VICTIM-RELATED MEDIATION PROCEDURE 'WITHOUT PREJUDICE TO THE RIGHTS OF OFFENDERS': REALIZABLE?[1]

Stephan Rixen*

A. Introduction

The 1985 UN 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' recommends utilizing 'informal mechanisms for the resolution of disputes, including mediation'[2], but 'without prejudice to the rights of ... offenders'.[3] In a similar way, the European Committee on Crime Problems of the Council of Europe, in 1985 and 1988[4], emphasizes the value of mediation and is aware that 'such (mediation) procedures do involve a number of disadvantages'.[5] Criminal science and policy should pay particular attention to the question 'how far the rights and interests of victims as well as offenders are safeguarded in the framework of such procedures'.[6]

It is the objective of this work to develop a mediation procedure that generates both a balance of power and a high degree of satisfaction among victim and offender.

I. THE APPROACH

In Europe, the wave of 'victimophily'[7] has brought up 'alternatives' like 'mediation', 'médiation', or 'Täter-Opfer-Ausgleich' (which are semantically explained by synonyms like redress or restoration but *not* restitution).[8] Transforming the victim-related UN and Council of Europe guidelines, criminal policy in (Western) Europe shows virtual harmony.[9] This resemblance in realizing 'alternatives' to classical punishment coincides with far-reaching cooperation and harmony in the field of criminal procedure where the application of the European Convention of Human Rights is strengthening the rule of law.[10] However, European scholars say, mediation run by the state endangers the rule of law and its specific

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* Stephan RIXEN is a law student at Tübingen University.

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2. United Nations, 1986, p. 5.
3. United Nations, 1986, p. 2.
4. Council of Europe, 1985, p. 23; 1988, p. 22-23.
5. Council of Europe, 1988, p. 23.
6. Council of Europe, 1988, p. 23.
7. Expression used by WEIGEND, 1989, p. 16.
8. TRENCZEK, 1989, p. 470.
9. Cf. the articles in ESER, A. et al. (eds.), 1990.
10. In detail cf. MÜLLER-RAPPARD, 1986; VOGLER, 1986, p. 49.

constitutional principles.[11] In my view, the beacon of modern European legal culture gives sufficient proof of a practical need throughout Europe for what I call 'a balanced mediation procedure for adults'.

Our look at mediation and the criminal justice system may fit the problem of 'restitution'. Restitution mainly focuses on the *object* one has to give for financially compensating the victim. The idea of mediation mainly focuses on the entire *method* of dealing with the conflict between offender and victim. Especially in practice, restitution is an element of that method of coping with crime; but, it needs not be. I intend to determine how far and in what way the concepts of victim-related mediation and formal criminal processing may be combined. I will try to develop my model *within* the criminal justice system. The 'reformist' approach, of course, cannot fit abolitionism.[12] However, nobody is hindered from developing mediation outside the system and to make the victim the gatekeeper of *in*formal conflict regulation.[13] Nevertheless, mediation within the system may help to limit the pain of crime and conventional criminal justice. Therefore, we dare to sail betwee the Scylla of a model misused by the system and the Charybdis of increasing systemic dehumanization by neglecting to press for internal changes.

II. THE WAY OF THINKING

In section B, after having defined what is preliminarily meant with 'mediation' in our context (B.I.), one must look at current empirical evidence which asks whether and how much victims are interested in mediation as an alternative to conflict resolution (B.II). Since 'informal' conflict resolution sheltered by the state is no longer pure informal conflict resolution we have to discuss the rights of suspects involved: the presumption of innocence and the principle of 'nemo tenetur se ipsum prodere' (liberty not to incriminate oneself) (B.III.). Furthermore, bringing in the conclusions drawn before, the pros and cons of informal and formal conflict resolution will be weighted against each other (B.IV.). Finally, I will sketch out the model of a balanced mediation procedure (B.V.). In addition, we have to examine the current European circumstances of implementation.

B. Mediation

I. THE IDEA OF MEDIATION[14]

The rise of the idea of mediation is the result of many variables. As sociology of law shows, mediation is an essential trait of alle European legal systems ('vergelijk', 'concordat', 'Vergleich', 'convenio'). In particular, studies have been done to

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11. WEIGEND, 1989, p. 335-339; in detail KONDZIELA, 1989.
12. STANGL, 1990, p. 293-294.
13. VOSS, 1989, p. 35.
14. Cf. BLANKENBURG, 1980, p. 87; TRENCZEK, 1989, p. 465-466 and p. 471-475; WEIGEND, 1989, p. 220-243 and p. 321-324; SESSAR, 1990, p. 280 and 282; CHRISTIE, 1977, p. 4, 6 and 12; SMITH et al., 1988, p. 378.

reveal the ideological motives that had an impact on the rise of mediation as a *new* concept (it was first developed in 1974 and 1978 in Kitchener, Canada, and Elkhart, Indiana, U.S.A., with the 'Victim-Offender-Reconciliation-Program', VORP).

The rise of mediation is the result of criticism of traditional criminal justice said not to meet the real interests of the participants in an interpersonal crime. It is also an effect of the idea of interactionism: most interpersonal crimes seem to be the result of dynamic developments within a relationship that is 'co'-formed by social partners of conduct. Moreover, the idea of mediation expresses a general bias against growing 'juridification' of life ('hyperlexis', 'legal pollution). Criminal justice administrators seem to be trained to steal conflicts which are the property of victim and offender. The consequence is the depersonalization of social life and the criminal justice process. Therefore, personal confrontation should replace unilateral sentencing of the offender. The parties accompanied by a mediator of similar social origin will usually solve the underlying causes of their conflict and even reconcile with each other. In future, the 'conflict participants' may live in a more peaceful relationship because they have learned to cope with conflict constructively. Mediation linked to 'community', 'neighbourhood', 'small society', and 'Lebenswelt' is likely to meet the real interests particularly of victims and, furthermore, to revitalize the individuals' capacities to deal with interpersonal conflicts beyond the alienating 'system'. So, mediation is likely to trigger off change in society as a whole.

In comparison with the reality of operating projects, the ideal project (with its tendency towards 'moral improvement')[15] in most respects is questionable.[16] However, whether *all* victims of personal crimes do really prefer mediation to classical criminal justice is not known. A look at empirical evidence would help give a 'purified' explanation of mediation within the criminal justice system.

II. THE INTERESTS OF VICTIMS

1. The Value of Empirical Research

Empirical evidence alone cannot give findings which are absolutely generalizable: attributes of crime, victim and offender vary considerably such that statistical characterization of reality fails to reflect the entire range of correlating variables. Nevertheless, empirical findings are a more reasonable basis for legislative policy than decisions based on subjective opinion. Therefore, empirical research can give us objective orientation in the field of victimology.

15. KILIAS, 1990, p. 233, refers to CLARKE who shows ways to cope with crime and victimization without 'moral improvement'.
16. VOSS, 1989, p. 48-50; WEIGEND, 1989, p. 314-343.

Beyond 'qualitative' impressions, nearly no evaluation of current running adult mediation projects and their development over time has yet been done.[17] Only research that is indirectly linked to mediation for adults exists.

In a research project on mediation in the U.S.A. the parties were asked if they were satisfied by the talks: the majority said they were.[18] It seems useless to draw analogies between the U.S.A. and Europe. In fact, there is some doubt whether the researchers' question was sufficiently operationalized in order to effect valid answers. The parties might have just been expressing gratitude for the services received without cost.[19] SMITH, BLAGG and DERRICOURT interviewed 21 victims and 24 offenders of whom respectively 15 and 13 had met 'their' offender or victim.[20] Motives of offenders and victims for (not) entering mediation talks and the assessment of the meetings are contradictory. At least SMITH et al. generally conclude 'that real communication is possible between victims and offenders, even in the shadow of the law; and, that in some cases anyway something like reconciliation is possible without reparation, or with only a symbolic reparative gesture'.[21]

In a German study, VOSS asked victims of assault (with injury), robbery and property crimes whether they were willing to enter mediation in 'their' case.[22] 55% of the respondents said 'yes', 43% refused to enter. When the researchers tried to arrange an appointment for mediation, only 34% wanted to participate. In addition, the researchers wanted to know if the victims were willing to participate in mediation where they had a relationship to the offender before the criminal incident. If victim and offender knew each other, 41.9% of the victims agreed to mediation. If they were *not* acquainted before the incident, 63.1% of the victims decided on mediation.

Of the victims who lived in *conflict-burdened* relationships with the offenders before the crime, 72.4% *rejected* mediation. Of the victims acquainted with the offender before the incident and injured by property crimes, 61.3% accepted mediation. Only 40.3% of the victims of *violent* crimes, who knew the offender before, showed a willingness to enter mediation. Violent crimes are more likely to be committed if the victim and the offender are acquainted with each other before the incident: 66.3% of property crimes and 33.7% of violent crimes took place in victim-offender-relationships (no relationship: 81.1% of property crimes and 18.9% of violent crimes). If the relationship has conflicts, the rate of violent crimes is higher than the rate of property crimes). If the relationship has conflicts, the rate of violent crimes is higher than the rate of property crimes. According to KILIAS and WEIGEND these findings are similar to studies made by MAGUIRE/CORBETT in the U.K. and GAROFALO/CONNELLY in the U.S.[23]

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17. TRENCZEK, 1989, p. 481-482; PETERS, 1990, p. 272; KILIAS, 1990a, p. 257; DÜNKEL, 1989, p. 447.
18. KILIAS, 1990a, p. 257.
19. KILIAS, 1990a, p. 257; WEIGEND, 1989, p. 312.
20. SMITH et al., 1988, p. 380.
21. SMITH et al., 1988, p. 393.
22. VOSS, 1989, p. 38, 43 and 46.
23. KILIAS, 1990, p. 235; WEIGEND, 1989, p. 348 (footnote 566).

In his Swiss study, KILIAS asked victims if they had feelings of frustration or retribution when remembering the crime.[24] Of the victims who knew the offender before the crime, 44% said 'yes'. The same victims were asked if they had the same feelings after having met the offender again: 42% had. Only 22% of the victim acquainted with their offenders and who *avoided* meeting them again, showed feelings of frustration and retribution. Of the victims not knowing the offender before, 40% showed feelings of frustration and retribution when they saw the offender again. But, of the victims who were not acquainted with their offenders and did not meet them again, 50% had these negative feelings also.

In their study, SESSAR, BEURSKENS and BOERS wanted to examine the attitudes of classical punishment and restitutive 'alternatives'.[25] In hypothetical cases of assault (with injury) and property damage, 67.1% of the respondents agreed to arbitration directed by a non-judicial official in order to obtain restitution; only 54.8% wanted reconciliation. In cases of property damage, the attitudes of victims and non-victims to reconciliation are quite similar (60.5% and 59.7%, respectively; willingness is different in cases of assault [with injury]: 41.9% [victims] and 50.7% [non-victims]).

In further hypothetical cases, although different to the kind of crime and its factual circumstances, about 40% of the respondents decided on a non-punitive reaction to crime (private reconciliation or arbitration procedure). Non-punitive reactions were found in less serious cases of fraud, theft, negligent or intentional assault (with injury). The respondents rarely decided on non-punitive reactions in cases of burglary, rape, serious theft and negligent homicide.

In the case of recidivist burglars, 45.2% of European respondents considered symbolic restitution ('community service') to be the most appropriate sentence (according to the *1989 International Crime Survey*).[26] This rate coincides with the general non-punitive trend in cases of less serious crimes; however, relative to the respondents' answers non-punitive reactions to crime seem to be inappropriate for burglaries characterized as serious personal crimes.[27]

3. *Conclusions*

Substantive and methodological confusion makes it difficult to draw clear conclusions. To a large degree, the validity of conclusions based on partial data depends on the kind of theory or criminal policy researchers and interpreters adhere to.

'Concerning mediation as an alternative to criminal prosecution, at first sight, the findings are ... discouraging'.[28] The, indeed, 'must have the effect of a cold shower for those believing to ... influence the criminal justice system in a fundamental way by developing victim-related alternatives'.[29]

Mediation, relative to its idea, wants to be more than mere (civil law) restitution. Therefore, it must especially fit crimes that are, first of all, eruptions of con-

24. KILIAS, 1990, p. 235-236.
25. SESSAR et al., 1986, p. 92-93, 94 and 96.
26. VAN DIJK et al., 1990, p. 82.
27. SESSAR et al., 1986, p. 95.
28. SESSAR, 1990, p. 279.
29. PETERS, 1990, p. 271.

flict relationships, e.g. violent crimes. But, as VOSS's study shows, 72.4% of *these* victims refused mediation! Since the parties probably tried different ways of self-control, the criminal justice system has become the victim's 'last resort'.[30] Indeed, crimes among persons who know each other, tend to be reported to police rarely.[31] In addition, other personal crimes caused by deep-rooted conflicts are not easily reached by mediation (not usually a specific therapy).[32]

Although KILIAS's doubts whether interpersonal conflicts are at the root of much crime[33], there *are* cases remaining: nearly 30% of victims in a conflict relationship accepted mediation.[34] Single 'qualitative' impressions of successful mediation in cases of serious offences including rape may, at least, claim that mediation is appropriate.[35] 'Mediation cannot be seen as being inappropriate for these cases as long as it did not have ... (a) chance to prove its appropriateness'.[36] Nobody can deny that this 'last resort' might be the very last opportunity to reconcile with each other.

In the contemporary circumstances, the vast expectations behind mediation may be unfounded. It cannot replace classical criminal justice as a whole. But it is *one* means to limit the pain within the conventional criminal justice system. At least, preliminary empirical evidence gives sufficient proof that mediation is appropriate in itself.[37] In the end, we can infer from the interpretation of empirical evidence, linked to moderate abolitionist standards, that mediation within the system can be installed beyond absolute absurdity. Mediation may work.

Dit not the treatment ideology take a *long* time to reach 'nothing works'?

4. A 'Purified' Idea of Mediation

'Purified' mediation does not aim at the abolition of conventional criminal justice. It is one reaction to crime among others because not every crime is due to an interpersonel conflict. Mediation *tries* to initiate communication between victim and offender; it *helps* to discuss the reasons for the crime, it *aims* at compensating the emotional and the financial aftermath of the incident; and, if possible, it *intends* to develop a new basis for future social contacts.[38]

Ideally, mediation within the criminal system should not be limited to a narrow concept of reconciliation. Mediation is a framework of interpersonal guidelines that can be applied to each individual case.

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30. SESSAR, 1990, p. 279.
31. HANAK et al., 1989, p. 163; KILIAS, 1990a, p. 257.
32. SESSAR, 1990, p. 279.
33. KILIAS, 1990a, p. 257.
34. VOSS, 1989, p. 46.
35. TRENCZEK, 1989, p. 481-482; SESSAR, 1990, p. 281.
36. SESSAR, 1990, p. 281.
37. PETERS, 1990, p. 472; KILIAS, 1990a, p. 258.
38. WEIGEND, 1989, p. 349 and p. 365.

III. THE RIGHTS OF OFFENDERS

1. The Persumption of Innocence

On the surface, the 'rights of offenders' seem actually to be a rather strange topic in times of 'victimophily'. Regardless of some rare recent thinking on 'la victimización del delincuente' (the victimization of the offender)[39], victimology, as a rule, draws the line clearly – offenders are 'out of bounds'. Therefore, it is not so inconsistent when Robert ELIAS predicts future legislative tendencies to strengthen a 'presumption for victim rightis', and SEELMANN and SCHÜNEMANN write of a trend to weaken the presumption of innocence with a kind of 'Opfervermutung' (presumption for the victim).[40]

Since we are trying to sketch out a model mediation procedure which might be implemented into European criminal proceedings, we must look at the procedural aspects of the European Convention on Human Rights, especially at its Article 6, Paragraph 2: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. In fact, the presumption of innocence with its roots in medieval Christian natural law and 'enlightened' concepts of human rights and liberties is a common product of (Western) European legal cultures; it significantly exemplifies the rule of law in the field of criminal justice.[41] Given the intent to develop a balanced mediation procedure, two problems arise. First, one should examine the scope of using the presumption of innocence. Does it cover pre-trial proceedings? What is meant with 'charged with a criminal offence'? Second, we have to look for a procedural mode appropriate to safeguard the proof of guilt 'according to law'.

a. The Scope of Application

In the 'Adolf Case', as for the substantive and temporal scope, the European Court of Human Rights confirmed that '... these expressions (i.e. 'criminal charge', 'accusation en matière pénale') are to be interpreted as having an autonomous meaning in the context of the Convention ... The prominent place held in a democratic society by the right to a fair trial favours a 'substantive', rather than a 'formal' conception of the 'charge' referred to by Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to examine whether there has been a 'charge' within the meaning of Article 6 ...'[42] Taking into account the judgement of the Court in the 'Engel Case', one may add that the scope of the presumption of innocence is substantially independent of the label which has been put on a procedure by national legislation.[43] Therefore, even if mediation is no part of the trial in court, but a

39. LANDROVE DIAZ, 1990, p. 138-150.
40. ELIAS, 1990, p. 242; SEELMANN, 1990, p. 166-167; SCHÜNEMANN, 1986, p. 198.
41. PAEFFGEN, 1986, p. 46 and 65-70.
42. European Court of Human Rights, Adolf Case judgement of 26 march 1982, Series A, no. 49, p. 15.
43. Cf. VOGLER, 1986, p. 142.

part of the pre-trial proceedings[44], the presumption of innocence must also be maintained.

One may think that the suspect might waive the right to be presumed innocent. However, the presumption of innocence is an established part of the rule of law; it gives proof of the fundamental normative quality of the relationship between state and citizen in free Europe.[45] Therefore, it transgresses the interests of the individual in question. Generally individuals can waive rights held by themselves. But the waiver of an individual right must be excluded if it is going to erode the substance of the legal order that guarantees third parties' rights. In conclusion, the suspect cannot individually declare a waiver of the presumption of innocence.

b. The Proof of Guilt 'According to Law'

Since the presumption of innocence makes the rule of law concrete in the field of criminal process it can only be refuted by the non-appealable decision of an independent judge who has to be satisfied 'beyond a reasonable doubt'. Normally, he (or she) weighs the evidence put forward to convict the suspect. The judge may base his/her decision on a confession of guilt. In that case, the court must determine that this confession has been given in complete freedom; from a statement of the accused not intended to be a confession of guilt, no such confession may be inferred.[46] The question appears: what is the meaning of 'in complete freedom'?

2. The principle of 'nemo tenetur se ipsum prodere'

The confession of the suspect is usually an essential precondition for mediation. On the other hand, within the criminal procedure, the offender has the right not to incriminate himself ('nemo tenetur se ipsum prodere'). He/she must not be compelled to plead guilty (to confess). Some scholars claim this principle is an inherent element of the presumption of innocence.[47] In any case, it is a part of the rule of law and, therefore, has become, in Article 14, Paragraph 3, a provision of the U.N. 'International Covenant on Civil and Political Rights' of 19 December 1966.[48]

However, is not the opportunity of avoiding classical punishment proposed by a system interested in reducing caseloads, an improper pressure on the suspect? A suspect who is unsure of having sufficient evidence to prove his innocence or thinks an acquittal less likely, hopes to get a less severe sanction through mediation.[49] If the system assessed the refusal to use mediation as an official or 'second code', aggravating circumstance, would not that inappropriately force the subject?

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44. VAN DIJK, VAN HOOF, 1990, p. 342-343; PEUKERT, 1985, p. 164; PAEFFGEN, 1986, p. 45 (footnote 151).
45. KONDZIELA, 1989, p. 184-185; VOGLER, 1986, p. 139; PAEFFGEN, 1986, p. 46-47 and 65-68.
46. VAN DIJK, VAN HOOF, 1990, p. 341-342.
47. Cf. references NOTHHELFER, 1989, p. 37.
48. PAEFFGEN, 1986, p. 68 (footnote 273) and p. 71.
49. WEIGEND, 1989, p. 328.

The problem of voluntariness, i.e. a confession based on an 'entirely free decision of 'the suspect's' own free will'[50], is well known from the area of adults' 'diversion'. Diversionary measures normally cannot be taken without a suspect's consent and free decision to participate e.g. in 'community service'.[51] Mediation within the criminal justice system, however, is somewhat similar to running adult diversionary programs.

When there is sufficient suspicion, the state has the option to 'threaten' the suspect with full execution of criminal proceedings including the imposition of classical punishment. Mediation, therefore, is a kind of offer by the state to replace the harder rule by a softer direct victim-offender-rule. From a 'systemic' point of view (which is only valid in our context), the state offers two legitimate burdens different in the degree of control to reach a re-installed 'public order'. Given the two alternatives, the offender has a margin of decisions. Thus, voluntariness is in fact 'reduced'[52] by systematically legitimatizing the reasons.

However, one has to be aware that even in running mediation projects, 'absolute' voluntariness does not take place either.[53] Even one of the 'grassroots' projects (the San Francisco Community Board Program), is working with soft social pressure to 'convince' hesitating conflict participants. Collaborators visit these participants in their homes and try to encourage them to mediate ('gentle persuasion'). The Dorchester Urban Court in Boston does not avoid distancing the criminal justice system at all. On the contrary, it often threatens the offender with criminal or civil law procedures so as to ensure that mediation will be accepted. Horrible stories of the imponderabilities of trials in court are a subtle means to 'convince' offender (and victim). Of course, if the criminal justice system granted suspects exemption from punishment, voluntariness might be ideally safeguarded. Unfortunately, exemption from punishment allowing suspects to make a decision for mediation or not, would at present, 'blow up' the system.

3. Conclusions

'Reduced' voluntariness does not contradict our 'purified' idea of mediation which abstains from bringing out *mainly* moral or quasi-therapeutic reconciliation.[54] From a legal perspective, the inappropriateness of state pressure that might even threaten to reduce voluntariness has to be thoroughly controlled by a judge. Thus, as he (or she) controls the credibility of confessions, the judge plays a central role in the mediation procedure.

Nevertheless 'voluntariness' remains the Achilles'heel of the criminal justice system that is, *nolens volens*, based on compulsion. In favour of the offender, judicial proceedings may bandage the heel, but they cannot make it invulnerable.

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50. European Court of Human Rights, Application no. 5076/71, X vs. United Kingdom, Coll. 40 (1972), p. 64-68, esp. p. 67.
51. TAK, 1986, p. 10.
52. WEIGEND, 1989a, p. 152.
53. WEIGEND, 1989, p. 262, 1989a, p. 150.
54. WEIGEND, 1989a, p. 151 and 154-155.

IV. THE PROS AND CONS OF MEDIATION

Before I try to sketch out the ideal model mediation procedure, I want to summarize the pros and cons of formal and informal conflict resolution; they all have to be taken into account.

1. Summary

The conventional criminal proceedings is the best safeguard of the rule of the law, the constitutional rights and liberties, and the presumption of innocence. In addition, it may prevent the suspect from giving a confession of doubtful worth. However, we also know about doubtful confessions from normal proceedings: 'plea bargaining' and its European equivalents may also question the rule of law. Instead, the rule of law and its enforcement by state authorities might avoid differences of power between victim and offender (otherwise, the victim may have the opportunity to exert an influence on the sentencing decision).[55] However, within mediation, differences of power cannot entirely be excluded; as the mediator can only produce formally equal conditions for the duration of mediation. However, classical criminal processing also cannot give more than a formal balance of power.[56] Informal regulations may have a pedagogical effect on the offender and thereby hinder him (or her) from blaming the victim.[57] Conventional criminal proceedings cannot efficiently fight 'techniques of neutralization'.[58] Furthermore, since the complicated structure of the criminal process is not immediately evident to lay persons, the participants, in particular the victim, may feel like 'strangers' in a juridical nightmare. On the other hand, even though European criminal procedure is strengthening the victim's position, the victim plays a subordinate role. In mediation talks, he (or she) would play a principle role in his (or hers) case.[59] In a mediation procedure a look at the social substratum of the incident might replace an abstract meta-conflict produced by jurists handling the incident with 'hermetic' patterns of legal relevance.[60] Mediation may also effect a widening of the net of social control.[61] Refering to the results, it may also infringe on equality. However, classical sentencing does not grant total equality either.

2. Conclusions

Obviously, every detail – formal or informal – is *partially* advantageous to victim and offender. 'The question should therefore not be one of conflict betwee mediation and the criminal justice system, between formal and informal processing of

55. KONDZIELA, 1989, p. 178.
56. WEIGEND, 1989, p. 341.
57. KONDZIELA, 1989, p. 185.
58. On techniques of neutralization cf. CONKLIN, 1986, p. 209-213.
59. KERNER, 1985, p. 500.
60. CHRISTIE, 1977, p. 4; WEIGEND, 1989, p. 330.
61. STANGL, 1990, p. 298; KONDZIELA, 1989, p. 178.

criminal matters. Instead, there should be more integration of the two'.[62] Integration of contradictory principles is the genuine task of legal regulation. In a conspicuous way, legal procedure seems to be able to generate a balance of interests and power (if, of course, it is loyally transformed from the 'law in the books' into the 'law in action'). Indeed, the victim's perspective must not be isolated from the offender's perspective. Thus, 'the place of the law in this 'market' of social peace'[63] is to make the perspectives practically compatible.

V. THE MODEL MEDIATION PROCEDURE

To a certain extent, drawing drafts includes arbitrary elements. Therefore, my concept is not free from questions. Furthermore, my draft only gives direction. In view of a certain ideological version of mediation in a certain criminal justice system, it will have to be made more concrete; at least, I can provide a *substantiated* model.[64]

The procedural steps and the following explanations have to be understood together.

1. The Procedural Steps

1. A crime has been committed, the suspect confesses and is likely to be guilty; if the prosecutor denies (restrictively interpreted) 'public interest' in prosecution and shares reasonable expectation that victim and offender are willing to arrange mediation talks, the prosecutor must suggest to the court that a mediation procedure be offered.

If the prosecutor refuses tot determine a case as suitable for mediation, the suspect or the victim may appeal to the court.

2. The court has to determine thoroughly that the confession is credible and must be convinced of the guilt

If the credibility of the confession is doubted or the guilt denied, the court must drop the case.

If the prosecutor's recommendation is followed, the court refers the case to a mediation centre.

3. The court must suspend prosecution, to allow a sufficient time to carry out the mediation:

4. If, during mediation, the victim and the offender reach a satisfying result, the court must waive prosecution permanently.

5. If mediation fails (victim and/or offender are unwilling to cooperate, with no satisfying result), the court must decide when to begin the regular trial.

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62. JOUTSEN, 1987, p. 288.
63. ZAUBERMAN, 1990, p. 306.
64. Generally cf. SCHÖCH, 1984, p. 390-391; KONDZIELA, 1989.

2. Explanations

a. Crimes which Qualify for Mediation

With regard to the ideal of mediation, even very serious personal crimes should qualify for mediation. However, within the criminal justice system, one must accept that contemporary legal practice in Europe works with the normative category of 'public interest'. Only in cases of crimes that do not infringe on social peace, can the legal order dare tot waive classical prosecution and punishment without undermining the stability of the norms treatened by the crimes.[65] 'Public interest' is a presumption criminal justice administrators construct by asking a representative 'reasonable man' who is thought to be an average-sensitive person embedded in the socio-cultural circumstances and concepts of justice of his/her time.[66] The notion of 'public interest' implies that there are conflicts which are perceived by the public as a menace to social peace. Thus, strictly speaking, 'public interest' is nothing more than the positive version of punitiveness.[67]

As we have seen above, evidence shows that the general population seems to be highly punitive in cases of burglary and rape. With a certain degree of plausibility, the same would be valid when considering sexual assaults of rape-like impact, extremely cruel corporal offences, homicide and murder. On the other hand, public prosecutors and judges dealing with criminal matters have above-average attitudes of punitiveness refering to *all* crimes; only in cases of rape they are, more or less, as punitive as the general population. In cases of less serious crimes against health and property punitiveness differs significantly.[68]

Following these findings, a vast majority of conflicts usually covered by classical sentencing could be managed by 'alternatives' – e.g. restitution, improved civil procedure and, of course, mediation – without contradicting the attitudes of the public! Moreover, these alternatives could effect full clarification and stabilization of the norms at least[69] as successfully as conventional penal sentencing.[70] STANGL adds that the norm-clarifying impact of alternatives like mediation might be improved when installed in the framework of the criminal justice system.[71] Indeed, I do so here. Lastly, I cannot agree with WEIGEND who calls 'private quarrels' ('Delikte im sozialen Nahbereich') to be solely suitable for mediation as far as they can be defined by penal law criteria as 'minor offences' ('Vergehen').[72] With regard to the current knowledge of punitiveness ('public interest') that idea would eliminate too many conflict-burdened incidents which are valid opportunities for mediation.[73] Crime is characterized by ever specific circumstances

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65. LUHMANN, 1983, p. 40-64 and 106-115; JAKOBS, 1991, p. VII and 6-14.
65. WEIGEND, 1989, p. 345. Similarly JAKOBS, 1991, who speaks of the 'Jedermann' ('Everbody'), p. 23, representing the expectations of an undisturbed, thus peaceful society, p. 482-483.
67. Similarly WEIGEND, 1989, p. 353.
68. SESSAR, 1989, p. 49-53; SESSAR et al., 1986, p. 96.
69. Because it is doubtful, as SCHUMANN's study shows (1989, p. 50-52), whether penal law can clarify norms at all; similarly HANAK et al., 1989, p. 5.
70. SCHUMANN, 1989, p. 8-9; FREHSEE, 1987, 113 and 119; WEIGEND, 1989, p. 319-320.
71. Quoted by WEIGEND, 1989, p. 318 (footnote 461).
72. WEIGEND, 1989, p. 351-352 and 359-360.
73. KONDZIELA, 1989, p. 187 (footnote 58); TRENCZEK, 1989, p. 480 and 483; DÜNKEL, 1989, p. 462.

(e.g. degree of parties' acquaintance; understanding of the motives of the incident – 'that might have happened to me, too' –; degree of emotional or financial damage; method of reporting to the police; history of interpersonal conflict, 'trigger' of the final breach of norm, etc.). Conventional criminal justice cannot react appropriately by too rough a scale of sentencing options. Especially in view of personal crimes, mediation might administer more 'proportional' justice by taking into account victim responsibility. Therefore, we think it is acceptable that, in principle, *all* kinds of personal crimes are suitable for mediation, as far as – restrictively interpreted – 'public interest' (murder etc.) is not infringed upon.

b. Further Remarks

The Offender and the Judge

To safeguard the presumption of innocence, the judge has to review every confession. Even if it is desirable (from a viewpoint of reconciliation), mediation cannot take place when the judge denies the suspect's guilt. If confession and guilt are sufficiently proved the judge should refer the case to an independent mediation centre. He himself (or her herself) is not the mediator.[74] The informal character of mediation with its pedagogical and interpersonal intentions is not disturbed by the formal atmosphere of a trial in court. Together with the recommendation, the public prosecutor has to bring in a bill of indictment that is suspended until mediation has been finished.[75] In the bill, the prosecutor has to propose a sentence which cannot be transgressed by the court in case mediation fails. The suspect should know about the threatening sentence. In addition, he/she needs should not be afraid of a 'reformatio in peius'. The right to appeal 'arms' the suspect against perfunctory discretion. By this, the suspect may bring in the results of private talks with the victim which the prosecutor refused to assess as a type of mediation already started. Since voluntariness is also good for the victim, the offender may not appeal against the result of mediation if he/she is not satisfied. He/she can only re-enter the traditional legal process.

The Prosecution

The public prosecutor should ensure cases conform to the guidelines. These should identify cases unsuitable for mediation. In general, the guidelines should be similar to our definition of 'purified' mediation. In order to avoid 'net-widening', norms should provide that mediation not take place in cases of petty first time 'private' offences.[76] An official exhortation could finish prosecution (virtual decriminalization). A continuous assessment of case suitability would stabilize even 'proportional' equality linked to the individual incident. The prosecutor has to ask the offender and the victim whether they are willing to mediate. 'Reasonable' expectation means that the prosecutor can recommend mediation even if the victim is unwilling due to vexatious motives at the time of questioning. Prognosis must be that the victim's attitude will change after having entered mediation (SMITH et al. have given evidence for real changes of attitude; therefore, this

74. KONDZIELA, 1989, p. 187.
75. KONDZIELA, 1989, p. 188.
76. KONDZIELA, 1989, p. 178.

measure seems to be useful.).[77] At the time of questioning the offender, the prosecutor must have fixed his/her sentencing proposal and given it to the court to avoid illegal pressure.

The Victim

Of course, the victim cannot be forced to finish mediation successfully because his/her free will also has to be respected. Therefore, the power to define whether mediation ended successfully or not must be held only by the victim and the offender. A skilled mediator will try to form a dialogical atmosphere and help to find a moderate (symbolic/psychological, even financial) result. It seems to be acceptable to victims that the prosecutor orders (with no legal way for the victim to stop it) mediation when he/she is unwilling because of vexatious motives. The victim's free will is sufficiently respected because he/she can still refuse to define mediation talks as succesfull. On the other hand, the victim must have the option to appeal to the court if the prosecutor ignores his/her will for mediation.

The Mediation Centre

Since often special knowledge is necessary in dealing with complex feelings, specially skilled and motivated professionals (psychologists, social workers) should direct the mediation talks.[78] This is highly important because, as evidence shows, (conflict-burdened) personal crimes are very likely to be the more appropriate cases for mediation. There should be meetings with each of the 'conflict participants' in order to prepare the personal confrontation concerning wishes, fears, etc. and to introduce the general idea of mediation. The behavioral details of mediation, in particular the problem of suggestive or manipulative influences exerted by mediators cannot be examined within this work.

3. Contemporary Conditions of Implementation

It is a truism of both comparative law and legislative science that, in order to work properly, legal regulations need to fit in with the prevailing (legal) culture.[79] Another truism is that the effect of a supranational legislative draft depends on the similarity of the functional problems confronting the various legal systems.[80] Of course, I cannot give a precise comparative examination of the cultural, ideological, social and institutional variables that decide the effect of the draft[81]; I can only give a general orientation.

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77. SMITH et al., 1988, p. 394.
78. SMITH et al., 1988, p. 394.
79. SHAPLAND, 1990, p. 288.
80. ZWEIGERT / KÖTZ, 1987, p. 31.
81. Cf. FIJNAUT, 1987, p. 57-84, who looks at the problems of comparative and integrative studies in a sophisticated way.

a. Different Legal Cultures in Europe: 'Comparative' Remarks

Currently, a victim-friendly spirit exists throughout Europe.[82] Consequently, there is a high tendency to enact new victim 'alternatives'. The U.K., the Netherlands, Belgium, Austria, France, and Germany (as examples) have well developed victim assistance schemes, high-levelled victimology and many legislative intentions. Spain, however, has just started national victim surveys, and only a few victim aid centers are operating.[83] In any case, there is a general trend with varying regional responses.

As for the system of prosecution, GOLDSTEIN and MARCUS – in spite of criticism by LANGBEIN and WEINREB – gave proof of the functional similarity of the adversarial and the inquisitorial systems.[84] So, my model could be implemented on the Continent as well as in the U.K. where, of course, the role of the public prosecutor would have to be modified. As for the principle of prosecution – mandatory prosecution ('Legalitätsprinzip') or discretionary prosecution ('opportuniteitsbeginsel') – the differences are small. Even in systems with an official principle of mandatory prosecution, discretionary prosecution de facto determines criminal processing.[85] As for countries which officially adhere to strict mandatory prosecution like Spain (with only rare discretionary use by the 'Ministerio Fiscal') my model might be implemented within substantive law, but not within procedural law. Successfull mediation might become 'active penitence' ('arrepentimiento activo',, 'tätige Reue') that negates the criminal character of the conflict.[86] De facto the principle of mandatory prosecution would be paralysed (to a larger extent than up to now). The legal belief system, however, would be kept alive. A 'flight' into the area of substantive law is not an unusual legislative way in the field of 'alternatives' for decriminalizing; similar legal provisions or drafts are seen in Switzerland, Greece, Austria, France, Portugal and Italy. In cases of cheque fraud, the Portuguese and French penal codes enact a sort of 'active penitence' which exempts the suspect from punishment if he/she has repaired the damage or has promised to do so within a period of 10 or 30 days, respectively; Italian legislators discuss a period of 60 days.[87] Since the victim's will for mediation seems to be the higher the longer the period between the incident and the talks is the model procedure should involve a similar longtime period.[88] Lastly, all problems refering to legal doctrine ('legal dogmatics') can be fully solved if the 'atmosphere' of implementation would allow.

82. Cf. the articles in ESER, A. et al. (eds.), 1990.
83. Information given by Prof. DE LA CUESTA, San Sebastian, during a lecture in Leuven on 26 February 1991.
84. GOLDSTEIN / MARCUS, 1977, esp. p. 279-283; LANGBEIN / WEINREB, 1978.
85. KUNZ, 1984, p. 40 and 44-45.
86. DÜNKEL, 1989a, p. 118, 1991, p. 7; similarly RÖSSNER, 1989, p. 31-32.
87. DÜNKEL, 1989, p. 406, 1989a, p. 118, 1991, p. 9.
88. SCHÄDLER, 1990, p. 151-152.

b. Conditions of Implementation

The model can only become reality if legislators decide to enact it and if criminal justice administrators enforce it. In particular, the problem is whether the contemporary institutional framework in Europe can make implementation probable.[89] I think it to be an advantage of this model that it is similar to adult diversion programs operating all over Europe. One may object that by a less similar model the independence of mediation may be strengthened.

First, in my opinion, all direct mediation talks *are* independent of criminal justice administrators. Second, at present, similarity to diversion is the admission ticket to legislative discussion, as they are less likely to deal with proposals which are too far from the existing system. The similarity to diversion is also important in the way it is applied. Jurists could make decisions based on commonly known standards and patterns of behaviour. Moreover, they could keep the formal decision-making control. I concede that caseload-reducing could hardly be possible since a lot of work could shift or even grow (judges' work could shift from less trial to more assessment of confessions; prosecutors could have to write bills of indictment *and* substantiate recommendations to prevent appeals).[90] However, the pressure of higher caseloads might influence administrators to be more 'generous' concerning their positive assessment of cases. This might not be disadvantageous to an offender who believes in his/her innocence, for he/she could opt for normal trial by not defining mediation as 'successful'. By analogy, the victim could have the same opportunity. The 'allure' to be used as another tool for caseload-reducing might, in fact, help achieve system support. Besides, the model could be a way for the system to relegitimatize its existence, as it provides an example of 'softer' conflict regulation methods and, thus, affirms the subsidiary role of classical punishment.

The question of costs cannot be appropriately answerd.[91] One has to keep in mind that a lot of work could be done within existing structures. Even running diversion services may also deal with mediation.

Of course, nobody can predict if the model would be too expensive or too complicated to work successfully in practice. Only experience can replace the uncertainty of a prognosis.

C. Conclusion

'Procedures for mediation' might not only 'result in conciliation between the offender and the victim and resolution of the conflict', but might also 'avoid some of the drawbacks of the criminal justice system'.[92] However, 'such procedures do involve a number of disadvantages'[93], which could be 'deactivated' by legal regulations based on the analysis of victims' and offenders' interests. Legal regulations

89. Generally cf. FIJNAUT, 1987, p. 83.
90. KONDZIELA, 1989, p. 188.
91. FIJNAUT, 1987, p. 94, generally refers to the aspects of costs.
92. Council of Europe, 1988, p. 22-23.
93. Council of Europe, 1988, p. 22-23.

could combine the advantages of informal conflict resolution, with those of the conventional criminal justice system's formal reaction to criminal disputes.

Above all, criminal justice must be *relevant* to victims and offenders; and, relevant to the system that has to follow the victims' and the offenders' – generalized – interests. The model tries to realize victim-offender-justice which has both a low degree of abolitionist Utopia and a high degree of structural affinity to the system.

In any case, this paper proposes that a victim-related mediation procedure, 'without prejudice to the rights of offenders', is indeed realizable.

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