Restorative Justice

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Nordic Mediation – Comparing Denmark and Finland

Abstract

The Nordic countries have a long common history in criminal policy but a closer look also indicates individual development. The introduction of Victim Offender Mediation (VOM) is one example of Nordic diversity in details. The focus of this article is on Denmark and Finland which on the one hand have in common that VOM does not "automatically" divert a criminal case from the court rooms but on the other hand they are different as in Finland a case may be diverted after VOM and in Denmark that is not an option. This fact may be part of the explanation why the number of VOM cases is markedly bigger in Finland than in Denmark. In both countries minors may be taken into a VOM process but only after consent from a parent and in both countries domestic violence cases are only taken into VOM after a closer consideration.
Keywords: Mediation, Nordic criminal policy, diversion

Abstract

Die nordischen Staaten haben eine lange gemeinsame Geschichte in der Kriminalpolitik, aber ein näherer Blick zeigt, dass es auch individuelle Entwicklungen gibt. Die Einführung des Täter-Opfer-Ausgleichs (TOA) ist ein Beispiel für nordische Vielfalt in den Details. Dieser Beitrag beschäftigt sich mit der Situation in Finnland und Dänemark, die einerseits gemein haben, dass der TOA nicht „automatisch" zur Diversion führt, aber andererseits Unterschiede aufweisen, da Diversion in Finnland nach einem TOA möglich ist, während dies in Dänemark nicht der Fall ist. Dieser Umstand mag Teil der Erklärung dafür sein, warum die Zahl der TOA-Fälle in Finnland erheblich größer ist als in Dänemark. In beiden Ländern können Minderjährige nur mit dem Einverständnis der Eltern an einem TOA teilnehmen, und in beiden Ländern kommen Fälle häuslicher Gewalt nur nach eingehender Prüfung für einen TOA in Frage.
Schlagwörter: Mediation, nordische Kriminalpolitik, Diversion

The Scandinavian countries share strong similarities in criminal justice and penal policy. These similarities are based on intensive Nordic co-operation in legal matters in general and criminal legal matters in special. In 1952 the Nordic Council was established due to long shared traditions and enhanced co-operation in legislative matters in the Nordic region. This Council still plays a role in the Nordic countries. From 1960 to the mid-1980s the Nordic Criminal Law Committee worked successfully in order to enhance co-operation and to achieve harmonization in matters of criminal justice.

Substantive Nordic criminal policy features include low incarceration rates compared to international levels, a relatively wide application of fines and community sanctions, and an emphasis on a crime preventive approach based on social policy instruments. It is common for the Nordic countries that all offenders under the age of 15[1] are dealt with only by the child welfare authorities. Young offenders aged 15 to 17 are dealt with by both the child welfare system and the system of criminal justice. Strictly speaking, the sanction systems are characterized by being one-tier systems as there are no separate juvenile criminal systems with specialized interrogators, courts etc. The number of specific penalties only applicable to juveniles has been quite limited, although growing during the past years.

However, while seeming similar from a distance, there are also differences between these countries, should one take a closer look. The following gives a short overview of these similarities and differences in one particular area namely restorative justice and victim-offender mediation. The focus is on Denmark and Finland.[2]

1. Introducing mediation in the Scandinavian countries

The roots of Nordic mediation in criminal cases are to some degree laid down in the abolitionist writings by *Thomas Mathiesen* and *Nils Christie* in Norway and *Louk Hulsman* in the Netherlands in the 1970s. One specific article by *Nils Christie*, "Conflicts as Property" (1977) has played a very important role in the Nordic as well as in many other countries. In the spirit of this article, where it was argued that conflicts instead of being "stolen" by lawyers, should be given back to their "owners" the first mediation experiments started in Norway in the municipality of Lier in 1981 and in Finland in 1983.[3] Elements of informality, voluntariness, and community involvement were crucial from the very beginning. But there were also differences. For instance one very fundamental approach was different, namely the question whether a successful mediation could possibly replace a prosecution and court-decision or not. In Norway – the mother country of Nordic mediation – it has always been the case that a success-

1 See especially the comparative work by *Dünkel et al.* (eds.) 2010. For Nordic youth justice see *Lappi-Seppälä* 2012 and *Lappi-Seppälä/Storgaard* Nordisk Tidsskrift for Strafferet 4/2014. On changes in the age of criminal responsibility in Denmark see *Storgaard* 2013.

2 This article is by and large based on the two chapters about Denmark (*Storgaard*) and Finland (*Lappia-Seppälä*) in *Dünkel et al.* (eds.) 2015 which also serve as a general reference for relevant information in case there is no specific reference in this article.

3 See further *Grönfors* 1989; *Iivari* 2000.

ful mediation leads to non-prosecution. In Finland on the other hand, the decision of putting charges before the court when mediation has been successfully carried out is left in the hands of the prosecutor. In Denmark it is never a possibility that mediation replaces a traditional criminal procedure leading to a traditional punishment. This was the case in two prior experimental periods[4] and it is codified in the Act on Mediation, § 4 (Lov om Konfliktråd).

The "official institutionalization" of mediation took place in the form of the enactment of Mediation Acts. Again all Nordic countries followed the same basic pattern, but with some modifications. Norway having been in the front from the very beginning was the first country to pass a bill on mediation. This came into force in 1992.[5] In 2002 the Swedish bill on mediation in criminal cases came into force and in Finland the bill came into force by 1 January 2006. In Denmark the bill came into force by 1 January 2010 after two periods with local experiments.

The practical role of mediation also varied. Thanks to an early start, Norway was the forerunner in terms of application in practice. However, Finland quickly reached the Norwegian figures in the 1990s, and passed them in the 2000s. Today there are about 10,000 referrals to mediation in Finland and Norway whereas Denmark has less than 1000 cases per year (latest figures from 2013).[6]

The codification led to individual ways of organization and specific scopes of mediation in the Nordic countries. In Finland the obligation to secure access to mediation when wanted by both parties was laid upon the provincial governments under the responsibility and supervision of the Ministry of Social Welfare and Health whereas the Danish mediation became a duty for the local police to organize and carry out into practice by non-police mediators, though. In both countries mediation in criminal cases is practiced as a Victim Offender Mediation (VOM), i.e. victim, offender and a neutral third person (the mediator) are involved. The parties may bring a supportive person but not a legal support or defense lawyer. And if such supportive persons are attending this must be agreed upon beforehand. There is no involvement of the society or other so-called stakeholders. In both countries the mediation is financed by the public authorities and free of charge for the parties.

In the following we look a little more into detail in mediation in criminal cases (VOM) in Finland and Denmark.

2. Formal requirements for mediation

In Denmark as well as Finland § 2 of the Acts of Mediation state that mediation is only possible between parties who have "personally and voluntarily expressed their willing-

4 On the evaluation of the prior experimental periods, see Betænkning 1501.

5 In Norway an adjusted bill was introduced in 2014, Lov 2014-06-20-49. This did not change the basic principles of mediation, but added new juvenile sanctions.

6 *Lappi-Seppälä/Storgaard* Nordisk Tidsskrift for Strafferet 4/2014; http://konfliktraad.dk/konfliktraad-i-tal.aspx. For comparison: Denmark and Finland each have a population of roughly 5.3-5.5 million, Norway 4.7 million, and Sweden about 9.5 million.

ness for mediation" (the Finnish formulation). Explicit consent is always required from both parties. As for the Finnish law it is furthermore required that the "parties are able to understand the meaning and significance of mediation and of the decisions that are carried out during the mediation process". In Denmark it is part of the training of the mediators that they keep an eye on the parties understanding the process and the potential consequences of agreements. It is mentioned in the preparatory works for the Danish act that in case the offender is mentally disordered (and even not punishable for that reason) special attention has to be paid to his or her ability to understand the process and the potential agreements.

In both countries consent from the parties can be withdrawn at any stage of the process, in which case the mediation will be terminated. The mediator must bring the mediation to an end if it turns out that one party tends to dominate the other strongly or they seem to be making agreements that are illegitimate or illegal.

The Danish Act on Mediation states in § 2 that it is a condition for mediation that the offender has confessed the main and important part of what he or she is charged for. Likewise in Finland the offender also must admit his or her guilt before mediation. In none of the countries, however, there are formal requirements related to the admission of guilt. In mediation, there can be no dispute whether the crime has occurred and who was the perpetrator.

Mediation is available for all age groups. Statistics on age are not to be found for Denmark, but in Finland mediation is most relevant for younger age-groups.

As mediation is informal by its nature and not defined as a criminal punishment, it may be applied in both countries also for offences committed by children below the age of criminal responsibility. As for Denmark this is not mentioned in the Act itself but pointed out in the preparatory works. In both countries, however, the Act requires that if one of the parties is below 18 years old a parent or guardian must give their consent to mediation.

Regarding applicable offence types, in principle any type of crime can be dealt with through mediation. However, the Finnish 2006 Mediation Act also provides general guidelines to define which types of cases are "more suitable", and which types of cases are "less suitable." In this judgement one should take into account "the nature and method of the offence's commission, the relationship between the suspect and the victim, and other issues related to the crime as a whole". This is a fairly broad statement, but the Act also defines three more detailed limitations:

1. violence in close relationships should be mediated only in cases referred by the police and the prosecutor and two mediators should be present;
2. mediation of violence in close relationships should be excluded if violence was repeated or there had been earlier, unsuccessful mediation processes;
3. mediation is forbidden if the victim is below the age of 18 and he/she is in a specific need of protection due to young age.

The law accords the criminal history of the offender no general relevance as a selection criterion with the exception of domestic violence. However, in practice at least the police seem to exclude offenders with long criminal histories from mediation in cases of

other offence types as well. In Denmark there are neither explicit recommendations nor explicit exclusions regarding types of offences or criminal records of the offenders in the Act itself but the wording of the preparatory works in the White Paper[7] is to a large degree identical with the Finnish 2006 Act.

3. The mediation process

In Finland mediation can be initiated at any time between the commission of the offence and the execution of the sentence and by any of the involved parties. There are no differences in the mediation process according to different stages of the criminal procedure at which the mediation has started. In Denmark where mediation under no circumstances can replace the criminal procedure the mediation can take place after the court procedure (that possibility is open also in Finland), for instance when the offender serves a prison sentence.

In both countries the submission of cases to mediation is mainly initiated by the police or the prosecutor. Once a case has been referred to the mediation coordination unit (in Finland the provincial governments, in Denmark a small civil unit under the authority of the police), the unit contacts the parties in order to ascertain their willingness to participate. Where this is agreed, a (first) meeting is arranged. The sessions are often held in neutral public places like libraries and mainly after normal work-hours, for instance in the late afternoon or in the evening. The set-up is intended to be informal, participants are addressed in first-name terms and the flow of discussion is relatively free. One session may be sufficient, but more may be added. The mediators' guidelines include suggestions on how to arrange the sessions. However, it is also emphasized that each mediation session is individual and must be directed towards the needs and interests of the parties in each specific case.

Contrary to court proceedings mediation is based on confidentiality. This goes for mediation in civil conflicts as well as criminal cases and of course the VOM-processes in Denmark and Finland. In the Finnish Act it is stated: "Mediation is organized closed from the public". In the Danish Act it is stated that breach of confidentiality by the mediator may be punished in accordance with the criminal law. This implies that when the victim and the offender make an agreement in VOM only that fact may be told to the police. But without the consent of both parties the content of the agreement cannot be passed on.

The Finnish 2006 Act explicitly requires personal participation: "The parties must attend mediation meetings in person" (§ 18). In both countries the parties are allowed to bring assistance (see above) and children below 18 years may bring care-takers in the meeting unless the mediator finds this counterproductive. In Finland the right of parents of a child under 15 to attend the mediation meetings in all cases is stated in the Act. In Denmark the same "right" is stated in the preparatory works.[8]

7 Betænkning 1501.
8 Betænkning 1501.

As for time limits in Finland the VOM process must be carried out before the prosecutor makes the final decision whether the criminal case should be brought before the court. Therefore VOM must take place in due time before the prosecutors time-limits for putting charges which is normally two or three months. In Denmark the prosecutors have time-limits for putting charges as well, especially in cases of assault there is often a time limit of 30 days. If VOM has been carried out successfully in Denmark before the case is tried in court, this may play a role in court but if and to which degree is totally within the discretionary power of the judge. The same is true in relation to the execution of the sentence if the VOM takes place at that stage.

The mediator's principal role is always to mediate on a neutral basis. They have no formal authority whatsoever. As for Finland the mediators are equipped with some knowledge of the ways and means of the criminal justice system which gives them some power to influence the content of the settlements. They can, for instance, say that this or that amount of money would or would not stand if compensation were to be decided by the court. This is not the case in Denmark, where the case will always go to court afterwards or has been to court. In Denmark compensation or compensatory activities may be agreed upon in a VOM process but the main focus is on the meeting and the talking.

In both countries the VOM process usually leads to a written agreement or contract that contains the subject (what has happened – the facts as they are agreed upon), the content of a settlement (how the offender has consented to repair the damages and how he or she puts their apology), the place and date of the possible restitution and for Finland also the consequences of a breach of the contract.

4. The consequences and effects of mediation

As for Finland the aftermath after a successful VOM depends to a large degree on the category and seriousness of the offence. In complainant offences, successful mediation automatically means that the police will close the investigations. If the case has already gone to the prosecutor, he or she will drop the prosecution.

In non-complainant offences it is at the discretion of the prosecutor whether or not the process is continued. This is regulated by the grounds for non-prosecution. Dropping the charge would be possible according to the law if prosecution seemed "either unreasonable or pointless" due to successful reconciliation, and if non-prosecution did not violate "an important public or private interest". In these cases non-prosecution remains discretionary. Should the prosecutor take the case to court, the court may also waive from penal measures, or mitigate the sentence according to general sentencing rules, which name mediation as a general legal reason for mitigation.

Mediation also has civil law consequences. Contracts drafted in mediation processes are binding in the same sense as all civil contracts. Should a party feel to have been misled by false information etc., it would be possible to take the case to a civil court.

As a consequence of the different role of VOM in the total criminal procedural structure the consequences of a successful mediation (and maybe even the understanding of *when* VOM has been successful) for the aftermath is different in Denmark. If the case was in VOM and the report says that it was a success, the judge has the possibility of taking the report into account in the sentencing. This is not mentioned explicitly in criminal code, but it is accepted as included in general mitigating circumstances in § 82 of the Criminal law. If VOM takes place after the case was in court and therefore the judge could not consider it in sentencing, a report must be sent to the prison if the offender is (still) imprisoned related to the case. It is assumed that a report on successful VOM might play a role in a future decision on early release – but it is not laid down in any rule or instruction for the prison and probation system. A successful outcome from VOM does not necessarily imply payment of damages or compensation as the court very often includes this question in the criminal case and decides about damages or compensation. The focus is on how the parties talk together, if the offender gave honest apologies, if the victim felt that she or he was heard and respected etc.

5. Organization and coordinating agencies

In Finland the overall responsibility for organizing and supervising mediation lies with the Ministry of Social Welfare and Health. Apart from the ministry an Advisory Board on Mediation in Criminal Cases, the mediation office, and of course the mediation officer in charge play different roles.

The 2006 Mediation Act establishes the Advisory Board on Mediation in Criminal Cases. This Board acts under the auspices of the Ministry of Social Welfare and Health, and is appointed by the government for a period of three years. Its duties are to monitor and assess developments in mediation in criminal cases and to make proposals for its future development as well as to promote co-operation between mediation agencies and other activities in such cases.

The actual delivery of mediation services is organized by the publicly funded mediation office. The municipal social welfare authorities usually carry the responsibility for the coordination of mediation services and for providing them with some logistics etc.

Cases are allocated to mediators by the mediation offices. Mediation sessions – in turn – are run by voluntary (unpaid) mediators. The qualifications for mediators are defined in law fairly loosely. Mediators must have passed a short training course. In addition it is required that "he /she otherwise has the training, skills and experience that a proper functioning as a mediator would require". They are not considered public servants while exercising VOM. In practice many volunteer mediators do have a job in the municipal social services. But, as mediators, they work outside their working hours and on a voluntary basis.

For Denmark the situation is different. First of all, VOM is introduced and implemented nationwide via the police. All police districts have appointed VOM coordinators who may or may not be police officers. Whatever job the VOM coordinator had

before, this job is a civil job and not related to traditional police work. If a police officer during the investigation or a prosecutor considers a case as suitable for VOM, it is presented to the coordinator and if she or he also finds it suitable, the case is handed over to a mediator who presents the concept of VOM to the parties and asks if they are interested in it. If both parties are positive, a VOM meeting is arranged by the mediator. The meeting takes place on neutral grounds such as the local library.

Being a VOM mediator is not regarded as a full-time job and the mediators are not appointed as such to any public office or authority. Still, they are paid by the state via the local police, per case 1500 DKR (about 200 EUR). This is a fixed amount and is not depending on how successful the parties find the mediation or if a good agreement comes out of it.

The mediators in the Danish VOM are trained shortly in mediation. The mediation concept is the so-called reflexive model which is developed in Denmark by *Vibeke Vindeløv* and used in mediation in other types of conflicts as for instance conflicts between divorced parents about parenthood and in the so-called court-mediation, where civil cases brought before the court are diverted into mediation which in these cases is carried out by a lawyer or a judge.

6. Statistical data on mediation

In numbers mediation plays a substantial role in the Finnish justice system. Mediation cases can be counted in different ways. The often used unit "referral" may include several offences, several victims and/or several offenders. The statistics published by the Ministry of Social Welfare and Health tries to keep these units separate. According to official statistics, in 2012 there was a total of 8472 referrals to VOM involving 11,908 offences.[9] These offences in turn involved 11,994 suspects and 9265 victims. During that year mediation-processes started in 7957 cases. In all, 574 of these processes were interrupted, which equals an overall failure rate of about 7%.

The clear majority of cases involve either minor forms of assault and battery (56%) or minor property offences (26%). The majority (about 64%) of offences are non-complainant offences. When these figures are reflected against cases dealt with by the criminal justice system, it looks like one out of five assaults (22%) known to the police has been diverted to mediation. The share is almost equal in disturbing domestic peace and defamation (17%). More than one out of ten (14%) cases of damage to property is referred to mediation. But for theft offenses, the share is only 2%. In the younger age-groups (below 18 years), more than one third of the offenses eligible for mediation are diverted.

Most cases are sent to mediation by the police (82%) or by the prosecutor (14%). Only a small number of cases come directly from either the parties or the social welfare authorities (2% each).

9 All data from the National Institute of Health and Welfare.

In almost half (41%) of the cases the offender was under the age of 21, 12% involved children below the age of criminal responsibility, and one fifth (17%) were attributable to the age group from 15-17. The majority of the victims were aged 30 and older (see Table 1).

*Table 1: Mediation according to the age of the parties, 2012, Finland**

	N	%
Age of the offender at the time of the offence/ event	12,305	100
< 15 y.	1516	12
15-17 y.	2053	17
18-20 y.	1536	12
21-29 y.	2475	20
30-64 y.	4456	36
65+ y.	269	2
Age of the victim/plaintiff	9762	100
< 15 y.	725	7
15-17 y.	726	7
18-20 y.	1106	11
21-29 y.	2126	22
30-64 y.	4710	48
65+ y.	369	4

Source: National Institute of Health and Welfare
* Includes also a small number of civil cases, which are not reported separately.

Out of the 11,558 agreements drafted, 37% consisted of monetary compensations and 5% of compensation through work. The majority of agreements consisted of symbolic compensation, such as an apology (40%), withdrawal from all claims related to offense (10%), promise not to repeat the behaviour (8%) and return of the property (0,5%). The total monetary value of compensations in 2012 was 1.94 million EUR.

Experiences of the participants and the views of different stakeholders have been explored in several reports. Overall, the parties' experiences with mediation have been quite positive.[10] There are no substantial gender differences or differences between offenders and victims.

10 See especially *Iivari* 2010. See also *Grönfors* 1989; *Järvinen* 1993; *Iivari* 2000.

Recidivism studies indicate (*Mielityinen* 1999, a quasi-experimental setting, controlling for offence type and prior criminality) that reoffending was generally lower in the mediation group (56% against 62% in the control group). However, one cannot rule out the impact of selection processes, as those willingly participating in mediation have already shown signs of pro-social attitudes.

The latest year of which statistics on VOM in Denmark were published is 2011, which was only the second year after the nationwide and permanent introduction of VOM. In that year, 1080 cases were found suitable for VOM in the whole country and out of them, 595 cases were dealt with in VOM. The by far biggest group regarding type of crime was assault with 40%, this is 221 cases. Second was robbery, which formed 16% (88 cases), 6.3% (35 cases) were burglary and 2.7% (4 cases) were rape cases. A total of 9 cases are categorized as homicide. It is not possible to see, however, if the homicides were actually completed (which does open VOM for relatives of the victim) or it was attempted or if it was negligent or intentional.

Out of all the offenders in VOM[11] 90% are male. This is an accurate mirror of the gender division of offenders in all registered crimes. Among the victims 55% are male and 45% female. In general the victims are older than the offenders. Of the offenders in VOM, 32% were below the age of 18, 38% were 18-29 years old, 23% were 30-49 years old and 6% were 50 or older. For the victims, the division in age groups was as follows: below 18 years old were 18%, 34% were 18-29 years old, 25% were 30-49 years old and 24% were 50 years or older.

7. Conclusion

Victim Offender Mediation has reached an established position in all Nordic countries. In the course of this development mediation may have been forced to compromise with some of its original abolitionist ideals: having a specific law on mediation in criminal cases with legally defined roles and confirmed responsibilities for mediators may not have been what authors like *Christie*, *Hulsman* and *Mathiesen* had in their minds in the 1970s. The abolitionists of the 1970s may also be disappointed by the fact that in Finland and Denmark, unlike in Norway, mediation does not automatically divert the case from the criminal justice system. This may narrow its diversionary effect, but on the other hand, it also prevents mediation from becoming restricted to trivial cases.

Today mediation is offering a widely used alternative to approaching some conflicts. It provides the victim and the offender a genuine possibility for communication which is not possible in the court room. Mediation has reached wide public support. Also criminal justice officials and practitioners such as prosecutors, judges and even police officers seem to recognize the value of the human dimensions. Their interest seems mainly to be ensuring that legal and ethical safeguards are met – or at least not directly broken; and that the application of mediation schemes is not replacing the criminal justice systems in cases with too serious crimes.

11 Numbers only for the first quarter of 2012.

Today, the most visible disagreement concerns the value and suitability of mediation in cases of violence in close relations. This seems to be an issue where it is difficult to separate ideological arguments from factual ones. No doubt, this debate will continue. It is equally clear that also the forms of mediation will evolve. There are rapidly spreading forms of school-mediation, as well as initiatives for introducing mediation practices in institutional settings and in prison facilities, all of which had to be left out in this short overview.[12] One subject that has not been debated much is the fact that minors may be included in VOM. This is the case in both Denmark and Finland. It would not be debatable had mediation not been formalized but practiced in the spirit of the abolitionists. Attention should be paid to the risk of net-widening as well as legal and ethical principles when a minor is encouraged to confess an act for which he or she cannot be tried in court. This situation contains an obvious risk that "the crime" is linked to this person and possibly added to his or her file at the social services or the police. Further consequences of this and how to deal with them is a challenge for future considerations.

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12 See *Lappi-Seppälä* 2015.

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