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Restorative Justice as a mean to effective crime control and alternative to imprisonment. Conflict as property revisited

Abstract. *The article presents the route of restorative justice in Poland – from the very idea towards its implementation in criminal law, criminal procedures, and also as an alternative for imprisonment. It discusses the processes of the development of mediation institute and other forms of restorative justice in Poland, emphasizing the problems that have been faced and the ways to overcome those difficulties. It also stresses the possible dangers that, the author argues, we are not willing to see yet. Perceiving a crime as a conflict, and conflict as property that should belong to parties involved in it, the author points out to the danger within benign developments of rational policy, which might also lead to stealing the conflict from those it belongs to. Voting for more severe punishment and, thus, using victims as a pretext for making criminal law to serve political interests – is one of the identified risks. So the article, on one side, highlights the importance to keep restorative idea and practice as a tool to help the victims to regain their voices, and on the other – to be able to see a human being in a person who committed an offence. Other important agents in the mediation process are mediators. They should also be aware of the dangers and do everything to prevent themselves from stealing the conflict and act like those who share the space and life in Vidaråsen. Thus, Conflict as property will be just like a warning for us to leave the room for victim's and other party's wants and needs.*

Keywords: *restorative justice, crime control, alternative for imprisonment.*

1. The roots

This article is about the road Poland is on to introduce restorative justice procedures within criminal justice system. It is on the difficulties Poland overcome and is still facing while introducing the new possible means of alternative to imprisonment. It is also about possible dangers we are not willing to see yet.

The restorative justice procedures are introduced in the name of victims. It is to observe victims rights and interest within criminal justice system. It is also to bring

back the conflicts to the parties that own the very conflict. The new developments are eager to achieve that goal. This article is about that but also about still invisible what, if not in time diagnosed, named and prevented can bring once more the same effect and steal the conflict from those most involved in it. It was once stolen by lawyers, judges and prosecutors who officially acted as benign and supportive for victims. Today the same very process is possible with mediator taking the lawyers place.

On March 31, 1976 Nils Christie delivered Foundation Lecture of the Centre for Criminological Studies at the University of Sheffield. The text was later on published as *Conflict as Property* in "*The British Journal Of Criminology*" (v. 17, 1977, pp.308-332) and became one of the most important text in the contemporary criminology. Crime was presented as conflict, and conflict as property that should belong to parties involved in it. This conflict, Christie announced was instead "stolen" from the most interested at by professionals. The stealing is a symbolical figure, the shift in power is real. The shift is from victim to the state that almost annihilate victim, her/his feelings, thoughts and opinion. The court process form an artificial theatrum with quite artificially and technically cut of from the reality something called – "material truth".

Nils Christie was demonstrating the loss of victims influence on the search for conflict's solution. It is not fair. Christie stressed that the social system should be organized so the conflict are perceived as important element of society development and the handling of them should not be monopolized by professionals. While talking about professionals Christie meant mainly lawyers and advocating for less court procedure where lawyers, advocate, prosecutors and judges – all representing the official, state perspective of understanding of conflict are replacing those immediately involved and leave no space for them and their stories.

This article have an immense power. It never got old or out of date, and some decade later brought visible changes in the criminal justice in many countries including Poland. Alternative responses to crime and victims rights spread all over even in the countries demonstrating hard line on crime and justice like United States or Russia. The article: "Conflict as property" became one of the most quoted in criminological literature and one of the most powerful. Repeated by many brought the changes. Nils Christie mentioned five elements that should be present while looking for conflict's solutions: (1) the parties involved are present, (2) they talk often and are eagerly listen by the audience; (3) close relatives and friends are present; (4) local communities is also there, (5) judges and official experts even if present are much less involved, they rather observe, follow the procedures and let the parties decide. These, are the roots of conflict resolution. It does not exclude judges., does not exclude lawyers. It just allows the

proportion of space for everybody involved, and avoid often artificially created "truth" to suit the court procedure requirements.

The idea of a stolen conflict was simple, and convincing. The call to give conflict back to those it belongs was strong enough to agitate and convinced many. At the same time traditional punitive justice brought general no satisfaction and inequality. The result of both is that the restorative justice is in fashion. Alternative dispute resolution techniques reached all kind of court procedure: civil, administrative and criminal as well.

Fashion? Not an adequate term. It is both the need to counteract the neoliberal tendencies smuggled into the criminal justice policy and make criminal justice more efficient in terms of quality of court made decision and also in terms of reasonable time. The orientation towards restorative justice is also part of looking for the better way of solving problems. It helps the growing tendency to perceive crime as problem to solve, and therefore to make room for victim say.

The development mentioned above is important and help the process of regaining the voice for victims. Victim became visible. Victim became a target. It is the main target for restorative justice. It is also the main target used by propagators of punitive ideology. Just deserve is not enough, It should be much more to satisfy victim. Victim satisfaction is used as an argument for more severe punishment and less care for reeducation. All the victim is offer is more punishment for an offender. It is hardly any good satisfaction. So what it is? An abuse. The victim figure is once more shifted away and used as pretext to introduce more law and order ideology. And it is done within Restorative justice discourse and idea. An argument to call for more severe punishment is used in the name of observing the victims' interest.

Victims are also used as pretext for making out of criminal law a political tool. Politicians unable to offer the reasonable criminal policy vividly and loudly call for more punishment in the name of victims right. The phenomenon is well by Zygmunt Bauman in his book: "*Globalization*"[1]. With the state limited to demonstration of police and juridical penal power, when no plans for nor social policy are developed loud demagogy tends to talk about victims while offering no efficient judicial system but more severe criminal law and criminal procedure.

Within this type of arguments is often heard that restorative justice is not an adequate tool for it is missing the state protection that victim is entitled to. So together with restorative justice oriented on making space for victim to voice his/her needs we face the process when victim is used again for other political processes.

Let me now move on and present shortly how the restorative justice got to Poland

[1] Bauman, Zygmunt. 2000. *Globalizacja*. PIW. Warszawa.

as an idea and than as an institution in the criminal law, criminal procedure, and also as part of execution of penalty. I will discuss the process of development of mediation and other forms of restorative justice in Poland; the problems one face and the way to overcome difficulties.

1.2.The Legal Side of Mediation, For Adults.A short introduction

A New Look at the Legal Side of Mediation for Adults

Before acquainting you with the provisions on mediation in the new Polish codes, I suggest we think about why the legislators has decided to include mediation in the institutions of law, that is, in criminal, material and procedural law, and consequently (which is what I am trying to convince you of) also criminal executive law.

Perhaps they are trying to keep up with the latest fashion? Or perhaps they found it hard to refuse? Perhaps they did it hastily at the last minute, without giving any particular thought to what they were doing or why? Or maybe mediation is the logical consequence of some basic idea relating to criminal codification? If the answer lies in this last question, it also brings us to a host of new questions about the leading prerequisites of codification and about the foundation on which it is based. There is a type of justice that concentrates on protecting the state's interest, but there is also another type that takes heed of the interests of individuals. Apparently, the latest codification is heading in the second direction. This is confirmed by the position of the subsidiary prosecutor, society's participation in the penitentiary process, as well as the potential and place of mediation in criminal proceedings.

1.2. Mediation at the Next Stages of Criminal Legal Proceedings

When is mediation permissible? First, in order to permit it, we have to know about it. This would seem to be a banal truth, but student lawyers in the courts unfortunately have to admit that they never hear this word uttered during their practical studies. This institution, at least for student lawyers, much too frequently remains in the twilight zone. Apparently, the matter is no better, although I hazard to make any sweeping generalizations, in the case of the prosecutors, the culprits, the victims, and even the judges.

There is also the harmful and unjustified conviction that, if it exists at all, mediation is only possible in those cases in which the defendant is threatened with a punishment of no more than five years in prison. This is a terrible mistake, which we will also prove. Let us also think about how true the statement is that mediation can take place only before the first court hearing. Current laws envisage precise grounds for its use at the first hearing also. It can also be applied during the penitentiary process.

1.3. The Court Perceived from the Inside—or Justice, Where Do You Think You Are Going?

At one time, about the 10th century AD., along with the appearance of state borders and the development and increase in the significance of public institutions, the state assumed responsibility for resolving conflicts, removed this responsibility from the parties involved and imposed its role as fair judge. The courts were always a weapon in the hands of the authorities. They could be more or less strict. But in order to preserve the political system, they had to be at least in working order and considered at least relatively fair. Relatively, because the history of legal proceedings is also the history of a shift into the shadows, toward nonexistence, toward ignoring the person who has suffered from the violation of the law.

I hope you will not consider what follows from the pages of history a personal insult, and that we can think about how mediation can help to improve legal proceedings. I have collected the arguments put forward by judges and prosecutors against mediation. I hope that I can counteract them with other arguments ensuing from the work of the court itself perceived from the outside.

For several years now I have been reading lectures and holding seminars on "The Policy of Criminal Punishments in the Countries of the European Union." One of the assignments I give my students under this topic is to find out how Article 6 of the European Convention, which is also in effect in our country, is implemented in Polish judicial practice. The results of this work are extremely interesting and show very positive changes in the Polish courts. At the same time, they ruthlessly show the discrepancy of the arguments put forward by practicing members of the law against mediation.

1.4. The Green Light For Mediation

The results of these research studies unequivocally show that improving the situation in the courts requires not so much an increase in the number of hours judges work, as a change in approach to the cases courts are engaged in. It appears that instead of engaging in the statistics of those cases "marked with a tick," we need to show an interest in the welfare of those people whose cases come to court. And then, without any miracles, these statistics will most likely improve.

It is time to move from the statistics of "finished cases" to the statistics of people who know that human insult and fairness are taken seriously in the courts. As I write this, I am worried that I may be suspected of cheap demagogy and flippant idealism. But I write this because such conclusions clearly follow from the studies conducted by my law students. They point to the source of those painful questions encountered by our current legal proceedings, which cannot be resolved with the help of substitutes and surrogates.

There is no reason deceiving ourselves that if, while making the next changes to the law, and quietly begin to remove the victim from its norms, the "throughput" of the courts will improve and they will become less "clogged." Promoting the axiology of the mechanical "registration" of cases does not withstand the test of court effectiveness.

1.5. Taking the Rights of the Victim Seriously

We cannot issue *The Charter of Victims' Rights* under the auspices of the Ministry of Justice and believe that this is all it takes. The *Charter,* apart from other things, sets forth that the victim should enjoy the same rights as the culprit. But it is not enough to put this in writing, the law has to be changed in such a way that the victim is not only not deprived of his say, but has rights at least equal to those enjoyed by the accused. The victim should also be provided with means of mediation, for example, and a real chance to resolve the conflict.

It took three days and three nights for me, along with Kszysztof Pavlovsky, to write *The Charter of Victims' Rights*. Prior to this, many specialists and volunteers worked for almost a year on its contents. Now, I am getting phone calls at the Polish Society of Legal Enlightenment from victims who say that the *Charter* is rubbish and junk. This curt review is not surprising. We are dealing with frightened people who feel helpless and confused and who are deeply convinced that no one is protecting them, that they are scoffed at when they say how things should be, and that no one would even think about taking them seriously.

There is no reason to think that mediation will solve all the problems of the criminal justice system. It will not also suddenly bring about any general improvement. But we should realize that it is one of the tools that, if used correctly, can help to change public opinion about the courts and about the attitude of judges toward the victim. As a result, by increasing the efficiency of the courts, this may help to raise the quality and satisfaction of the work carried out both by you and by me. Last but not least it might realty serve well to solve the problems between involved parties and help us to see simply problems where at present we look for crime and hard punishment. Mediation helps us to see victim and seek remedies that have victim interest on mind. This is enough to consider the mediation worth to implement within the criminal justice system.

2. Words

In "*Limits to pain*" Nils Christie very correctly and with the good sense of humor paid attention to the importance of words[2]. Word matter and the idea behind discussion on employee in the funeral bureau was that although it might be all right to use euphemism in the occupation related to death and

[2] Christie, Nils (1981) *Limits to pain*. Universitetsforlaget. Oslo:13-19.

sorrow, it should not be so where delivery of pain is on stake. There we should be quite precise and know exactly what is the nature of what we do. So words matter. It also matter to be precise when we describe reality. Words also matter to be, to give names to problems, to identify phenomena that exists yet are not seen as long as it stays nameless.

Professor Ignatovitch from Belgrade argued during the November 12, 2005 Symposium held in Belgrade and dedicated to Restorative Justice that the best argument to deal with cases in the court is the fact that after all people turn with their claims and problems to court. We have two words here: "court" is the one and "option" is the other. We know people turn to court, but what we know about the choice they have? Is there any other option available for them? Is anything else but court that operates? Is anything but court that is promoted, made known and available? Is there anything else they know is available for them but court?

The fact that someone turns to court might illustrate her/his wish that it is exactly court that will decide in her/his case. But it as well might mean that someone see no other alternative way for he/she has no knowledge and no information on other options, or that these other options are simply not available, or not in operation. It might mean that words are missing, as well as institution might be missing, too.

In 2002 Wojciech Zalewski wrote an article on "Compensation strategies in the Polish Criminal Law compared with *Restorative Justice* postulates"[3]. Restorative Justice had no polish term, and instead the author still used an English one. And yet already from 1997 mediation was present in the Polish Criminal Law, ad Polish Criminal Procedural Code. It was one of possible methods of solving conflicts and restoring harm, but there was no mental connection between mediation and restorative justice.

It is similar with other issues. Domestic violence had for long time no name, and it was perceived as private family matter. Sexual harassment was not mentally recognized. We only knew about those bad girls who were bad enough that their bosses and colleagues at work dare to advanced them sexually. If the men did it – those women for sure had to be guilty. They would not dare to advanced pure and decent women. Gender studies has no relevant polish word – so we use an English one. We can of course try to describe it as study on the cultural context of gender, but the short, identified term is still missing. Restorative justice was about the same. It was only when Jim Consedine from New Zealand and Nils Christie came to lecture, also about Restorative Justice.

[3] Zalewski Wojciech (2002) Naprawienie szkody w polskim prawie karnym a postulaty *Restorative Justice*. *Czasopismo Prawa karnego i Nauk Penalnych*. Rok VI: 2002, z.2: 65-92.

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Only than we really got to the point when we had to decide about the Polish term for those English words. We hesitate between term "compensation" and "restoration" – both sounds well in Polish. The facts that restoration is more often used is probably because of bulk of English literature which help to make the translation more accurate.

So we had mediation in criminal law procedure from 1997, yet the restorative justice term came only in 2003. Together with the term came the contemplation and thought, but at the beginning was missing and needed was the word.

3. Large or small

In his recent book, "*Suitable amount of crime*" Nils Christie is beautifully portraying the differences between relationship within small and large society. Mono and multi culture, local and global. The female at the water well presented in the book make a great impression and make us yearning and craving for the village we still remember from childhood as idyllic place. People know each other, felt bound together and even if they did not like each other they did have respect and were able to other people opinion. It sound idyllic and seems to belong to lost paradise. But may be it is not so lost in past as we could at first sight expect?

Poland is as spacious in terms of thousand of square kilometers as Norway. What make us considerable large in comparison with Norway is the population. There are almost ten times more of us, that Norwegian in Norway. It helps Norwegian to feel small as the country and unite like one big family. It, on the other side, helps Poles to believe we are much bigger country than Norway is. It also make us believe that with so many of us no bond, coherent, consistent and articulate policy is possible for there is too many options and interest to be satisfied. I often hear than that solution adequate for small countries are not helpful for large one. Is it really so?

It is enough to compare the number of imprisonment per hundred thousands in Denmark, Norway, Sweden (around 60 per 100 000) and Lithuania, Latvia or Estonia (over 300 per 100 000). Small countries here, small countries there, and what a different solutions! Conclusions are easy to draw. It has very little to do with size; it has all to do with the criminal policy and state policy. And when it comes to the policy; yes the public opinion does matter as far as decision are taken, yet those responsible for public opinion are also responsible for the way public opinion is form. So, it is useful to learn as much from small as from large societies able to shape public opinion and criminal policy towards other options that the one oriented on massive incarceration. We have one energy, one time and one bulk of resources. If we want to take the victims right seriously, we have to give space, time, and resources for that party of conflict as well. And it must be something more that dubious satisfaction that the one who broke the law is spending time behind the bars.

Many for sure deserve it, yet the differences between the numbers of incarcerated and the differences in quality of life respectively and amount of kindness in every day life leave no doubts. Less imprisonment is correlated with those state where quality of life and kindness is on the higher level.

The Polish criminal law reform from 1997 has been prepared for several years, and already in 1991 mediation has been introduced as an experiment with the special juvenile justice courts. Mediation came to Poland together with development of non-governmental sector, together with development of new approaches to victimology and together with notion of civil society and human right of the democratic state.

Without non-governmental sector the development would end-up with several conferences, high official visits in Denmark and Germany to see shops as well as mediation center with "Brücke" project in München[4], and Hans Christian Kofoed school in Copenhagen[5]. That would be the end. With ngo created for promoting mediation, restorative justice and probation like Polish Centre of Mediation, Polish Association of Family Mediators, Polish Association for Legal Education, Polish Helsinki Committee or Polish Kofoed School, the international cooperation and gaining the knowledge became redistributed and freed from obstructive state bureaucracy. Poland did not develop yet the American type of Parliamentary lobbyist. But non governmental sector from the very beginning actively work for promoting many of the new ideas, including mediation and restorative justice.

With victimology oriented on researches on "the level of victims contribution for the rape offence" we could not reach far. Victim was studied to evaluate the offenders guilt. To understand victim was not for the victim sake but for the better evaluation of offender action. We needed an actual change within criminal justice perspective and that one came together with 1989 major political change and the beginning of building of democratic state of law. In the history of idea and major political changes even 100-200 years are not much. 16 year is therefore quite a short period.

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[4] Started among the others by Christian Pfeiffer, program "Brücke" (bridge) introduced mediation as part as seeking solution with juvenile lawbreakers.

[5] Bjørkøe Jens Aaga, Bjørkøe Marianne (1997) Sat underfor- Nej tak! Aktivering og livskvalitet. Kofoeds Skoles Forlag. Cobenhavn. Kofoeds school is the place where people often on margin, or marginalized can prove themselves they are able to build quality life for themselves and for others. It is the place where many ex-inmate starts new life, and where people sentenced for probation can serve their time being helpful for others and for themselves. It is the place where to get the food one has to work, yet it has nothing to do with Lenin motto "those who do not work – do not eat". At Kofoed everybody are invited to work for there people do believe everyone can work and do something meaningful which bring developments and joy to those who work and those who can share the effect of that work. It is the place where human being is really treated humanly, and where big words meet at the small items and activities .

I am aware that changing the name from totalitarian or communist into democratic and free does not change that much. The people mind is not changing and switching of or on like the electrical push-button. And yet some paradigm and perspective, social atmosphere might change and open new horizons for thinking and acting. It needed so much, it needed the change of political system to re-discover victimology and open new approach to victim. Victim ceased to be just mere research object and became the subject instead. Victim got invited to have words in their own cause, and got chance to decide about themselves and type of compensation they need.

Poland is filled with discussion about the need to build civil society, but civil society it is not there and it has never been for historically it lacked conditioned to develop. Because of political and economical situation we can easily call ourselves politically brave and economically rather poor yet , apart from historically very special moment of Solidarity 1981 we did not have experience in building, nurturing and cultivating civil society. It probably needs quite a level of Solidarity and understanding of common goods and destiny. The drastic differences in people social situation and communist past does not help the process.

Polish students, are the best example of the process. They reached a noble space in worlds' best criminology literature. They are by Nils Christie. It is hard not to hear an irritation in the author voice describing the Polish students reaction on the need for informal social networks, and the need for knowing your neighbors, and the need for primary control as an alternative to state control.

All he met was blank faces. "I met blank faces. Of course I met blank faces. Trained to distrust your neighbor, conditioned to situation where that neighbor might be a spy for the system, it might all come back, why establish ties that might prove dangerous. This is one of serious costs of having been trained into life in one-party state"[6].

So it is evident that process is something that need time to bring effect we expect, and the time itself is not a guarantee. Therefore I want to stress that we did not count just on time. We started with development of non governmental organization, cooperation with others who already had experience, and with taking seriously the new philosophy of democratic law and order state.

There are 364 Parliamentary member in the lower chamber, 100 in the upper. It is almost 500 of them. This is exactly as much as the oldest and one of biggest prison in Olso (Botfengslet). The limits for Oslo prison was cut short to 375, nothing like that happened in Polish Parliament. Yet 364 MPs, like inmates are not all in one activity at the same time. So when it came to working on the new criminal law and criminal procedure code, different commissions had about 20-30

[6] Christie, Nils (2005) The suitable amount of crime...op.cit: 74.

people each including specialists, experts and visitors. The last group consisted of academics, activists and in fact they were quite a few. Professor Dobrochna Wójcik, Professor Andrzej Murzynowski, dr Anna Walczak, Dr Beata Czarnecka-Dzialuk and last but not least Janina Waluk.

They all were there to repeat like an endless refrain just one phrase – we need mediation as possible procedure to deal with the crime. We need to give chance to victim and offender to discuss what happened and decide what to do. Most people had no idea what those few are talking with equally small number of people gathered for building new criminal code and code of criminal procedure. And at some point like the women at the water well, the Polish ladies who discussed the issue of mediation among themselves and among some other who also were interested won. MPs were fed up. They really wanted to get rid from them and the only way to manage was to meet and suit their expectation.

You might later on heard other stories. You might even get the picture of matured and well aware experts and those officially invited to participate in the process. Yet the truth was it was done by the firm, withstand, dedicated and determined stance of just few women. They had no water well. They share the room of small NGO where all those matter could be discussed and visualized in the words. They saw mediation at each stage of the criminal process. Before, during and after court procedure. They manage to reach the first two. The third – mediation after sentence is not in the law, yet.

4. Theory and practice

It happens at the University, yet it more often happens in the court. When I present the legal position described in the official law, I happen to hear – this is just theory, it does not work in practice. When I asked judges, and prosecutors why, although art 58 of criminal code when it comes to imposing the punishment oblige them to consider first fine, later on probation and as last resort imprisonment, they plainly inform me that people that get criminal court are usually too poor to pay fine, and probation might work well in the lecture room, but it did not adjust itself in practice. Law is than often treated not only by students, as mere theory, nothing that binds or oblige, nothing really serious or compelling to think or watch our action. And here it comes mediation, and the broad space for victim.

Mediation was formally introduced into the Polish criminal law system in 1997 and came into force on 1st September 1998. From the very beginning mediation sessions could be conducted at every stage of court proceeding: at the stage of preparatory proceedings as well as during the whole court proceeding. It however required reading and interpreting the lower in accordance with the letter and spirit of that law. It occurred to be far too complex, and in result the opinion was that mediation is only possible at the preparatory stage of prosecutor and court

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action. In 2003, just after few years of being enacted it was about to be fully annulled, by taking chance that amendment were anyhow to be introduced. It was because of conference on mediation organized by Polish Ombudsman were several member of the Parliamentary legal committee was invited that instead the new rules took away all the doubts and introduces mediation broadly than before for it also started to be possible for police to start mediation in the pre-trial stage of proceedings.

At that conference judge Agnieszka Rękas gave a clear picture of how she act to make mediation possible in her court in Czestochowa. It was also due to other judges who name openly the problem. And the problem was that the opposition against mediation was not so much from the judges but advocate, lawyers side. The proceedings were quick and among parties. No advocate was in most cases needed. The judges were also paying attention to the need and want of well prepared mediators.

We had at that time mediation trained in what the mediation is and how they need to run mediation. They however on most cases had little knowledge on what are the legal consequences of mediation for parties involved in mediation and how to help parties to understand the possible aftermath of mediation for parties participating. Special legal regulations concerning mediation were introduced into the general part of the Polish Code of Penal Procedure (k.p.k) (article 23a k.p.k, and 325i k.p.k).

Due to this amendment, mediation became without any doubts admissible at every point of criminal procedure. Moreover, to promote this form of resolving criminal cases at the preparatory stage, time – of one month - necessary to prepare and conduct a mediation session was excluded from the statutory limited amount of time prescribed for the police (or prosecutors') investigation. On 13th June 2003, the Ministry of Justice issued legally binding regulation on conducting the mediation process. According to provision 11 of this regulation, a mediator - immediately after receiving the referral decision – is obliged to:

1. contact the victim and offender (suspected or already formally accused) to appoint times and places of individual pre-mediation meetings;
2. organize pre-mediation individual meetings with each of the parties in order to inform them about the idea of mediation, rules of mediation process and their rights;
3. conduct victim-offender mediation sessions "face-to-face" direct or indirect;
4. help parties in writing down terms of negotiated agreement and monitor its fulfillment.

As it was already mentioned cases can be referred to mediation by:

- prosecutors – at the stage of preparatory proceedings;
- police officers – at the stage of preparatory proceedings;
- courts – at any level of judicial proceedings (up to the final judgment);
- courts – in cases prosecuted on private accusation (on the motion or consent of both parties) instead of conciliatory proceedings.

Sometimes it is inaccurately presented as it is also possible to refer the case by the penitentiary courts (or directors of penal institutions) – at any point of serving the sentence of imprisonment (no matter for how long the offender was convicted)[7]. It is not the case. Mediation is not regulated by the Polish Criminal Execution Code (k.k.w). It refers to mediation only once in relation to conditionally release (art 162 k.k.w). From the context it is obvious the mediation agreed to before or during the trial is possible here to be taken into consideration. There is space for possibility of mediation during the execution stage, yet the norms regulating the process are missing. There is no objection for anyone wishing to have mediation anyhow, yet it will not have any legal consequences nor any other than general regulation. Those general regulation are describing the process of accepting visitors and volunteers into prison and participation of society in the process of execution of punishment.

It is than evident legal loophole as to the execution stage. It should not exist if we agree that legal rights of victim are the one to govern the process. There is no good reason why victim should be deprive of mediation process when offender is sentences to imprisonment. Assuming both parties are agreeing – it should be allowed. In fact it is taking place, and in fact sometimes penitentiary judges deciding on conditionally release are taking into consideration the fulfillment of agreement made during the executory stage. So here we have an interesting case of something that exists in reality though it is not provided by the law. Lawyers often argue, mediation after court make no sense for the judgment is already given. Those lawyers do not understand that court decision is rarely equal to what victim desire, and needs and to what offender can offer to repair the damage he/she did.

Mediation can but does not need to have an effect on court decision. Court is free to evaluate it. Mediation may influence the court to pass one of the following decisions:

- conditional discontinuance of a criminal proceeding;
- unconditional discontinuance of a criminal proceeding (e.g. when there is no or minute social harmfulness of an act);
- judgment upholding terms of reached mediation agreement (e.g., reparation of damages, financial restitution, compensation of moral injury, personal or community service, offender obligation to change behavior, to undertake anti-drug or anti-alcohol therapy, to apologize to the victim);
- sentencing judgment without a trial (voluntary submission to penalty as a side-effect of mediation process).

[7] Czwartosz, Elżbieta (2005) Victim Offenders Mediation, short note from Poland. *Restorative Justice on line*, January 2005 Prison Fellowship International page; http://www.restorativejustice.org/editions/2005/January/editions/2004/Novemeber/poland1

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Marzena Kruk from the Ministry of Justice has been carried out the research from 1 September 1998 to 31 December 2003, on the effect of mediation[8]. In almost 60% of cases referred to mediation, the parties managed to reach an agreement, and only 34% of them finished with nothing. In 6% of cases primarily referred to mediation, sessions did not occur due to different reasons (e.g.: court withdrew the referral decision, one of the parties did not agree to participate or there were no possibilities to contact her).

Mediation is frequently used to dissolve criminal conflicts concerning offenses against family and guardianship, life and health, honour and bodily inviolability, while crimes against property are still more often decided in traditional judicial proceedings. The procedure introduced within criminal justice that provide space for victim and allow to take the problem out of court seems to mitigate the negative side effects.

There are different additional procedures allowing to take the conflict out of court and into procedure structured in accordance with restorative justice procedure. possibilities. Mediation – most broadly introduced is one of them. There are also possibility for negotiation, financial damages, reparation, compensation, official apology. There are also possibility to run conferences of restorative justice, conciliation, and facilitation session. They will all fit in practice under term: "mediation" although requires different techniques and different know how to run it.

Poland, in fact can serve as an example of different possible practice, and for sure can serve as an example how to introduce mediation. Law was just a first step. Together with it came seminars, training for judges, laymen, lawyers, journalist, law students, sociology and psychology students, for people interested in and what is most important - the knowledge.

We had chance to have four of great people – real driving forces behind the restorative justice idea.

Nils Christie was first, and we translated *Limits of pain* (Polish Printing House, 1991) first. Than some of articles, and recently *Suitable amount of crime* (Polish Association for Legal Education, 2005). Lectures, meeting, seminars. From University to prison, from court to probation officers - everybody got "infected" and affected. Jim Consedine was next, and we published his book on *Restorative Justice* (Polish Association for Legal Education, 2004); next came Martin Wright, and again we prepared the publication of his book on restoring *Respect for Justice. Symposium*. (Polish Association For Legal Education, 2005).

We had also visit Jean Steward who was an actual driving force behind restorative justice in New Zealand, and prepared the

[8] Data based on findings of Marzena Kruk: *Funkcjonowanie instytucji mediacji w sprawach karnych*.(2004). Instytut Wymiaru Sprawiedliwości Polskiej Akademii Nauk (Functioning of mediation procedure in criminal cases. Polish Academy of Sciences)

Polish publication on *Restorative Justice; Idea, Theory and Practice* (ed. By Platek, M. Fajst, M Liber, 2005). Education, information, publication, meeting with very expert and presentation for all involved in criminal justice system and those interested what the restorative justice brought spectacular result. Today restorative justice, namely mediation is also introduced officially in the civil law, family law , labor law and in administration law court procedure. It is all done within 2004 and 2005. The success is great, so is the danger of conflict as property revisiting.

5. Conflict as property revisited.

We live in the world that despite the stories is less hungry, less military oriented and more caring for people as for the natural resources. We live in the world where slavery and discrimination exists yet there is much less acceptance for what before seemed natural. We actually live in the world which when looked at with Nils Christie eyes is quite manageable and benign. People are not very different from each other and our dreams and fears are quite similar as well.

Christie wrote the very special book on *Vidaråsen*. Place he cherish for it proves exactly how similar and valuable we are even if we looked quite different – almost "defected". *Beyond Loneliness and institutions. Communes for Extraordinary people.* This book is about those we used to place in Poland in closed institutions, those who in Russian are called "niepelnocennyje" " not fully valued" and for whom Norwegian build villages. In those villages leave people with different mental deficiency, or I should rather say who have ability to see things differently than most of us. This village is also for others who look "ordinarily", and act as most of us is expected to act, but they have this privilege to share life and experience with village habitant and owners. Sometime however when comparing the life outside village it is hard not to believe while observing the two group, that one perceived as "ordinary" behave often much more "crazy" than those perceived as "different"[9].

Why do I write about it here? For *Vidaråsen* is a great example of possible balance between specialization and respect for autonomy, sovereignty, independence and lack of intrusion. Ordinary people are needed to help villagers to function, yet this help can not take over and overwhelm them, replace their ideas, their work, their will, and their intuition and choice. There is a parallel between *Vidaråsen* as it function and mediation as it must function to be of help and not of stealing. In *Vidaråsen* the only one who can vote in *Vidaråsen* Parliament are villagers. In mediation the only one who vote and decide should also be those involved. It refers to the whole process including the choice of mediator.

That is how we get to the point of who can be mediator and how we "produce" her/him? According to the law in criminal cases the person must be over 26. This requirement is weird and come from old law. Judges were once ago to be 26 to start the

[9] Christie, Nils (1989) Beyond loneliness and institutions. Community for extraordinary people. Norwegian University Press.

profession. Today we rise the age limit for judges to 29, but used the old stratification for mediators. It is not very useful. In case with juveniles young mediators, those over 18, age of majority, trained as mediators could be of great help. They can run family cases, and civil cases, and even serious business cases, but not criminal one, even if they are trifle – and many are trifle. Mediators are also required to understand conflict be lawyers, psychologists , pedagogues or somebody alike. They can in fact be also wise women or man – and be quite old, but it is less often. Ten years ago, still some five years ago the courses for mediators were run by Polish Centre for Mediation. It last at least five days, were run by best professionals and cost very little for the money were organized from different foreign funds. Today it is not anymore so., It cost a lot, is hardly available for average interested in become mediator, and is not longer than few days. It is possible to get the course even for two days at the University but it also cost a lot and is available for rather few.

We just manage to break the monopoly, domination and control of lawyers company who traditionally were reserved in the profession for son, daughter and close relatives. Advocate cost a lot and give often no guarantee for good service. We just manage to introduce mediation to break the monopoly, domination and control of court and prosecutors over the conflict party.

Conflict to the extend has chance to be retrieved by parties. Unless new danger will not prevail. We are at the stage now when different discussion on who should be training mediators, should mediators have certificate like advocates and reimbursement as high as lawyers. Is as little as 30 Euro paid for the whole mediation run usually by two mediators during at least month is helping or hampering the mediation and the process to get used to that institutions? Should anyone be allowed to mediate or just the very special chosen group? The discussion is needed and it is good to have it. We just have to be careful not to allow to create new, close profession interested rather in earning on helping and knowing better what the parties need.

The title of my presentation is conflict as property revisited. I was about to point out the danger within benign developments of rational policy, which still might lead to stealing the conflicts from those it belongs to. There are easy identified risks – voting for more severe punishment is one of them. There are however other, more subtle and in fact more complex, and yet we have to be aware of them to keep restorative justice idea and practice as tool to voice the victim needs and be able to see the human being in the person that cause the harm. Mediators are necessary for mediation. They are to be aware of danger and do all not to steal the conflict and act like those who share the space and life in *Vidaråsen*. If it work there – it is possible also in mediation and than Conflict as property will be just like a warning to watch ourselves not to know better what is best for victim, and what victim and the other party want and need.

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