RESTORATIVE JUSTICE THEORY AND THE FINNISH MEDIATION PRACTICES

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ABSTRACT
The theory of restorative justice is noble indeed. Furthermore, the international literature is rife with uplifting anecdotes of successful restorative ceremonies where the parties to a crime meet and experience a moving emotional shift from hostility to empathy and co-operation. Creative win-win agreements are reached. Eventually, the parties may hug and even make friends and invite each other to a dinner, etc. Does this happen also in Finland?

In Finland, the most prominent manifestation of restorative justice is victim-offender mediation. In order to investigate to what extent the restorative ideals are actually realized within the Finnish mediation practices, 16 cases of victim-offender mediation have been observed. The data has been gathered by law students in the city of Turku between 2001-2003.

According to the data, there are many advantages to mediation: Most of the time, the parties come up with viable agreements they are satisfied with. The offenders are motivated to compensate for the damages. The parties are given voice; they have the opportunity to tell their stories in their own words. The initial tension is reduced as the mediation proceeds. Rather than the state’s retributive interests, the victims’ rights are promoted.

However, some discrepancies between the practice and the theory were also revealed: It is difficult to make especially young offenders truly participate in the mediation process. Emotions are not openly conveyed. The crime itself, the morals and the emotions attached are left largely undisussed, while the most attention is paid to the making of the agreement. Pre-mediation meetings and support persons are not taken sufficient advantage of. When the parents are present, they dominate the discussion. Furthermore, the agreements are not very creative. The compensation tends to be solely monetary while other options are ignored.

It was also found out that, in the absence of regulation, access to mediation as well as the mediation process depend on the attitudes and habits of single persons. Too few and too lenient cases are referred to mediation. In order to more fully exploit the restorative potential of crime reduction, the Finnish mediation practices need elaboration.
INTRODUCTION

MEDIATION IN FINLAND
Victim-offender mediation is the main example of restorative justice (RJ) in Finland. It has been practised here since 1983. Nowadays, free mediation services are available in most of the Finnish municipalities. Mediation is carried out by volunteers and coordinated by the social welfare authorities.

However, RJ remains in the margin of our crime control: Mostly lenient cases and young offenders are referred to mediation. Also the concept of RJ is still quite unknown in Finland. Mediation and RJ are largely ignored in the law schools, and many legal practitioners have little knowledge of them. Also the basic training of mediators is parsimonious and particularistic, lasting approximately 30 hours at the local level.

There is no actual legislation on mediation in Finland. Only a couple of paragraphs refer to it in the procedural legislation. Recently, a law of mediation has been drafted. However, it is uncertain whether it will ever come into effect. The law’s main functions would be to enhance mediation’s legitimacy and secure the availability of mediation services all over Finland.

THE RESEARCH QUESTIONS
RJ theory is ambitious and noble indeed. Furthermore, the international literature is rife with inspiring anecdotes of successful restorative ceremonies where the parties meet and experience a moving emotional shift from hostility to empathy and cooperation. Emotions are vent and the crime and its impact are lively discussed. Agreements reached are creative and satisfy all stakeholders. Family and friends are also involved in the conferences. Eventually, the parties may even hug, make friends and invite each other to a dinner, etc. (See e.g. Umbreit 2001, Braithwaite 1997, Wachtel 1997) Is this happening also in Finland?

Mediation sessions are confidential. Because the public cannot attend the conferences, it is important that researchers scrutinize them (Braithwaite 2003). There is also another reason for studying mediation in action: the success of restorative practices depends on their quality (Maxwell & Morris 2002, 2000). The more restorative the process, the better the results (Braithwaite 2002). Therefore, the crucial questions are: What actually happens during mediation? To what extent is the Finnish mediation restorative?

THE RESTORATIVE PRINCIPLES
In order to clarify what is meant by RJ, I briefly go through some of its main principles. Some of them are more fundamental than others. E.g., respectful dialogue must always be required. On the other hand, some values are rather by-products that cannot be forced, e.g. forgiveness. (Braithwaite 2003)

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1 In order to fill the gap, I have been giving lectures on mediation and RJ in the Faculty of Law in the University of Turku since 2001.
2 Stating that mediation forms one of the bases the prosecutor or the judge may waive further measures on. Mediation can also lead to a lighter sentence.
Empowerment: Empowerment is one of the most fundamental elements in RJ. The parties are in the centre, while the authorities and the mediators only provide them with a safe place for dialogue. The parties are given voice. They make the agreements; they are the experts. (See Christie 1977) Mediators only control that the agreements do not violate the human rights or exceed what would be imposed in court of law (Braithwaite 2003).

Restoration: In the restorative process, all material, emotional and social damages caused by the crime shall be addressed.

Responsibility: The offender is to take full responsibility for the crime.

Dialogue: The parties can tell their stories in their own words. They understand what is being said and agreed upon. Through genuine dialogue and storytelling, the parties come to understand each other better.

Emotional process: Rather than just a method to settle conflicts, RJ is an emotional process. Emotions constitute the core of the dialogue. Emotions need to be dealt with in order to get over the psychological crisis. (E.g. Umbreit 2001) Victims especially need to resolve their anger, fear and shame, and offenders their shame (E.g. Ahmed et al. 2001, Wachtel 1997).

Respect: Although the wrongful act is disapproved of, the offender is treated with respect.

Community: Community also plays a central part in the restorative process. The significant others need to be invited in the conference for they exert the most influence on the individual’s behavior and can best monitor the fulfilling of the agreement. (E.g. Braithwaite 2002)

Rehabilitation: RJ is concerned about resolving underlying problems, not just the isolated conflict. The parties can be referred to social services where victims can get support and offenders treatment, education, etc. (E.g. Christie 1977)

Creation: RJ enables creative, individual, win-win agreements.

EMPIRICAL DATA
In order to study the micro processes of mediation, observation is a useful method. In the present study, 16 cases of mediation have been observed -however, three of them were cancelled before the parties even met each other.

The cases have been attended by the law students who have participated in a mediation course in the Faculty of Law, University of Turku, Finland. I provided the students with a “checking list” of the items to pay attention to, and they wrote me reports on their findings. Mostly, the students were only passive observers but some got to act as real co-mediators. The data has been gathered in the city of Turku between 2001-2003.
The data consists of nine cases of violence and seven property offences. The crimes included e.g. stealing a car, stealing a moped, breaking into a car, breaking into a cellar storeroom, shoplifting, and rather muddled acts of violence. Many of the crimes were committed intoxicated, and none of them resulted in serious injury.

The cases were selected by the local mediation office. Not all mediators welcomed students to their cases but preferred working alone. Some students worked in pairs, while there was only one mediator in each case. In all, there were at least eight different mediators in the cases observed. The students were given access neither to the most sensitive cases (including e.g. family violence), nor to rather dull cases with low chances of succeeding. So, the extremes may have been left out and the data may yield a fairly reliable picture of the mainstream of mediation.

ADVANTAGES TO MEDIATION
According to the data, there are many advantages to mediation: In most of the cases, the parties met each other and made an agreement. Only three of the 16 cases did not result in an agreement; in these cases the parties did not even meet. The parties had an opportunity to tell their stories in their own words. They also listened to what the others had to say. After an agreement had been reached, the parties seemed satisfied. The agreements were viable and just. Furthermore, they were reached quickly and at a low cost.

Rather than the state’s retributive interests, the victims’ rights were promoted. They had a say on the procedure as well as the agreement. The damages agreed upon ranged from 25 to 1200 euros, while the median was 250 euros. Importantly, the victims are really likely to get the payment for the offenders were motivated to compensate. In four cases, they had already paid off by the time of the reporting.

The offenders’ motivation was enhanced by certain features of the mediation process: they were treated with respect, they could affect the terms of the agreement and the whole process was voluntary. In one case, the offender was not willing to co-operate but was about to leave the conference. However, as the mediator stated that he was not obliged to stay but was fully entitled to leave, he decided to stay!

There often was an emotional progress taking place: The initial tension of the parties reduced along the mediation process. First, the parties were anxious and angry, but as they heard the other’s story and had an opportunity to express their feelings, they became more relaxed and peaceable. Also direct communication between the parties increased towards the end of the sessions. Typically, the victims were relieved to hear that there was no personal motive for the assault. Also receiving information of the process helped the parties relax.

All in all, the students believed that the cases were better suited for mediation than court. Also the mediators were valued for their charitable work for the common good.
PROBLEMS FOUND
However, not all restorative practices succeed in realizing the demanding restorative principles (e.g. Daly 2003, Barton 2000). Also in this study, the following discrepancies between the action and the theory were revealed:

LACK OF DIALOGUE
Rather than discussing with each other, the parties shortly replied to the mediator’s questions. It was especially difficult to make young offenders truly participate in the process. Emotions were not vent. The crime itself, the morals and the emotions attached were left largely undiscussed while the most attention was paid to the making of the agreement. E.g., remorse was not openly expressed, spontaneous apology was absent, no hugs were observed. The Finnish reintegration ceremonies (Braithwaite 1989) seem to be limited to the signing of the agreement and shaking hands.

The expressing of disapproval and reintegration are crucial for shame management. Though not necessarily spoken, lack of dialogue may risk those processes. Unacknowledged and undischarged sense of shame may lead to unhealthy defensive responses, even violence. (Van Stokkom 2002, Ahmed et al. 2001) More active participation would probably bring about remorse, apology and make the conference memorable. These kind of factors are inversely linked with recidivism. (Maxwell & Morris 2002, 2000)

LACK OF PRE-MEDIATION MEETINGS
It is important for mediators to meet the parties separately before they meet each other. The parties need information of the mediation in order to feel safe. Pre-mediation meetings help them relax and concentrate on the dialogue in the actual mediation. (E.g. Umbreit 2001) However, in the observed cases, pre-mediation sessions were rare. Usually, the mediator only called the parties by the phone in order to settle a date for the joint session. As a consequence, the parties entered them somewhat confused.

In one exceptional case in which pre-mediation meetings were applied, the mediator had already written down the contract before the joint session. Then, as the parties finally met each other, they just signed the agreement and little time was devoted to the dialogue.

MONETARY COMPENSATION PREVAILS
The agreements reached were not very creative. Typically, the mediator just filled in the blanks in a form. Ironically, although RJ would indeed enable individual solutions, also mediation becomes guided by the routine and favors standard outcomes (Kandel 1995). The compensations were only monetary while other options were ignored. E.g., none of the agreements included work. Working could mean a much more concrete, active and direct sanction than paying. Furthermore, through working, especially young offenders could learn new skills and improve their self-esteem and self-control.
LACK OF COMMUNITY
Significant others are important sources of shaming and reintegration. Effective shaming and shame management are not easily produced in the absence of the offender’s loved ones. (Ahmed et al. 2001) This potential is not fully realized within the Finnish mediation. Only five of the observed meetings included support persons. Mostly they were the children’s parents. In one case, the offender had a supporter with him, but the mediator did not allow him to participate because the victim did not have any supporters either.

Furthermore, in those cases where supporters did attend, they dominated the discussion. They inhibited the actual parties from expressing their views and in some cases even made the decisions for the minors. If the parties are silenced, they will not be committed to the process or its outcome. Accordingly, the minors used to hide under their caps, play with their mobile phones, joke with each other, make faces and so on.

POWERFUL MEDIATORS
As the parties were relatively passive, the mediators’ role became stronger. They formulated the agreements, and in some cases, outright determined the amount of the compensation. In the most extreme case, the mediator manipulated a higher sum than the victim claimed for in order to show the offender how serious the crime was. In another case, the mediator bargained about the compensation on behalf of the offender, referring to the legal praxis.

Admittedly, the task of mediators is to prevent more severe sanctions than what would be imposed in court. However, they should not violate the parties’ autonomy. When empowerment fails, RJ fails. (See e.g. Braithwaite & Mugford 1994) Another, a more practical problem is, whether mediators are informed of the legal praxis.

POWERFUL VICTIMS
Also the victims’ position was quite strong. In some cases, they were very keen on their monetary claims and threatened to go to court were their demands not met. There is a risk that perpetrators agree to pay excessive damages out of their fear of the trial. On the other hand, the autonomy of the parties is emphasized in the restorative ideology and the mediators are there to control the agreements. Furthermore, offenders may accept unnecessary high damages in court as well. However, the focus on money still implies a material bias in the mediation process: do the parties’ other needs remain unaddressed?

LACK OF REHABILITATION
It is plausible that the most effective crime control combines RJ and rehabilitation. RJ provides a suitable forum in which to address the parties’ rehabilitative needs (Braithwaite 2002). However, there was only one case where the mediator inquired if the victim needed any therapy. The needs of the perpetrators were not discussed

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3 With deterrence and incapacitation on the background (Braithwaite 2002).
either, although they obviously had at least problems with alcohol or other intoxicants.

HAPHAZARD POLICY
Also this study reveals that access to mediation as well as the mediation process depend on the attitudes and habits of single persons: police, prosecutors, mediators. Too few cases are referred to mediation. Although the range of cases that can be mediated is not restricted by the law, mostly rather lenient or juvenile cases are mediated. In the absence of a clear legitimization of mediation in the law, the activity remains endangered and marginal, subject to arbitrary application. (see e.g. Morris & Maxwell 2002). Also mediators are guided by their personal beliefs and customs rather than RJ theory. (See also Mielityinen 1999, Takala 1998, Scimecca 1991)

CONCLUSIONS AND DISCUSSION
According to the cases observed, there are many advantages to mediation: Usually, the parties meet and come up with an agreement they are satisfied with. The parties are given voice. The victims play a central role, and also the perpetrators are accepted as equal partners in the negotiation. The perpetrators are motivated to compensate for the damages, and the victims’ prospects of actually receiving the compensation are high.

Yet, the substantial demands of the restorative theory are not fully met: Rather than dialogue-driven, mediation is settlement-driven (see Umbreit 2001). Pre-mediation meetings could be utilized more in order to foster dialogue. Nor are support persons taken advantage of in the sense the theory puts it. Agreements could also be more creative and individual.

More attention needs to be paid on the training of mediators. Obviously, the scant basic course does not provide them with skills needed e.g. to activate the parties. Lack of dialogue is likely to entail lack of commitment and undermine the crime reducing potential of RJ. Were mediation developed, it would also gain legitimacy and more serious cases.

In many respects, the results support those obtained in the previous studies on the Finnish mediation (Mielityinen 1999, Takala 1998). On the whole, RJ theory needs to be more broadly introduced also in Finland. The current practices must be up-dated and new ones adopted. RJ could be seen as a wider social policy than just victim-offender mediation (see e.g. Strang & Braithwaite 2002). Although the advantages of the Finnish mediation are evident, there is much more potential to RJ than this.

REFERENCES


