft (one tenth).[10]

However, there were certain problems associated with the non-regulated mediation system for criminal cases due to which it proved necessary to bring mediation in criminal cases under the law. First of all, the population did not have equal access to mediation in criminal cases, because not nearly all municipalities were able to provide mediation.[11] Consequently, it was noted that mediation in criminal cases would not expand significantly if organizing it depended on the voluntary participation of municipalities and their financial resources. If anything, there was a risk that the tightening conditions of the municipal economy would lead to the reduction of activities, the signs of which were already evident. For example, in 1999 mediation was available in 255 municipalities, but in 2003 it was provided only in 217 municipalities.[12]

In addition, the fundamental impact of the outcome of mediation on the legal status of the party concerned was seen as an important viewpoint for developing regulation. A reached settlement can be of significance when the prosecutor considers waiving prosecution, for example.[13] According to chapter 1, section 8, subsection 1 of the Criminal Procedure Act (689/1997), the public prosecutor may waive prosecution, for example if criminal proceedings and punishment are to be deemed unreasonable or inappropriate in view of, for example, a settlement reached by the offender and the injured party. A settlement has also been provided as a circumstance reducing the punishment in the context of reforming the provisions on the general principles of the

8 HE 93/2005 vp, pp. 5–6.

9 Iivari 2007, p. 10.

10 HE 93/2005 vp, pp. 5–6.

11 Iivari 2007, p. 9.

12 HE 93/2005 vp, pp. 5 and 10.

13 HE 93/2005 vp, pp. 5 and 10.

Criminal Code (Act amending the Criminal Code 515/2003).[14] It is worth noting the prior to the reform, mediation was accepted as grounds for reducing the punishment already under the previous Criminal Code (Act 466/1976). Due to the implications for the legal status of the parties concerned, it was deemed important to guarantee the national availability of mediation services and to ensure the quality of the services and that mediation complies with standard practice where the legal protection of the parties involved in mediation is considered.[15]

2.1 Act on Conciliation in Criminal Cases is Enacted

The Act on Conciliation in Criminal and Certain Civil Cases (1015/2005, hereafter Mediation Act) entered into force in January 2006. Under section 26 of the Act, the services referred to in the Act had to be arranged as of 1 June 2006. The main change caused by the legal reform was that mediation in criminal cases became a service available throughout the country, arranged by the provincial government. The Act included fairly specific provisions on the administrative aspects of mediation. Regulation regarding content, on the other hand, was kept to a minimum, because the intention was to avoid making the procedure subject to strict formal provisions.[16] This is evident, for example, in the fact that the provision in section 3 of the Mediation Act does not limit the types of crimes that can be subject to mediation, but under section 15, the mediation office may at its discretion assess the expediency of mediation in criminal cases as the case may be. The mediation office should conduct the assessment by considering the special characteristics of each case and the circumstances as a whole. In addition, the type of crime may be significant in this respect, for example sexual crimes against children should not, as a rule, be referred to mediation at all, and restraint should be exercised when considering mediation in crimes involving domestic violence.[17]

The general management, supervision and monitoring of mediation services was placed under the jurisdiction of the Ministry of Social Affairs and Health under the Mediation Act. A total of 24 areas were established in Finland. Activities were launched quickly in old areas with the additional resources, but establishing offices in new areas and hiring and training new personnel continued until late 2006.[18] The purpose of en-

[14] HE 93/2005 vp, pp. 5 and 10.

[15] Iivari 2007, p. 9.

[16] Sovittelutyöryhmän mietintö ("Report of the Mediation Team") 2006. p. 2 f.

[17] HE 93/2005 vp, pp. 16–17.

[18] National Research and Development Centre for Welfare and Health 10/2007. Rikossovittelu 1.1–31.12.2006. p. 3.

acting the Mediation Act was to secure sufficient government funds for the expansion of mediation activities.[19]

According to section 13 of the Mediation Act, mediation may be proposed by the crime suspect, the victim, the police or prosecuting authority or some other authority. One of the aims of this provision was to promote the initiative of the parties to crimes in initiating mediation, which is why the party to the crime is listed as the first possible proposer of mediation.[20] The drafting materials for enacting the law also deemed it necessary to limit the right to propose mediation only to the police and the prosecuting authority in crimes involving violence against the suspect's spouse, child, parent or other comparable near relation.[21]

The purpose of enacting legislation concerning criminal mediation was to provide the parties to the crime the opportunity to meet confidentially in mediation and to discuss the mental and material harm caused by the crime to the victim in the presence of an independent mediator. As a condition for mediation, the parties have to be sufficiently mature to understand the meaning of mediation and the decisions made during the mediation process. Mediation should be based on voluntary participation by the parties, meaning that each party can withdraw its agreement at any time in which case mediation should be suspended immediately.[22] Under section 15 of the Mediation Act, before starting mediation, the mediation office must ensure that the above conditions for mediation are met.

Under section 1, subsection 1 of the Mediation Act, mediation in criminal cases means a non-chargeable service in which a crime suspect and the victim of that crime are provided the opportunity to meet confidentially through an independent mediator. Mediation provides the offender the opportunity to take responsibility for his/her actions and the aim is to therefore reach a mutually satisfactory agreement between the parties on how the offender will make amends and compensate to the victim for the harm and damage he/she has caused or on other ways to decide matters related to a criminal case that can be settled by the parties. When providing mediation services, it is the mediator's duty to act as a conciliator between the parties. The mediator does not settle the disputes between the parties, but helps them settle them between themselves. The issue of guilt is not decided in mediation either. When the crime in mediation is subject to official prosecution, the issue of guilt is always decided in the consideration of charges or in court proceedings. The same also applies to crimes where

[19] HE 93/2005 vp, p. 10.

[20] HE 92/2005 vp, p. 20.

[21] Report of the Legal Affairs Committee LaVM 13/2005 vp: Hallituksen esitys laiksi rikosasioiden sovittelusta (Government proposal to Parliament for an act on mediation in criminal cases), p. 8.

[22] HE 93/2005 vp, p. 10.

prosecution rests with the plaintiff, unless the plaintiff no longer demands punishment as a result of mediation, for example.[23] The provision under section 3 of the Mediation Act, concerning issues dealt with through mediation, shows that mediation in criminal cases can be a parallel or an alternative method to a court procedure when dealing with criminal cases. A case can be referred to mediation regardless of whether it is dealt with by the police or the prosecuting authority or a court of law and regardless of the stage of such procedure.[24]

2.2 Main Duties of the Mediation Office and the Mediator

Section 16 of the Mediation Act lists the main duties of the mediation office, which the mediation office must fulfil with regards to each mediation case.[25] According to the provision, when a mediation office accepts a case for mediation, it must 1) nominate a mediator for the mediation process who is suitable for the task on the basis of his/her experience and personal characteristics and is not disqualified in the manner referred to in the Administrative Procedure Act (434/2003); 2) with the relevant parties' agreement, obtain documents necessary for mediation from the police or prosecuting authority, courts of law or other parties; 3) ensure the provision of an interpreter or translator if a party does not have a command of the language to be used in mediation or because of a sensory or speech defect or some other reason cannot understand the discussions held in the mediation process or be understood in it; and 4) after mediation, inform the police or prosecuting authority of the mediation process and its outcome, notwithstanding the provisions on secrecy.

The competence requirements for persons engaged in the provision of mediation services are provided for in section 10 of the Mediation Act. The persons in charge of mediation services and mediation advisors must have an appropriate academic degree. If there is a special reason, other persons with good knowledge of mediation services and of related planning and supervision may be accepted for these duties. Persons who have completed introductory training in mediation services and otherwise have the education, skill and experience required for the appropriate handling of the duties may also act as mediators. The independence of the mediator is one of the most important principles of mediation, which is why nominating a mediator is one of the duties of the mediation office. In terms of a single mediation assignment, the suitability of the mediator should be assessed based on their experience and personal attributes, which means, for instance, that the more demanding the mediation assignment, the more

[23] HE 93/2005 vp, p. 10.

[24] HE 93/2005 vp, p. 17.

[25] HE 93/2005 vp, p. 21.

education and experience the mediator should have. In addition, the ideological basis of mediation requires mediation to be performed as voluntary work, which means that the nominated mediator is primarily a voluntary worker.[26]

Under section 17 of the Mediation Act, the duties of the mediator consist of 1) arranging mediation meetings between the parties; 2) conducting the mediation without bias and respecting all parties; 3) helping the parties to find mutually satisfactory solutions concerning the crime in order to redress the mental and material harm the victim has suffered because of the crime; 4) giving the parties information on available legal assistance and other services; 5) drawing up a document on the agreement reached by the parties in the mediation process and verifying it with a signature; and 6) after mediation, submitting a report on the mediation process to the mediation office. In addition, according to the legislative materials of the act, it is expedient to carry out mediation primarily in pairs through two mediators.[27]

The arrangement of mediation without an audience and the obligation of the parties to participate in the mediation process in person are provided for under section 18 of the Mediation Act. The reasons given for making the process confidential were that mediation is based on the aspirations of the parties and is voluntary. In addition, in most cases it takes place outside the sphere of the authorities.[28] In this respect, criminal mediation in Finland differs from court mediation, which is clearly a measure taken by the authorities. Measures taken by the authorities are, as a rule, public, and under section 21, subsection 2 of the Constitution of Finland, provisions concerning the publicity of proceedings shall be laid down by an Act.[29]

According to section 20 of the Mediation Act, the provisions of the Act on the Openness of Government Activities (621/1999, hereafter Openness Act) shall apply to the publicity of documents held by mediators or mediation offices and to the confidentiality obligation of the mediation office personnel or other persons participating in the handling of mediation cases. In addition, the roles subject to a confidentiality obligation shall be determined by section 23 of the Openness Act, meaning that the confidentiality obligation would apply to all the mediation office personnel, such as the persons in charge of mediation services and the advisors and the office personnel, as well as the volunteer mediators.

[26] HE 93/2005 vp, p. 21.

[27] HE 93/2005 vp, p. 22.

[28] Report of the Legal Affairs Committee LaVM 13/2005 vp, p. 10.

[29] HE 284/2010 vp: Government proposal for an act on mediation in civil matters and confirmation of settlements in general courts and for acts amending chapter 17, section 23 of the Code of Judicial Procedure and section 11 of the Act on the Expiry of Debts, p. 15.

2.3 Non-Chargeability and Equitability of Mediation and Development of Organization

According to the legislative materials of the Act on Conciliation in Criminal and Certain Civil Cases, the purpose of enacting the Act was to make mediation in criminal cases available throughout the country with the help of government funding, providing clients the opportunity to obtain a high-quality mediation service regardless of their place of residence.[30] Consequently, section 12 of the Mediation Act was enacted, under which expenses incurred in arranging mediation services are compensated from government funds.

However, certain problems were noticed in the equitable organization of services concerning the equal division of government compensations between service providers and regions. Some of the mediation service providers would return unused grants, whereas for some, the grants were not enough to organize services properly. The differences in the scope of services provided by different service providers affected the adequacy of grants. For example, in regions where the population is low and the populated area is geographically large and sparsely populated, the grants proved insufficient. In addition, the large variation in the number of mediation cases per region affected the adequacy of grants. In addition to the insufficient regional distribution of grants, the calculation of the grant referred to in section 12, subsection 3 of the Mediation Act caused difficulties in interpretation. It was deemed that the Act had not been specific enough in determining the expenses that may be covered by the grant and the Act did not require a report on the use of the grant either. In practice, these issues added ambiguity to the use of the grant and made it more difficult to monitor.[31]

It was therefore later deemed necessary to amend section 12 of the Mediation Act as of 1 January 2011 (Act 966/2010) so that the government grant for mediation services to service providers and municipalities is distributed based on the number of inhabitants, the surface area and the crime situation in each area. The more specific distribution and the relative weights of the criteria of dividing the grants are enacted in the Government Decree on Conciliation in Criminal and Certain Civil Cases. Section 5 of the Decree was amended so that the unequal distribution of the grants and the portion of the grant awarded to sparsely populated areas would be better accounted for. Under the reformed provision, the surface area and the crime situation would be given more weight than before in relation to the number of inhabitants. The weight of the number of inhabitants would be 50%, the surface area 20% and the crime situation 30%.[32]

[30] HE 93/2005 vp, p. 10.

[31] HE 92/2010 vp: Government proposal to Parliament on an act amending the Act on Conciliation in Criminal and Certain Civil Cases, pp. 5–6.

[32] HE 92/2010 vp, p. 6.

Another key reform in legislation concerning criminal mediation was the centralization of the fragmented administration. According to the Mediation Act in force in 2014, the duties and responsibilities of mediation in criminal and civil cases were divided between the Ministry of Social Affairs and Health, the advisory board on conciliation in criminal cases, various Regional State Administrative Agencies, mediation offices and mediators. In addition, the Finnish Institute for Health and Welfare THL has coordinated statistical, research and development tasks related to mediation in accordance with a performance contract concluded with the Ministry of Social Affairs and Health. The duty to arrange mediation services belonged to the Regional State Administrative Agencies. In terms of the overall development of services, the fragmented administration had caused problems to the harmonized organization of mediation services and the mutual cooperation of the parties. This was reflected for example in the lack of systematic activities. It had not been possible to properly establish harmonious practices, for example, and the scope of duties, responsibilities and cooperation between the parties have been somewhat unclear. Due to the fragmented administration, it has also been impossible to fully develop and tap the potential of electronic data management in the provision of mediation services.[33]

Already back in the 1980s and 1990s, in the early years of mediation services in Finland, it was thought that the services would be mainly aimed at young people. Mediation was consequently placed under the administrative branch of the Ministry of Social Affairs and Health, where one of the reasons was that most mediation customers were minors. This was indeed the case at first, but later on, a shift to adult customers became a growing trend across the country.[34]

Under the amending law (1563/2009) that entered into force in 2010, the duty to arrange the services was transferred under the Regional State Administrative Agencies, because of changes in the appointment of public authorities caused by the regional government reform.[35] It was not until a legal amendment (Act 680/2015) entered into force in 2016 that the duty to arrange the services was transferred under the Finnish Institute for Health and Welfare THL. This transfer of duty was justified by the strong social dimension of mediation in criminal and civil cases. Moreover, THL, which operates under the Ministry of Social Affairs and Health, was already strongly involved in

[33] HE 329/2014 vp: Government proposal to Parliament on an act amending the Act on Conciliation in Criminal and Certain Civil Cases, pp. 3 and 5.

[34] Steering group examining the transfer of mediation services in criminal cases.: Rikosasioiden sovittelupalveluiden siirto oikeusministeriön hallinnonalalle. (Transfer of mediation services in criminal cases to the administrative branch of the Ministry of Justice.) Reports and guidelines of the Ministry of Justice 2021:10, p. 17.

[35] HE 59/2009 vp: Government proposal to Parliament on legislation related to reforming regional administration, p. 1.

developing mediation services, and it was noted that the institution possesses strong expertise, research knowledge and educational know-how in mediation, which had previously been somewhat untapped. The drafting materials for the amending law (680/2015) concerning the centralization of administration also considered transferring the Mediation Act under the administrative branch of the Ministry of Justice, but this was not seen as expedient in light of the social implications of mediation and its nature as a communal dispute resolution tool. These qualities were seen to weaken if mediation would be closely tied in with the criminal justice system.[36] In addition, it was seen that mediation under the Ministry of Justice might be overshadowed by the development and administration of the formal, punitive legal system and be subordinate to it when setting priorities.[37]

Despite this, in March 2020, the Ministry of Justice launched a project and appointed a steering group to examine the possibility to transfer mediation in criminal and certain civil cases from the administrative branch of the Ministry of Social Affairs and Health to the administrative branch of the Ministry of Justice. In its report published in 2021, the steering group proposed the transfer of mediation services under the administration of the Ministry of Justice, justifying this for example by it being consistent with international practice and by the need to develop mediation services consistently with other applications of mediation in the branch of jurisdiction, such as court mediation and expert-assisted court mediation of family affairs. As such, mediation services under the administrative branch of the Ministry of Justice would be provided by the state itself using a single provider model in a national legal aid and public guardianship agency that may be established in accordance with the legal aid model. Mediation personnel would mainly consist of government officials, in addition to which the special attributes of mediation services could be maintained, meaning that the volunteer mediators who have received training would perform the actual mediation outside the criminal justice system in accordance with the principles of mediation and alternative dispute resolution. According to the proposal, mediation under the new framework would begin in the beginning of 2024 at the latest.[38] It's likely that the schedule will not be fulfilled in time.

[36] HE 329/2014 vp, pp. 5–6.

[37] Steering group examining the transfer of mediation services in criminal cases.: Rikosasioiden sovittelupalveluiden siirto oikeusministeriön hallinnonalalle. (Transfer of mediation services in criminal cases to the administrative branch of the Ministry of Justice.) Reports and guidelines of the Ministry of Justice 2021:10, p. 25.

[38] Reports and guidelines of the Ministry of Justice 2021, pp. 24 and 49.

3 Relationship of Mediation to the Criminal Procedure and Court Mediation

One of the key differences between mediation and the court process in Finland is that the applied facilitative (human-centered) mediation does not focus on the legal demands and justifications of the parties, but their actual needs and interests. Facilitative mediation typically involves interest-based negotiation. The clients can have various social and psychological interests that cannot be satisfied by a monetary compensation or by applying laws. These can include the need to be heard, the opportunity to understand the opposing party's actions, avoiding a long and stressful court process or their personal reputation. Because of this, disputes should be looked at very broadly in mediation. Mediation is an assisted discussion that aims for cooperation and a settlement between the parties, unlike a court process, which can be seen to reflect a competitive stance.[39]

In mediation, the injured party learns what the crime means for the victim and society better than in a traditional criminal trial. Mediation therefore highlights the relationship between the victim and the offender, and the victim is not left out of the process, which is one of the risks of a criminal procedure. In a criminal trial, questions concerning evidence are often given first priority. In mediation, the focus is on dealing with the mutual relationship between the parties.[40]

The law clearly states that the mediation procedure is part of the criminal procedure. Mediation and compensation have been officially accepted as part of the criminal justice system under the amendment of section 15a of the Decree on the Enforcement of the Penal Code, which entered into force on 1 February 1997. The provision was moved on 1 October 1997 to chapter 1, section 8 of the Criminal Procedure Act (689/1997). A settlement reached between the parties is given as one criterion for foregoing measures on grounds that they are to be deemed unreasonable and inappropriate.[41] Chapter 6, section 6, subsection 3 of the Criminal Code of Finland states that reconciliation between the offender and the injured person is grounds for reducing the punishment. The law does not require only the conclusion of an acceptable settlement agreement as grounds for reducing the punishment, although a concluded settlement agreement does weigh down the scale more than a proposed agreement, but according to the legislative materials, the offender's attempt to reach a settlement shall also be taken into consideration in addition to satisfying the victim's compensation interest, even if a settlement is not reached. Although reducing the punishment cannot in this case be

[39] Kilpeläinen, T.: Asianajaja ja tuomioistuinsovittelu – Poimintoja empiirisen tutkimuksen aineistosta. Defensor Legis 1/2015, pp. 127–128.

[40] Tolvanen, M.: Rangaistusteoriat – Mitä ne ovat ja mihin niitä tarvitaan? Oikeus 4/2009, pp. 367–368.

[41] Tolvanen 2009, p. 368.

based on a settlement reached between the parties, the willingness of the offender to mediate can be understood as some other attempt of the offender to remove the effects of the offence, as referred to in the section of law.[42]

Under chapter 6, section 12, subsection 1(4) of the Criminal Code of Finland, a settlement is also accepted as grounds for waiving punishment if punishment is to be deemed unreasonable or pointless in particular taking into account the reconciliation between the offender and the injured person. In this respect, based on grounds of reasonability and appropriateness, waiving punishment in light of a reached settlement does not require the conclusion of a settlement agreement either. Reconciliation and mediation do not automatically lead to the waiving of measures; this can be precluded for example by the severity of the crime. When assessing the meaning of mediation, the key is whether the settlement is voluntary and reached on the basis of the right knowledge.[43] Under the reference provision in chapter 6, section 8 of the Criminal Code of Finland, mediation can also be grounds for mitigating the penal latitude or changing the type of punishment.

In addition, the meaning of mediation in the criminal procedure is manifested in the so-called grounds of reasonability under chapter 1, section 8, subsection 1 of the Criminal Procedure Act[44], whereby the prosecutor may waive prosecution if criminal proceedings and punishment are to be deemed unreasonable or inappropriate in view of a settlement reached by the suspect in the offence and the injured party. Avoiding criminal proceedings and punishment on the basis of a settlement alone can endanger the fulfilling of the agreement. It is in the victim's interests that the decision on the consideration of charges depends on fulfilling the agreement. This procedure also helps enhance the offender's sense of responsibility. In cases where the offender, having received a non-prosecution decision, neglects their obligations under the agreement, the prosecutor may, under chapter 1, section 11, subsection 1 of the Criminal Procedure Act, withdraw their decision if new evidence appears in the case that shows that the decision has been based on essentially incomplete or erroneous information. For example, if facts later appear on the basis of which it can be deemed that the offender was factually reluctant to pay already when concluding the agreement, the non-prosecution decision could be withdrawn.[45]

According to section 21, subsection 2 of the Mediation Act, in later phases of dealing with a case, a party to the mediation process must not, without the consent

[42] HE 44/2002 vp: Government proposal to Parliament on the reform of legislation on the general principles in the criminal legislation, p. 198.

[43] HE 44/2002 vp, p. 212.

[44] HE 58/2013 vp: Government proposal to Parliament on legislation on plea bargaining and to reform non-prosecution provisions, p. 6.

[45] Sovittelutyöryhmän mietintö ("Report of the Mediation Team") 2006. p. 13.

of the other party, refer to what the latter has presented during the process in order to reach agreement. The prohibition on referring to information concerns offers and counteroffers presented during the process and, for example, a confession presented by the crime suspect in a failed mediation in a criminal case.[46] The agreement reached between the parties in criminal mediation is an agreement under civil law that is binding on the parties regardless of the outcome of the prosecutor's consideration of charges or any criminal sanctions that may be imposed on the offender. The Mediation Act does not provide for the enforcement of agreements reached through mediation.[47]

The Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts (394/2011) provides for court mediation in civil matters. Criminal mediation differs from court mediation in that court mediation is clearly an action taken by the authorities. The Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts, which entered into force in 2011, does not affect the application of the Act on Conciliation in Criminal Cases insofar as the previous Act contains provisions on mediation in civil matters. However, if the parties to a settlement concerning a dispute reached in mediation under the Act on Mediation want to confirm the enforceability of their settlement, the provisions of chapter 3 of the Act on Mediation in Civil Matters and Confirmation of Settlements are applicable for this purpose. Chapter 3, section 18 of the Act determines the types of out of court mediation that the provisions apply to. The provision can be applied to a settlement reached in mediation in a criminal case insofar as the settlement reached in the procedure concerns a civil matter, such as compensation for damages.[48] Under section 20 of the Act, the district court may confirm all or part of a settlement reached in out of court mediation enforceable. Proceedings shall be commenced by a written application submitted to the district court office. A settlement agreement confirmed in court is grounds for execution and corresponds in its enforcement to a court judgement or an arbitral award issued by arbitrators. A confirmed settlement agreement is final and cannot be appealed.[49]

[46] Report of the Legal Affairs Committee LaVM 13/2005 vp, p. 12.

[47] Steering group examining the transfer of mediation services in criminal cases: Rikosasioiden sovittelupalveluiden siirto oikeusministeriön hallinnonalalle. (Transfer of mediation services in criminal cases to the administrative branch of the Ministry of Justice.) Reports and guidelines of the Ministry of Justice 2021:10, p. 16.

[48] HE 284/2010, pp. 15, 23 and 25.

[49] Hietanen Kunwald, P.: Sovitteluoikeutta vai sovittelua ja oikeutta? Defensor Legis 3/2019. pp. 310–311.

4 Criminal Mediation – Role, Legal Debate and Challenges

In the first half of the 2000s, it was noted that the interest toward alternative dispute resolution methods had grown significantly in Finland. The topic had been actively discussed in law journals, and practical attempts had also been made to create new procedures as alternatives to court proceedings.[50] Mediation practice was also at the focus of international research at the time. It was clear that the establishment and development of mediation in Finland would require an in-depth analysis of the mediation services and the mediation process in particular. The importance of mediation research is reflected in the fact that mediation occurs behind closed doors with no audience.[51]

The 1999 Recommendation of the Committee of Ministers of the Council of Europe required member states to promote mediation programs, because making them equally available for everyone was considered important. In practice, this meant that member states were at the very least required to officially acknowledge mediation, whether it be private or public, as one possibility and an alternative or a complementary procedure to the traditional criminal procedure. The Recommendation did not, however, describe mediation as a right, but the agents of the criminal justice system should see mediation as a legal opportunity the use of which should be considered.[52] Similar views had also been presented by the United Nations Economic and Social Council (ECOSOC) in its Resolution 2002/12 (Basic principles on the use of restorative justice programmes in criminal matters).[53]

Debate in various forums over expanding mediation services across the nation had been ongoing in Finland throughout the 1990s and initiatives to this end has been submitted to the Ministry of Social Affairs and Health and the Ministry of Justice. It was not until 1 February 1998 that the Ministry of Social Affairs and Health established a broadly-based evaluation and monitoring group on mediation in criminal and civil cases, which was tasked with evaluating the organization and funding structures of mediation, promote the expansion of mediation services and propose development measures, among other tasks. In its report, the group proposed the appointment of a separate investigator to draw up a plan for making mediation available across the

[50] Ervasti, K.: Tuomioistuinten ulkopuolinen riitojen ratkaisu – Näkökulmia vaihtoehtoisiin konfliktinratkaisumenetelmiin. Lakimies 7–8/2000. p. 1237.

[51] Elonheimo, H.: Restoratiivinen oikeus ja suomalainen sovittelu. (“Restorative Justice and the Finnish Mediation”.) Oikeus 2/2004. p. 180.

[52] Iivari, J.: Oikeutta oikeuden varjossa – Rikossovittelulain täytäntöönpanon arviointitutkimus. (“Justice in the Shadow of Justice. An Evaluation Study of the Implementation of the Act on Mediation in Criminal Cases.”) National Institute for Health and Welfare Report 2010:5, p. 14.

[53] HE 93/2005 vp, p. 5.

nation. The appointment of an investigator can be seen to stem from various types of needs and pressures, such as the expansion of the use of mediation to crimes committed by adults. In particular, the increasingly aggravated cases that were referred to mediation, such as domestic violence cases, and the increased training needs of mediators were seen as challenges that required new solutions.[54]

In October 2000, as a result of a cooperation agreement between the Ministry of Social Affairs and Health and the Ministry of Justice, a broadly-based working group was set up to continue the work of the investigator by investigating the national financing and coordination of mediation services, the scope of mediation and the regulation of the procedure. At the same time, a cooperation conference of ten European countries, "European Support Service for Restorative Justice", convened by the Belgian Minister of Justice during the Belgian EU Presidency, was held in Leuven, Belgium, on 26 October 2001, to discuss the development of European cooperation in criminal mediation. The more far-reaching objective of both these initiatives was to broaden the scope of mediation services and make them more organized and permanent. Another objective was the institutionalization of mediation.[55]

The regulation of mediation has determined the role of mediation in relation to the criminal justice system in two ways: on the one hand, mediation has been portrayed as a distinct alternative to court proceedings, but on the other hand, it has also been portrayed as complementary to court proceedings. Already back in the 1990s, Finland showed signs of following the European trend whereby the judicial system had tried to adapt the different forms of mediation to serve the various diversion objectives of the formal system. In connection with this, the formal criminal justice system also wants to dismantle the processing of cases toward more informal forums and, instead of emphasizing diversion alone, increasingly stress the needs of the parties and their rights to participate. This trend was evident in Finland in the form of new practices and trials, for instance in terms of community service and juvenile punishment. In addition, the 1993 reforms of the dispute settlement procedures in courts are indications of the same trend.[56]

As mediation services later evolved in the 2020s, the debate on juridification in Finnish mediation research is still often avoided. There are many reasons for this, such as the fact that mediation is not seen to have a direct link to the legal system. Conflicts are constantly settled in society that never go through the legal system. Whenever a dispute is settled with the help or assistance of an outsider, this can be called media-

[54] Iivari 2010, p. 13.

[55] Iivari, J.: Rikossovittelu — Oikeuden vaihtoehto, täydentäjä vai roskakori? ("Victim-offender mediation – An Alternative, an Addition or Nothing but a Rubbish Bin in Relation to Legal Proceedings?") Oikeus 4/2001. p. 472.

[56] Iivari 2001. pp. 473–474.

tion, according to its general definition. This occurs on a daily basis in families, work and hobbies, and this mediation is free-form, prompt conflict resolution that involves examining the interests and needs of the parties and dealing with the related emotions. It is a common impression that mediation is about settling conflicts before they escalate and are taken to court. The outcome of mediation is not typically transferred to the legal system either, although under certain conditions it is possible in Finland to have a settlement agreement in a civil case to be confirmed as enforceable. Consequently, there is mediation in Finland that falls entirely outside the legal system and can to some extent highlight the social aspects of mediation. Only the settlement of a conflict that involves judicial elements typically requires a settlement becoming part of the legal system, resulting in implications related to procedural and private law. The settlement agreement settles the legal dispute between the parties, prevents or terminates a court process or arbitration concerning the same case and often conclusively determines the future of the parties.[57]

4.1 Objective of Mediation in Terms of Criminal Policy

In Finland, the objective of mediation in terms of criminal policy is to ease the load of the criminal justice system by referring more minor offences to mediation and thereby try to avoid unnecessary, heavy court proceedings. The key ways to achieve this goal are withdrawing the demand for legal action as a result of mediation, particularly in crimes where prosecution rests with the plaintiff, and considering mediation as grounds for waiving measures. The reduction of costs is also strongly related to the goal. Other goals related to criminal law have been avoiding the accumulation of punishments and stigmatization and preventing recidivism particularly in juveniles and making amends to the victim of the crime in more concrete ways than the legal system would allow. In terms of legislation, mediation has therefore become a complementary, auxiliary organization to the criminal justice system, while still containing individual elements of an alternative procedure and sanction.[58]

The Anglo-American/European alternative legal form to the traditional retributive system is restorative justice, which places a strong emphasis on the parties' right to participate and on concrete restorative decisions instead of sentencing and punish-

[57] Hietanen Kunwald, P.: Sovitteluoikeutta vai sovittelua ja oikeutta? Defensor Legis 3/2019. pp. 309–311.

[58] Jauhiainen A.: Rikostensovittelu. In Seuraamusjärjestelmä 2019 — Kontrollijärjestelmä tilastojen ja tutkimusten valossa. Research Briefs of the Institute of Criminology and Legal Policy 45/2021. Helsinki 2021. pp. 180–181.

ment.[59] Particularly the underlying premises of restorative justice make a significant exception to the retributive thinking of the Western legal system.[60]

In Finland, the main restorative procedure is victim-offender mediation. The core of restorative justice is that the parties concerned come together with the help of an external mediator or other convener to discuss the consequences of the crime and what should be done about it. Restorative justice refers to a specific procedure and its prevailing values, such as respectful dialogue. Some of the most important restorative values and attributes of the procedure include the comprehensive reparation of damage caused by the crime, the offender's sense of responsibility and moral learning.[61]

Even in the first half of the 2000s, restorative justice received less attention in theoretical research in Finland.[62] However, by 2012, the situation was completely different. By then, it was clear that criminal policy had been systematically implemented for a decade from the perspective restorative justice. The implemented policy focused specifically on alternative sanctions to imprisonment, such as mediation and community sanctions. The most obvious outcome of this was the development of the prison population in Finland. According to the latest international statistics (ICPS), the prison population rate in Finland per total population is one of the lowest in the world. For instance, in the United States there are 629 prisoners per 100,000 of the national population, whereas the corresponding ratio in Finland is 50. [63]

The methods and legislation of restorative justice were the most advanced in the Nordic countries in the first half of the 2010s. In Finland, the equal treatment of the victim and the offender has become the starting point for developing mediation services. In various other European countries, mediation has been developed either from the perspective of the offender or the victim. The main difference between these approaches is that Finland has sought to focus its development efforts on how the needs of the parties are taken into account and how they are heard in mediation. Finland has emphasized the dialogic nature of mediation: it is about interaction and dialogue.[64]

[59] Iivari 2001, p. 473.

[60] Jokinen, H.: Rikossovittelu ja moraali. Haaste 3/2012, p. 14.

[61] Elonheimo, H.: Restoratiivinen oikeus ja suomalainen sovittelu. ("Restorative Justice and the Finnish Mediation".) Oikeus 2/2004. pp. 180–182.

[62] Elonheimo 2004, p. 179.

[63] Kääriäinen, J.: Korjaavaa oikeutta. Haaste 3/2012.

[64] Kinnunen, A.: Restoratiivisen oikeuden kehitys Euroopassa. Haaste 3/2012.

4.2 Challenges in Criminal Mediation

The total number of criminal cases in district courts in Finland has decreased in the 2000s. In the peak year of 2004, around 67,000 criminal cases were instituted, but in 2020, only just over 50,000 cases were brought before district courts. The long-term decline in the total number of cases mirrors changes in the number of crimes recorded by the police, which has also decreased in the 2000s.[65]

As for the year 2020, 13,073 crimes were referred to mediation. The number of mediation cases increased in the years 2016–2020, although the number of crimes solved by the police has continued to decline. The role of mediation is relatively significant compared to criminal sanctions particularly when the case concerns crimes that are most suitable for mediation, such as assault, criminal damage, invasion of domestic premises and defamation, as well as various crimes committed by children and young people.[66]

The willingness of the police and prosecutors to refer criminal cases to mediation also affects the number of cases referred to mediation. One of the issues that currently causes friction in mediation is, indeed, the aforementioned willingness of the authorities to refer cases to criminal mediation.[67] An evaluation study published in 2010 concerning the enforcement of the Mediation Act found that prosecutors had conflicting views of the relationship between mediation and written proceedings in criminal cases, adopted on 1 October 2006. Chapter 5a of the Criminal Procedure Act provides for deciding a criminal case without the holding of a main hearing, that is, in written proceedings. The provision means that a simple criminal matter can be settled in the district court by written proceedings only.

This always requires the accused to agree that the case may be decided without a main hearing, in addition to which the accused must admit the described crime. When preparing the charges, the prosecutor considers whether a main hearing is necessary in the case, and makes a proposal concerning it in the application for a summons, after which the district court decides if the particular case can be decided without holding a main hearing. Tensions between mediation and written proceedings arise from the fact that both apply to the same mass of cases. Another problem is the performance target of the National Prosecution Authority, according to which a certain number of cases must be decided in written proceedings.[68]

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[65] Siro, J. & Aaltonen, M.: Rikosasiat tuomioistuimissa 2000-luvulla. Lakimies 5/2020.

[66] Jauhiainen A.: Rikostensovittelu. In Seuraamusjärjestelmä 2019 — Kontrollijärjestelmä tilastojen ja tutkimusten valossa. Research Briefs of the Institute of Criminology and Legal Policy 45/2021. Helsinki 2021. pp. 172 and 181.

[67] Jauhiainen 2021, p. 181.

[68] Iivari 2010, pp. 58–60.

In addition to the development target above, tapping the full potential of criminal mediation has been addressed in a report published by a rapporteur in 2020, which assessed and suggested improvements to the functioning of the criminal procedure chain, namely the waiting times, the value chains and the flow of matters. Representatives of the police, the National Prosecution Authority and the courts were consulted for the report. To begin with, the start of the criminal procedure chain can be simplified by reconciling pre-trial investigation and criminal mediation. Even according to the current legislation, the police could refer cases to criminal mediation without establishing in advance if the parties agree to mediation. According to the view of the mediation offices, it would be expedient to establish the parties' agreement to mediation only once, when the mediation office considers the initiation of mediation, because under section 2 of the Mediation Act, the mediation office must in any case obtain the parties' consent before mediation in a case may be carried out.[69]

Despite the statistics showing that the number of criminal cases reported to the police has fallen, restriction of the pre-trial investigation has become alarmingly common. In this respect, there is a fairly common view that the importance of criminal mediation will continue to grow as the police allocate their resources in a way that adds to the number of cases that are not investigated at all. Criminal mediation has proved to be a feasible method of moderate costs at least in some of the criminal cases that are in danger of not eliciting any reaction from the authorities. However, criminal mediation can be significantly increased only on the condition that more labor is hired in criminal mediation to supervise the work of mediators and to make decisions of an official nature in mediation. According to the persons in charge of the criminal mediation offices, the mediation organization is operating at the limits of its current capacity, and the number of cases referred to mediation cannot grow significantly because of this. In addition, it is particularly important to refer cases to mediation as soon as possible after the crime has been reported and not leave the case in line to wait for a decision on what will be done about it. According to the report, it is concerning that the number of cases referred to mediation by the police in some regions (such as Helsinki) has even decreased in 2019, at the same time as more and more pre-trial investigations have been restricted. This may be caused by problems in the flow of information between the police and the mediation services or people being unaware of the mediation services.[70]

[69] Tolvanen, M.: Rikosketjun LEAN-hanke – Selvityshenkilön raportti. ("LEAN project for assessing the criminal procedure chain. Rapporteur's report.") Reports and guidelines of the Ministry of Justice 2020:6, pp. 38–39.

[70] Tolvanen 2020, pp. 39–40.

5 Conclusions

The development of legislation concerning criminal mediation in Finland has been shaped, in part, by European trends and the policies of the European Union. The legislative development of mediation can be said to have started in Finland slightly behind the rest of Europe, not until 2006, although mediation had been an established practice in the country for several decades by then. It was this existing voluntary criminal mediation, available since 1983, that served as the springboard for legislative development.

Coming to the 2010s, the lead in legislative development had been reduced, which was reflected in the amendments to the Mediation Act, for instance concerning the centralization of the fragmented administration of mediation services to the Finnish Institute for Health and Welfare and revising the distribution basis of government grants. The year 2010 also saw the publication of the results of an evaluation study concerning the enforcement of the Mediation Act, which highlighted the experiences of the authorities of enforcing the Mediation Act, the crimes eligible for mediation and the significance of criminal mediation as part of decision-making in the criminal justice system.[71]

In legal debate and research, criminal mediation has searched for its place, sometimes as part of the justice system, sometimes as a complementary and an auxiliary tool. The social significance of criminal mediation has also been a hot topic, for example in debates concerning the administrative branch of choice of criminal mediation, either the Ministry of Justice and the Ministry of Social Affairs and Health. This has led to several different perspectives being presented on the role of criminal mediation, in which the views of legal scholars, citizens and the authorities involved in the criminal procedure can be quite different.

The current trend, however, is the development of the use of criminal mediation as part of the criminal procedure and the development of legislation to support this need. On a legislative level, the basic decisions of criminal jurisdiction have remained fairly stable in Finland for a long time. In the first place, much fewer criminal cases are taken to court now than in the beginning of the millennium. Although the total number of cases has increased slightly in the last few years, more than 10,000 criminal cases less than in the peak years of the early 2000s are now initiated. The increasingly common restriction of pre-trial investigations presents opportunities to develop criminal mediation, as cases that may be excluded from the judicial procedure could be referred to criminal mediation. In addition, development needs have been identified in the referral to criminal mediation and written proceedings in criminal cases. There

[71] Iivari 2010.

is currently an even greater demand for criminal mediation than can be met with the available resources.

The empirical legal research of criminal mediation has been complicated, in part, by a lack of information concerning the impact of criminal mediation on the criminal procedure. No statistical data has been available specifically on the processing of criminal cases referred to criminal mediation or the judicial decisions. Monitoring individual criminal cases referred to criminal mediation throughout the criminal process would require combining the register data of the police, the prosecutor, the mediation offices and the court. However, these databases are not primarily built for research use, and the availability of data can vary depending on the region. Combining the data would require the elimination of variables, compromising and exercising moderation when compiling data. [72] However, the creation of new research data is necessary in order to better understand and develop the role assigned to criminal mediation in the justice system.

[72] Jauhiainen, A.: Rikossovittelun merkitys rikosprosessissa – uutta tietoa kohti. Haaste 4/2021.