

Problem-Solving Justice in Criminal and Civil Justice in Finland

Kaijus Ervasti*

1. Introduction

Many problem-solving approaches have emerged in the field of law over the last 50 years. Nonet and Selznick introduced their theory of law in the late 1970s.¹ They made a distinction between repressive law, autonomous law and responsive law. Other approaches that have connections to problem-solving approaches include therapeutic jurisprudence, procedural justice, restorative justice, preventive law and proactive law. These approaches are interlaced with each other.² In the field of alternative dispute resolution (ADR) and conflict theory, many researchers have written about problem-solving approaches.³ These theories have typically been developed in the field of socio-legal studies, sociology of law or sociological jurisprudence and have often reacted critically to the theoretical assumptions of the traditional jurisprudence and function of court system.

A remarkable transformation has occurred in the role of courts in Western countries.⁴ The traditional role of courts has been dispute resolution, deciding who is right in civil cases and sentencing and imposing criminal sanctions in criminal cases. In that role, the courts function as neutral and impartial actors resolving issues based on historical facts and evidence in the case of due process of law. Today, however, courts handle a wide range of new problems, many with social or psychological dimensions. In these cases, courts do not only resolve issues of facts, but are also handling many kinds of human problems.⁵

Problem-solving justice as a concept has often been understood in relation to the criminal justice system. The best-known application of problem-solving justice is problem-solving courts.⁶ In the United States for example, there are drug courts, community courts, domestic violence courts and mental health courts. Nationwide, there are approximately 3,000 specialised courts that pursue problem-solving approaches.

* LL.D., Director of Research, Institute of Criminology and Legal Policy, University of Helsinki, email: kaijus.ervasti@helsinki.fi.

1 See P. Nonet & P. Selznick, *Toward Responsive Law. Law & Society in Transition* (2005, second printing).

2 See e.g. D. Stolle et al., 'Integrating Preventive Law and Therapeutic Jurisprudence: A Lawyer and Psychology Based Approach to Lawyering', (1997) 34 *California Western Law Review*, pp. 15-51; J. Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence', (2002) 38 *Criminal Law Bulletin*, pp. 244-262.

3 See e.g. C. Menkel-Meadow, 'Toward another View of Legal Negotiation: The Structure of Problem Solving', (1984) 31 *UCLA Law Review*, pp. 754-842; C. Menkel-Meadow, (1996) 38 'The Trouble with the Adversary System in a Postmodern, Multicultural World', *William and Mary Law Review*, pp. 5-44. Menkel-Meadow has postulated that the Western adversarial court system is no longer the best means for dispute resolution in today's post-modern, multicultural world. According to her views, the truth is illusory, incomplete, ambiguous, dependent on the knower and knowledge and, more importantly, complex. The increased complexity of modern proceedings, as well as modern life in general, means that most conflicts now have more than two parties. Multi-party and multiple conflicts will become distorted if they have to be expressed as two-party relationships. The courts, for instance, deal with issues relating to pollution, consumer affairs, mass misdemeanours and access to public services. Moreover, diagonally opposite presentations of the facts in a conflict are not the best means of getting to the truth. In contrast, polarised debate distorts reality, omits crucial pieces of information, oversimplifies complex issues and complicates clear ones. In addition, in a complex and multicultural world, individuals perceive 'reality' in different manners. For this reason, there are scholars who have questioned the assumptions that the adversarial system has about objectivity, neutrality and fairness.

4 See C. Menkel-Meadow, 'Peace and Justice: Notes on the evolution and purposes of legal processes', (2006) *Georgetown Law Review* 94, pp. 553-580.

5 See B. Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', 92(003) 30 *Fordham Urban Law Journal*, pp. 1055-1103.

6 In the United States, many advocates of problem-solving courts have been very enthusiastic about the system and saw the problem-solving court movement as a 'problem-solving revolution'. In other countries such as Canada, Ireland and Scotland, problem-solving courts are seen more as a part of the system or part of the solution, not as a complete solution or panacea. J. Nolan, 'The International Problem-Solving Court Movement: A Comparative Perspective', (2011) 37 *Monash University Law Review*, pp. 259-279.

The majority of them, approximately 2,000, are drug courts.⁷ In the ‘problem-solving courts movement’, courts are trying to identify the core characteristics of a phenomenon. Some researchers have stressed the following elements in problem-solving courts: 1) problem-solving orientation, where a focus is on the underlying problems of litigants, victims and communities as well as individual rehabilitation, 2) collaboration and 3) accountability.⁸ These principles are also common in restorative justice, therapeutic jurisprudence and the conflict resolution approach.

In Finland and the other Nordic countries, no courts could be described as problem-solving courts.⁹ As a theoretical concept, problem-solving justice is not very well known or used in research or in legal textbooks. Therefore, the core concept of problem-solving justice is quite unfamiliar in Finnish and in Nordic legal culture. However, problem-solving approaches in a broader sense currently are quite important in the law and conflict resolution. In the field of conflict resolution, there are many simultaneous and alternative problem-solving methods and ways to deal with conflicts.¹⁰ There are many mediation systems in the Nordic countries, including Finland,¹¹ and research in the field of conflict and conflict resolution theory is dynamic.¹²

Mediation has old roots in the Nordic countries but especially in the 2000s many new mediation systems have been introduced. Mediation is a natural component of the conflict resolution culture in Finland and Norway, but in Iceland, there has been minimal activity in this area. Sweden has some mediation systems, but it is not a commonly-used conflict resolution system. Denmark lies somewhere between Sweden, Finland and Norway.

In this article, I will describe problem-solving approaches in the field of law in Finland. I will also explain why we do not have ‘problem-solving justice’ as a core concept or problem-solving courts in Finland or the other Nordic countries in the field of criminal justice. Finally, I will discuss whether we should understand problem-solving justice in a broader sense than it has often been understood.

2. Court system

In Finland, there are general district courts for criminal and civil proceedings, and administrative courts for administrative matters.¹³ The Courts of Appeal and the Supreme Court are higher court instances in civil and criminal matters and the Supreme Administrative Court is in administrative matters. There are only four special courts: the high court of impeachment (criminal prosecutions against member of government, chancellor of justice, parliamentary ombudsman and members of the Supreme Court); the labour court (for collective labour disputes); the insurance court (matters of social insurance); and the market court (cases of market law, competition and public procurement).

In Finland, as in the other Nordic countries, the court system is quite simple. There are few special courts and there are no problem-solving courts. Civil cases and criminal cases are tried in the same courts. However, there are often separate criminal and civil sections in district courts, but it is quite common for

7 See E. Lane, ‘Due Process and Problem-Solving Courts’, (2003) 30 *Fordham Urban Law Journal*, pp. 955-1026; R. Boldt, ‘Problem-Solving Courts and Pragmatism’, (2014) 73 *Maryland Law Review*, pp. 1120-1172. For criticism of the problem-solving court system, see M. Hoffman, ‘Problem-Solving Courts and the Psycholegal Error’, (2011) 160 *University of Pennsylvania Law Review*, PENnumbra., pp. 129-139.

8 Boldt, *ibid.*, p. 1122-1125. Center for Court Innovation has been published principles of problem-solving justice: 1) enhanced information, 2) community engagement, 3) collaboration, 4) individualised justice, 5) accountability, 6) outcomes (effectiveness). Center for Court Innovation, Bureau of Justice Assistance (written by R.V. Wolf), *Best Practice Principles of Problem—Solving Justice* (2005).

9 In Norway, there are conciliation boards, which aim to settle civil cases but also give binding decisions. A. Nylund, ‘The Many Ways of Civil Mediation in Norway’, in L. Ervo & A. Nylund (eds.), *The Future of Civil Litigation. Access to Court and Court-Annexed Mediation in the Nordic Countries* (2014), pp. 97-119.

10 See K. Ervasti, ‘Past, Present and Future of Mediation in Nordic Countries’, in A. Nylund et al. (eds.), *Nordic Mediation Research* (2018), pp. 225-246; K. Ervasti & K. Salminen, ‘Conflict Resolution in the Garden of Forking Paths’, in A. Rønne et al. (eds.) *Fred, forsoning og mægling. Festskrift til Vibeke Vindeløv. Jurist og økonomforbundets forlag* (2017), pp. 95-110.

11 There are no mandatory ADR or mediation systems in Finland. Out of court mediators do not have any authorisation or register. Mediators have many associations in Finland, such as the Finnish Forum for Mediation.

12 See A. Nylund et al. (eds.), *Nordic Mediation Research* (2018).

13 See Code of Judicial Procedure (4/1734), Criminal Procedure Act (689/1997) and Administrative Judicial Procedure Act (586/1996).

judges to move from one section to another.¹⁴ In the Courts of Appeal and the Supreme Court, judges handle both criminal and civil cases. In procedural law, fair process is a key starting point.¹⁵

Traditionally in Finland, courts have at least four tasks in a civil procedure: 1) legal protection for private legal interests, 2) guide/control over the behaviour in society in general, 3) dispute resolution (solving legal disputes), and 4) control of public authority.¹⁶ In the 1990s and 2000s, courts have been receiving new tasks in civil cases. Today, the court's duty is to promote settlements in civil procedures, and a new court-connected mediation system has been introduced. According to the law (394/2011) the district court may also confirm all or part of a settlement reached in court-connected mediation or structured out of court mediation enforceable. These new tasks have changed the role and functions of courts. The roles of (perceived) procedural justice and conflict resolution in their true meaning of problem-solving have been emphasised more than ever. There is research on and discussion about the new systems and functions of courts in Finland.¹⁷

The courts not only resolve legal disputes, but also they often strive for amicable outcomes, so that the conflict between the parties is resolved holistically and conclusively. It could well be said that Finnish court procedure is moving away from the ideals of material law and a substantively correct judgment and towards the ideal of negotiated and contextual law. It is no longer enough for the procedure to meet the requirements of formal justice, but it must also meet the requirements of perceived procedural justice. In our times, the courts must be aware of the views of the parties regarding the quality of court work and the fairness of the trial. In short, the judicial role is undergoing a tremendous change.¹⁸

In criminal procedures, Finnish courts have the following functions: 1) to protect the innocent from criminal sanctions and 2) to fulfil an offender's personal responsibility when a crime has been committed. The function or role of courts in criminal cases has not undergone many changes. The criminal law, however, has seen the introduction of many new systems, and some of them have connections to the court system. For example, victim-offender mediation is widespread in Finland, there are new sanctions (like community sanctions) especially for young criminals and there is a wide range of programmes for prisoners, such as for sexual offenders and in life management. It can be said that the problem-solving approach is important in the Finnish criminal law system but not as a part of special court procedure as in the United States. In the following sections, I will look more closely at the criminal law system and civil justice system and their connections to problem-solving thinking.

3. Criminal justice system

3.1 Criminal law and criminal procedure

There has not been serious discussion about problem-solving justice, problem-solving courts or therapeutic jurisprudence in Finland or other Nordic countries.¹⁹ The main reason for this lies in the basic structure and principles of the Nordic criminal justice system. Nordic countries have different strategies to promote social justice in criminal policies that are used, for example, in problem-solving courts. The Nordic and Finnish criminal justice systems emphasise a rational and human approach, and criminal policy is quite pragmatic.²⁰ The prison population is small. In Finland and in the other Nordic countries, there are approximately

14 Judges often work for some years with criminal, family or other civil cases and after that with other types of cases.

15 Regarding the question of the relationship between the due process and problem-solving approaches, see Lane, *supra* note 3. See also C. Shdaimah, 'Taking a Stand in a NOT-SO-Perfect World: What's a Critical Supporter of Problem-Solving Courts to Do?' *University of Maryland Law Journal of Race, Religion, Gender and Class*, Vol 10 (2010), pp. 89-111.

16 See T. Hupli. 'Basic Features and Principles of the Finnish Procedural Law', in K. Nuotio (eds.), *Introduction to Finnish Law and Legal Culture* (2012), pp. 205-214.

17 See K. Ervasti, 'Court-Connected Mediation in Finland: Experiences and Visions' in L. Ervo & A. Nylund (eds.), *The Future of Civil Litigation. Access to Courts and Court-Annexed mediation in the Nordic Countries* (2014), pp. 121-135.

18 Ervasti, *ibid*.

19 I have found only one study in Finland that used the concept 'therapeutic jurisprudence'. It was a study (survey) about criminal procedure from the perspective of the victim. H. Kainulainen & E. Saarikkomäki, *Rikosprosessi väkivaltarikosten uhrien näkökulmasta* (2014). Swedish professor Diesen has written an article about therapeutic jurisprudence. See C. Diesen, 'Therapeutic Jurisprudence – an Introduction from Swedish Perspective', in P. Wahlgren (ed.), (2007) *51 Procedural Law. Court Administrations, Scandinavian Studies in Law*, pp. 131-162.

20 It is very interesting that the 'problem-solving courts movement' is seen both as a theoretical enterprise and as a pragmatic approach. Boldt, *supra* note 7, pp. 1120-1172.

40-70 prisoners per 100,000 inhabitants. For comparison, in the United States, there are 10 times more prisoners per 100,000 inhabitants.²¹ In the Organisation for Economic Co-operation and Development (OECD) countries, there are on average 150 prisoners per 100,000 inhabitants.²²

The low prison population rates and the criminal justice system have a connection to the Nordic welfare state, which is characterised by comprehensive welfare programmes and services, investment in human social capital, coordinated labour markets and relatively generous unemployment benefits. There are also small differences in incomes and in social equality and people's trust in institutions such as the police and courts is very high.²³ According to Lappi-Seppälä, 'Scandinavian penal policies are characterised by a pragmatic, evidence-based approach with a clear social policy orientation', and crime control and criminal policy are parts of social justice – not just issues of controlling dangerous people.²⁴ The aim of the criminal justice system is to minimise the social costs caused by crime and crime control and to distribute these social costs fairly. This kind of approach differs from the so-called 'fight-against-crime' approach.²⁵

The basic principles in the criminal law system in Finland are legality and equality. The Finnish criminal law system stresses the act or the behaviour of the offender, not the offender himself/herself or his/her special features, although there are some special rules for young people and mentally disabled people. The sentencing systems place high value on consistency and uniformity in sentencing. The ideological background in Finland has been 'humane neoclassicism'. This stresses legal safeguards and repressive measures. Individualised sentencing is de-emphasised. Community sanctions including rehabilitative elements were still being expanded in all the Nordic countries in the 1990s. In Finland and the other Nordic countries there are four types of sanctions: 1) the first level consists of warnings, usually in the form of non-prosecution, 2) the second level consists of fines, 3) the third level consists of community sanctions like community service or electronic monitoring, and 4) the fourth level is imprisonment (conditional or unconditional).²⁶

According to the Criminal Code of Finland (39/1889), a court can mitigate punishment because of advanced age, poor health or other personal circumstances of the offender. A court can also mitigate penal latitude if the offender committed the offence when under the age of 18 years. Imprisonment sentences will not usually be imposed for an offence committed when the offender was under 18 years unless there are weighty reasons for doing so. There are special orders for sentencing offenders under 21 years and specific juvenile penalty offenders under 18 years. The juvenile penalty is a four to twelve-month long community sanction which includes control, tasks and programmes that enhance social performance. Juvenile penalties also include work orientation under tutoring. The age of criminal responsibility is also quite high: 15 years.²⁷ Prosecutors can waive charges for several reasons. This opportunity is used in approximately 7,000 cases per year.²⁸

21 <http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_12.pdf> (last visited 21 November 2018) T. Lappi-Seppälä, 'Sentencing and sanctions in Finland', (2017) 5 *Peking University Law Journal*, pp. 101-137; S. Melander, 'Criminal law', in K. Nuotio et al. (eds.), *Introduction to Finnish Law and Legal Culture* (2012), pp. 237-248.

22 *OECD Economic Surveys* (2016), p. 121.

23 T. Lappi-Seppälä & M. Tonry, 'Crime, Criminal Justice and Criminology in the Nordic Countries', in M. Tonry & T. Lappi-Seppälä (eds.), (2011) 20 *Crime and Justice in Scandinavia, Crime and Justice: A Review of research*, p. 1-32.

24 Lappi-Seppälä, supra note 21, pp. 103.1-12.

25 Melander, supra note 21, pp. 240-242.

26 V. Hinkkanen & T. Lappi-Seppälä, 'Sentencing Theory, Policy and Research in the Nordic Countries', in M. Tonry & T. Lappi-Seppälä (eds.), (2011) 20 *Crime and Justice in Scandinavia, Crime and Justice: A Review of research*, p. 349-404.

27 See T. Lappi-Seppälä, 'Nordic Youth Justice', in M. Tonry & T. Lappi-Seppälä (eds.), (2011) 20 *Crime and Justice in Scandinavia, Crime and Justice: A Review of research*, p. 199-264.

28 According to 7 § of the Finnish Criminal Procedure Act (689/1997), the prosecutor may waive prosecution if 1) the anticipated sentence for the offence is not more severe than a fine and the offence, with consideration to its detrimental effects or the degree of culpability of the offender manifested in it, is deemed petty as a whole; and 2) the suspect has not reached the age of 18 at the time of the suspected offence and the anticipated sentence is not more severe than a fine or imprisonment for at most six months and is deemed to be the result of a lack of understanding or thoughtlessness of the prohibitions and commands of the law. According to 8 §, the prosecutor may waive prosecution if 1) criminal proceedings and punishment are deemed unreasonable or inappropriate in view of a settlement reached by the suspect in the offence and the injured party, another action of the suspect in the offence to prevent or remove the effects of the offence, the personal circumstances of the suspect in the offence, other consequences of the act to him or her, the welfare and healthcare measures undertaken and other circumstances; 2) under the provision on joint punishment or on consideration of previous punishments in sentencing, the suspected offence would not have an essential effect on the total punishment or 3) the expenses in continuing to consider the case would be manifestly disproportionate to the nature of the case and to the sanction possibly to be expected in it. For similar reasons, a court may waive the sentence in the case according the Criminal Code of Finland (39/1889).

According to the Criminal Code chapter 6, section 10a:

A juvenile penalty may be imposed for an offence committed before the age of 18 years, if:

- (1) a fine is, with consideration to the seriousness of the offence, the guilt of the offender manifested in the offence and the criminal history of the offender, an insufficient punishment and there are no weighty reasons requiring the imposing of an unconditional sentence of imprisonment, and
- (2) conditional imprisonment with supervision is not deemed sufficient in order to promote the social adaptation of the offender and the prevention of new offences.

However, the criminal procedure is always the same for all people. There are no special procedures or courts, for example, for young adults, drug users or some other special groups. The Finnish criminal justice system stresses the principle of 'same punishment for the same act', and the procedure is the same for everyone. At the same time, the system itself includes problem-solving elements. For example, for young offenders, child protection services are often primary and the criminal justice system secondary. The best interests of the child is the leading principle of all child welfare interventions and the use of imprisonment is heavily restricted for young offenders.²⁹

The victim has a strong status in Finnish criminal procedure. He or she has a position of the party – not only a position of witness – in the procedure, and he or she can press charges independently. There is also a state compensation system for criminal damages. In that system, the victim has an opportunity to be awarded compensation directly from state funds.

Kainulainen and Saarikkomäki conducted a survey of the criminal procedure in Finland from the perspective of the victims of violent crimes. Their theoretical basis has been therapeutic jurisprudence and (perceived) procedural justice. According to their research, most of the victims were satisfied with the criminal procedure. The police also received positive feedback. The length of the procedure and outcome of the process had a connection to the satisfaction of the victims,³⁰ so it would seem that there are problem-solving elements in the Finnish criminal procedure. Ervasti and Aaltonen conducted a survey of perceived procedural justice in civil procedure and de Godzinsky and Aaltonen in administrative court procedure. In their studies also, most people were satisfied with the procedure.³¹

3.2 Victim-offender mediation

In Finland, victim-offender mediation began from the beginning of the 1980s as a duty of the municipal social services. Victim-offender mediation is strongly linked with child welfare, youth work and social work. Its main focus has been on juvenile crime, and most cases have concerned assaults, criminal damages and thefts. The mediators are volunteers who receive brief training before they start working. Restorative justice is currently a strong ideological trend within mediation in criminal cases.

A new act on mediation in criminal cases (1015/2005) was enacted at the beginning of 2006. The main goals of mediation law reform was to:³²

- Secure equal access to mediation
- Safeguard enough government funding for mediation services
- Organise national management supervision and monitoring
- Create conditions for long-term evaluation and development
- Ensure that the procedures followed in mediation are more uniform
- Pay more attention to legal protection of the parties in the mediation process.

²⁹ Lappi-Seppälä, supra note 21.

³⁰ Kainulainen & Saarikkomäki, supra note 19.

³¹ K. Ervasti & M. Aaltonen, 'Osapuolten kokemuksia oikeudenkäyneistä', (2013) 118 *Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja*; V. de Godzinsky & M. Aaltonen, 'Koettu oikeudenmukaisuus hallintoprosessissa', (2013) 121 *Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja*.

³² HE 93/2005, Government's proposal to Parliament for the law on mediation in criminal cases (*Hallituksen esitys eduskunnalle laiksi rikosasioiden sovittelusta*).

According to the law, mediation in criminal cases is a non-chargeable service in which a crime suspect and a crime victim are provided with the opportunity to meet confidentially through an independent mediator to discuss the mental and material harm caused to the victim by the crime and, on their own initiative, agree on measures to redress harm. Mediation is available in civil cases if at least one of the parties is a natural person (not a company). It is also possible to handle domestic violence cases through mediation. Each state provincial office is obliged to arrange mediation services. Mediation can be proposed by the crime suspect, victim, police or prosecutor.

Each year, there are approximately 10,000-13,000 cases of victim-offender mediation in Finland,³³ which is a lot considering that there are about 60,000 criminal cases in the courts per year. About 2-3% of all crimes reported to the police are directed to mediation. That is about 4-5% of all the solved crimes. The mediation system is integrated with the criminal justice system. Typically, the prosecutor will not press charges if the case has been mediated and parties have reached a settlement.³⁴ Thus, in practice, mediation can replace criminal procedure in Finland.³⁵ Victim-offender mediation (VOM) has also strong position in Norway, but in Sweden, the system is not as widespread as it is in Finland and Norway.³⁶

Norwegian professor Nils Christie (1928-2015) has been influential in building victim-offender mediation systems in Nordic countries in the 1980s and early 1990s. It was because of him that the mediators in VOM are laymen in Finland and the other Nordic countries. In many other countries, mediators are professionals and working, for example, in the probation service. In the Nordic countries, he has also influenced many other mediation systems such as community mediation, school mediation and workplace mediation.

Christie's article 'Conflicts as Property'³⁷ has inspired many researchers, practitioners and system designers in Nordic countries and in other Western countries. Christie's thinking lies in the idea of communities, where people should handle their own problems and conflicts so that they can grow as humans. He has seen conflicts as a potential for activity and participation. According to Christie, lawyers in Western countries steal conflicts from people. He thinks that courts in criminal cases are offender-oriented organisations where the victims have been left aside. He has been advocating a lay-oriented court system. Christie's ideas have influenced restorative justice theory.³⁸

In 2016, 52% of the cases in mediation were for violent crimes and 18% were domestic violence cases. The proportion made up by property crimes was 25%. Police referred 82% of the cases to mediation offices and prosecutors 15%. Of the offenders, 33% were under 21 years and 11% were under 15 years. Of the victims, 23% were under 21 years old. The most common types of agreement were apology and monetary compensation.³⁹

3.3 Remarks about the Finnish criminal law system

In Finnish legal thinking, it has been stressed that the social policy system is the primary system for dealing with social problems, and the criminal justice system and punishments are secondary. The slogan often used is 'good social policy is the best criminal policy'. There are many programmes in prisons, such as sex offender

33 See J. Iivari, 'Providing Mediation as a Nationwide Service. Empirical Research on Restorative Justice in Finland', in I. Vanfraechem (eds.), *Restorative Justice Realities. Empirical Research in a European Context* (2010), pp. 95-119; T. Lappi-Seppälä, 'Finland', in F. Dünkel et al. (eds.) (2015) *1 Restorative Justice and Mediation in Penal Matters. A Stock-Taking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries*, pp. 243-266.

34 There is also street mediation in some towns in Finland. The idea is to stop a young person when she or he does something wrong or behaves in a disorderly manner. The goal is to encourage young people to understand their own blunders, take responsibility for them and correct them. In street mediation, the young person meets the complainant in a safe environment in the presence of his or her parents and the mediators. There is also a mediation of serious crime programme (e.g., homicides).

35 For example, in Denmark, VOM can supplement criminal procedure but not replace it. A. Stoorgaard, 'Denmark', in F. Dünkel et al. (eds.), (2015) *1 Restorative Justice and Mediation in Penal Matters. A Stock-Taking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries*, pp. 183-202.

36 L. Marklund, 'Sweden', in F. Dünkel et al. (eds.), (2015) *2 Restorative Justice and Mediation in Penal Matters. A Stock Taking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries*, pp. 917-933.

37 N. Christie, 'Conflicts as property', (1977) *17 The British Journal of Criminology*, pp. 1-15.

38 See J. Braithwaite, 'Restorative Justice and a Better Future', (1996) *76 The Dalhousie Review*, pp. 9-31; C. Gade, "'Restorative justice": History of the term's international and Danish use', in A. Nylund et al. (eds.), *Nordic Mediation Research* (2018), pp. 27-40.

39 A. Flinck & T. Kuoppala, *Rikos ja riita-asioiden sovittelu 2016*, Terveyden ja hyvinvoinnin laitos, Tilastoraportti 15/2017.

treatment programmes, anger management training, cognitive self-change programmes and programmes for drug users.

The Finnish criminal justice system has the same aims and features that are common in the problem-solving justice approach. However, practical solutions in criminal justice, such as strong social policy, using non-prosecution and programmes for prisoners, are somewhat different from those used in problem-solving justice, such as problem-solving courts or special procedures. In large-scale terms, the aims and features of problem-solving justice and therapeutic jurisprudence have been part of the Nordic legal tradition for a long time. That is probably the main reason why there is no specific movement relating to problem-solving justice in criminal law in Finland or in the other Nordic countries.⁴⁰

4. Civil justice system

4.1 Alternatives for the courts

In the past few decades, the significance of ADR has increased in Europe.⁴¹ In Finland, new methods for resolving disputes have been introduced. First, I will describe the methods of conflict resolution and mediation in Finland in general, and then focus particularly on dispute resolution in courts and court-connected mediation.

The Finnish administration includes several institutions that, among their other tasks, aim to resolve conflicts. Within the administration, there are different kinds of *advisory services* where disputes are resolved, such as consumer advisory services. There are also several *ombudsmen*, such as the consumer ombudsman, who take part in resolving disputes. The Finnish administration system even includes various *boards* that resolve conflicts. One such board is the Consumer Disputes Board, which makes recommendations for solving disputes between entrepreneurs and consumers. The public sector offers other *mediation services*. State institutions that take part in dispute resolution are typical in the Nordic welfare states.

In Finland, even the private sector has many systems for resolving conflicts. To resolve disputes, industry and commerce use *arbitration*.⁴² Many sectors have their own *self-regulatory systems* for resolving disputes. These include, among others, the Council for Mass Media in Finland, which supervises ethics in the media; the Finnish Bar Association's system for monitoring the ethics of advocates; and the Council of Ethics in Advertising. There are also *mediation systems* in the private and public sector.

4.2 Mediation systems outside the courts

In Finland, there are several officially or unofficially organised systems of mediation for resolving conflicts in different sectors. Such systems include peer mediation in schools, community mediation, family mediation, mediation by the Finnish Bar Association, workplace mediation, mediation by the Finnish Association of Civil Engineers and international peace mediation. School mediation, community mediation and family mediation are cost-free systems.

Over the past few years, *peer mediation* has rapidly become more common in Finnish schools.⁴³ In 2001, the Finnish Red Cross started to provide training for peer mediation. VOM has served as a model for peer mediation, which intends to reduce bullying and promote peaceful working environments in schools. The theoretical basis of mediation in Finnish schools is restorative justice.⁴⁴ The aim is to decrease misbehaviour by fostering the pupils' life skills. In peer mediation, other pupils act as peer mediators. The objective is

40 See Diesen, *supra* note 19, pp. 156-161.

41 See Ervasti, *supra* note 10 and J. Alfani et al., *Mediation Theory and Practice* (2001), pp. 1-2. According to Goldberg, Sander and Roger, there are three primary processes of conflict resolution: negotiation, mediation and adjudication. They have called variants of arbitration, mini-trial, summary jury trial and ombudsman as hybrid processes. S. Goldberg et al., *Dispute Resolution. Negotiation, Mediation and Other Processes* (1999). For the history of ADR, see D. Hensler, 'Our courts, ourselves: How the alternative dispute resolution movement is re-shaping our legal system', (2003-2004) 165 *Pennsylvania Law Review*, pp. 165-197. See also H. Brown & A. Marriot, *ADR principles and practice* (2011).

42 See Arbitration Act 967/1992.

43 See M. Gellin, 'Restorative Approach and Mediation in Finnish Schools – from Conflicts to Restoration', in A. Nylund et al. (eds), *Nordic Mediation Research* (2018), pp. 247-266.

44 Gellin, *ibid*.

to resolve disputes directly with the help of a trained pupil. In the mediation, pupils face each other, take responsibility for their actions and contribute to creating a better atmosphere in the school. The system is widely used within primary and secondary schools in Finland; each year there are over 10,000 mediated cases.

In the early 2000s, there was a mediation experiment for multicultural conflicts in Finland. In 2014, a Finnish refugee council founded the Centre for Community Mediation. Different conflicts of neighbourhoods and local communities are mediated in the system. The number of cases is about 100-200 per year. The community mediation model is based on the practice in the United States and the ideas of Nils Christie, and the restorative justice model was influenced by Finnish community mediation.⁴⁵

In divorce cases, regulation on mediation has existed in Finland for over 70 years. *Family mediators* can, by request, provide help and support in the event of family disputes and conflicts that concern compliance with decisions and agreements on child custody and rights of access. The service is free of charge. The primary goal of family mediation is to protect the best interests of the child. Family mediation is mainly the responsibility of municipal social welfare authorities who typically have a university-level education. They help the divorcing parties to agree on the custody of the children and the rights of access.⁴⁶ Family mediation is always voluntary in Finland, but in Norway, for example, child-custody mediation is mandatory for all separating couples with children.⁴⁷

A new phenomenon in Finland is *workplace mediation*. In workplace mediation, a company employs a mediator to assist in resolving conflicts within the work community. Disputes can, for instance, relate to workplace bullying. Conflicts in a work community can in many ways be counter-productive for the operation and performance of the work community. In Finland, workplace mediation has been developed primarily on the basis of VOM, and the theoretical basis of it is restorative justice.

Commercial mediation, or business mediation, exists in Nordic countries.⁴⁸ The Arbitration Institute of the Finland Chamber of Commerce has had its own mediation system since 2016, similar to the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Institute of Oslo Chamber of Commerce. The theoretical basis of mediation at the Finnish Arbitration Institute is the facilitative mediation model.

Mediation by the Finnish Association of Civil Engineers deals mostly with disputes concerning building projects. The building trade is an industry prone to conflicts as the projects often involve a network of multiple actors. Industry experts and lawyers can act as mediators. In connection with the mediation, it is also possible to choose a procedure that is based on an arbitration agreement and concludes when a settlement is reached.

In order to resolve different kinds of dispute, *the Finnish Bar Association* founded its own *system of mediation* in 1998. Its mediation rules were approved at the same time. The system is based on voluntariness, and the parties to the dispute appoint an advocate to act as a mediator between them. So far, few cases have been resolved within the system, which is still evolving. In mediation by advocates, a facilitative approach has been adopted, which means that the mediator seeks to create a favourable atmosphere for the parties to resolve the matter mutually. About one-third of the members of the Finnish Bar Association have attended a basic course in mediation.

In recent years, having an option for *environmental mediation* has also been discussed. There have been some experiments with environmental mediation. For administrative matters such as environmental conflicts, there is still no organised mediation in Finland or in the other Nordic countries.⁴⁹

International peace mediation, on the other hand, is a widely-used procedure. There have been several internationally acknowledged Finnish peace mediators, such as Martti Ahtisaari, Pekka Haavisto and Harri

45 Ervasti, supra note 10.

46 See V. Haavisto, 'Developing family mediation in Finland: The change process and practical outcome', in A. Nylund et al. (eds.), *Nordic Mediation Research* (2018), pp. 41-66.

47 See A. Nylund, 'A dispute systems design perspective on Norwegian child custody mediation', in A. Nylund et al. (eds.), *Nordic Mediation Research* (2018), pp. 9-26.

48 Regarding commercial mediation in Europe, see D. Richbell, *How to Master Commercial Mediation* (2014).

49 In the European Union there has been discussion about the options for alternative dispute resolution (ADR) and mediation in administrative law. See D. Dragos & B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law* (2014).

Holkeri. International peace mediation focuses on international crisis management and prevention of violence.

4.3 Settlement promotion and court-connected mediation

When it comes to civil proceedings in the Finnish general courts, there are two procedures that aim to solve a conflict amicably: the promotion of settlement in a civil procedure and specific court-connected mediation.

Judicial settlement efforts in a civil procedure play an important role in all Nordic countries. According to the Finnish legislation, a judge is required to investigate the prospects for settling a civil case during its preparation and pursue an amicable resolution of the matter. A judge may also make a proposal for a settlement. The promotion of settlement in civil proceedings is not a matter of mediation as such, but it is a matter of promoting an amicable resolution in judicial proceedings. Many provisions on judicial proceedings restrict the actions of the judge in promoting a settlement. The objective is also that the settlement that is reached complies with the substantive law. The system was adopted in Finland in 1993.

In Finland, the number of settlements certified by the District Courts has risen to nearly 2,500%. Moreover, not all the parties who reach settlements request that they be certified. Many judges surmise that almost half of the cases that they deal with end with some sort of settlement. According to empirical studies, some judges promote settlement very strongly and some more passively in that area.⁵⁰

In Finland, Norway and Denmark, a *court-connected mediation system* has been introduced. Court-connected mediation is a procedure, voluntary to the parties and managed by the judge, aiming at a situation in which the parties themselves will find satisfactory resolution of their conflict.⁵¹ Court-connected mediation is a cost free system. There is only a small court fee (€250).

Experiments of court-connected mediation started in 1997 in Norway and 2003 in Denmark, and since 2008, the system has been permanent in both countries after evaluation of the experiment. In Finland, there were no experiments, but at the beginning of 2006, the Act on Court-connected Mediation (663/2005) came into force. It was replaced by the Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts in 2011 (394/2011). Compared to the previous act, the Act of 2011 did not have major changes. It implemented the European Union Directive on certain aspects of mediation in civil and commercial matters (2008/52/EC), but legislative changes were quite small. The objectives of the court-connected mediation systems are as follows:⁵²

- 1) to add to the palette of procedures available to the courts and to improve their service in the ever-more complex area of dispute resolution,
- 2) to follow international developments in conflict resolution and to respond, in part, to the recommendations of the Council of Europe and the European Union regarding the introduction of alternatives to adjudication,
- 3) to reach the advantages that mediation has over regular adjudication and judgment (relationship of the parties, no winner/loser dichotomy, flexibility, final decision, compliance and enforcement),
- 4) to improve trust in the courts,
- 5) to create a procedure that is cheaper, simpler and faster than going to court, and
- 6) to lower the threshold for seeking judicial redress.

In Finland court-connected mediation cases become pending in court either by way of a specific *mediation application* or a *request* attached to the application for a summons (action). The request may also be made

50 Ervasti, supra note 17.

51 See L. Ervo & A. Nylund (eds.), *The Future of Civil Litigation – Access to Courts and Court – Annexed Mediation in the Nordic Countries* (2014).

52 HE 114/2004, Government's proposal to Parliament for the law on mediation in civil matters and confirmation of settlements in general courts (*Hallituksen esitys eduskunnalle riita-asioiden sovittelua ja sovinnon vahvistamista yleisissä tuomioistuimissa koskevaksi lainsäädännöksi*).

later, during the preparatory stage of the court proceedings. A case in court-connected mediation may be closed by a settlement certified by the court, or by the case being struck from the court docket. A case will be struck from the docket if the parties cannot reach a settlement or if they do not wish to have their settlement certified. If the case is also pending as a regular adjudicative matter, the failure of mediation means that civil proceedings will be resumed and may then be closed by a judgment, by a certified settlement or by the case being struck from the docket.⁵³

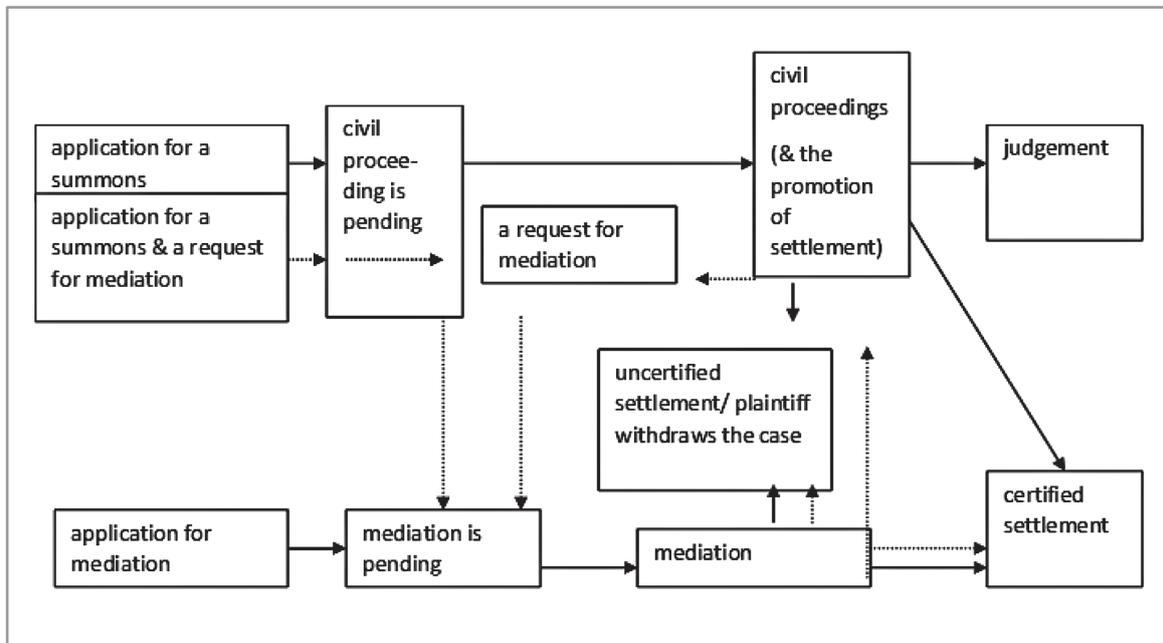


Figure 1 Court-connected mediation in Finland

The court decides whether mediation is to be undertaken. If the case is pending as a regular adjudicative matter, the court proceedings will be interrupted for the duration of the mediation. When a judge decides to refer parties to mediation, another judge of the same district court will act as a mediator.

Thus, only a judge can mediate in court-connected mediation in Finland. In Norway and Denmark, people other than judges – such as attorneys – can act as mediators. In order to obtain necessary expertise or to further the progress of the mediation, the mediator may enlist an auxiliary mediator. In practice it has been used only in family law cases.

At the beginning of 2011, four district courts started an experiment involving the engagement of an expert assistance in matters regarding child custody, rights of access and maintenance. The experiment is being carried out within court-connected mediation. In the experiment, the mediator was assisted by an experienced social worker or psychologist specialised in divorce mediation. The purpose of the experiment has been to decrease the number of protracted trials concerning children and to reduce conflicts between the parents. The experiment is based on a Norwegian model for mediation in custody disputes. That system has been nationwide and has been permanent since 2014.⁵⁴

The mediation process can be informal; there are no detailed procedural provisions in the legislation. That being said, the mediation must proceed equitably and impartially. The mediator may also discuss the matter with each party separately, if the parties consent to the same. According to the law, '[t]he mediator shall assist the parties in their efforts to reach agreement and an amicable resolution'. In other words, Finnish court-connected mediation is by nature a facilitative effort. However, by the request or on the

53 Ervasti, *supra* note 17.

54 See K. Salminen, 'Mediation and the best interests of the child from the child law perspective', in A. Nylund, *Nordic Mediation Research* (2018), pp. 209-222.

consent of the parties, the mediator may also make a settlement proposal. Secondly, therefore, Finnish court-connected mediation is evaluative in nature.

The theoretical basis of Nordic court-connected mediation is the facilitative mediation model.⁵⁵ In that model, mediation is understood as an assisted negotiation or facilitation of negotiation. A mediator helps the parties find their own solution and will not direct them to some predetermined resolution. Mediators must respect the self-determination of the parties. From this perspective, mediation has been seen as problem-solving.⁵⁶

Currently, there are about 2,000 cases per year in court-connected mediation in Finland. This is relatively high, as there are about 8,000 disputed civil cases in district courts per year. There are many civil cases in court-connected mediation, but over half of the cases are family law cases. According to empirical studies in Finland and Denmark, the agreements of the parties are often 'creative'.⁵⁷

Mediation ends when (1) a settlement is certified or the parties notify the mediator that they have settled in some other manner, (2) a party notifies the mediator that he or she no longer wishes mediation in the case, or (3) the mediator decides, after having heard the parties, that the continuation of mediation is no longer justified. If the case is pending as an adjudicative matter, it lapses with the certification of the settlement. If the settlement covers only a part of the matter under dispute, the pending proceedings are resumed in respect to the remaining part. The mediator is disqualified from sitting as a judge in the case; another judge must be assigned to preside over the resumed proceedings.

The specific procedure of court-connected mediation is thus a typical model of mediation which seeks to reach a settlement that accords to the needs and interests of the parties. The goal is not to reach an outcome that accords with the substantive law in force. By and large, the procedure can be arranged quite freely. This means that when a judge undertakes to serve as a mediator, he or she must let go of the earlier judicial role and assume a mindset that is quite different than that of an adjudicator.

It must be emphasised that settlement promotion and court-connected mediation are different systems based on different logic. Theoretical settlement promotion can be described as a compromising or conciliation system, or 'settlement-driven mediation'. It is not really mediation. A judge follows the rules of fair trial in a civil process, and that judge cannot be the mediator or use mediation techniques like caucuses (separate meetings) in that process. The idea of real mediation is that the parties themselves will create the solution based on their own needs and interests. A mediator helps parties to reach that goal. Mediation has often been described as 'assisted negotiation'. A solution based on interests and needs has been considered to be a better outcome (win-win) than a classical compromise in which parties distribute wins and losses. As Nylund has said: 'Judicial settlement activities should not be called mediation in English. The process is strictly settlement focused; the judge is, in my opinion, correctly prohibited from using mediation techniques and, therefore, the ability to generate "better" outcomes.'⁵⁸ If the judge uses procedure mediation techniques like caucuses, brainstorming or reality testing in court, a fair trial will be disturbed. If the judge uses separate meetings with the parties or tests the realities of the parties, he or she will lose his or her impartiality. So, settlement activities in a court procedure and court connected mediation are totally different systems, both theoretically and practically.

The Nordic court-connected mediation model, where judges act as mediators, is unique. In many countries, there is a referral system through which courts can send a case to out-of-court mediation.⁵⁹ It can be said that the Finnish system is moving away from the ideals of material law and a substantively

55 Discussion of the theoretical models of mediation (in civil cases) has been dominated by division of the mediation into facilitative and evaluative models by Leonard Riskin 20 years ago. L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques', (1996) *Harvard Negotiation Law Review*, pp. 7-51. Since then, transformative mediation has become the third primary model of mediation in civil cases. R.A. Baruch Bush & J.P. Folger, *The Promise of Mediation. New and Revised Edition* (2005). See also K.K. Kovach & L.P. Love, 'Mapping Mediation: The Risks of Riskin's Grid', (1998) 3 *Harvard Negotiation Law Review* 71.

56 See Menkel-Meadow, *supra* note 3.

57 K. Ervasti, *supra* note 17; L. Adrian & S. Mykland, 'Creativity in Court-Connected Mediation: Myth or Reality?' (2014) 30 *Negotiation Journal*, pp. 421-439.

58 Nylund 2014, *supra* note 9, p. 111.

59 See e.g. M. Pel, *Referral to Mediation. A Practical Guide for an Effective Mediation Proposal* (2008).

correct judgment and towards the ideal of negotiated and contextual law.⁶⁰ It is no longer enough that the procedure meets the requirements of formal justice, but it must also meet the requirements of perceived procedural justice. Today, the courts must be aware of the views of the parties regarding the quality of court work and the fairness of the trial. Conflict resolution is more than ever one of the main tasks of the court system. In short, the role of courts is undergoing tremendous change.

5. Conclusions

The Finnish conflict resolution system and court system have changed a lot in the last 30 years. The courts do not only resolve legal disputes, but also they often strive towards and promote amicable outcomes so that the conflict between the parties is resolved holistically and conclusively. The aim of the court system is problem-solving more than ever. At the same time, there are new conflict resolution systems outside the courts, such as different kinds of mediation systems, the aim of which is also problem-solving. Thus, the problem-solving approach has become a key objective of the Finnish conflict resolution system.

In Finland and the other Nordic countries, the (core) concept of problem-solving justice is relatively unfamiliar. However, problem-solving approaches are currently more important than ever in the legal systems of Finland and the other Nordic countries. The way that the system is functioning and changing is still different from that in many countries where the concept of problem-solving courts is more familiar. In the Nordic countries, the problem-solving approach is included in the whole criminal and civil law systems and procedural law. The attention and changes are less attached to the structure of the court system than in common law countries, and the idea of special courts has been rejected.

It is unlikely that there will be specific problem-solving courts in the future in Finland or the other Nordic countries. Instead, as a theoretical concept, problem-solving justice is useful in the Nordic context when we review and evaluate the functioning of the court and conflict resolution system. It is appropriate to understand the 'problem-solving justice' concept more widely than it has often been understood. In its wider meaning, it is not limited to the criminal justice system or to special problem-solving courts. Instead we can use it in a broader sense to describe different systems and activities the aim of which is based more on problem-solving than on pure judicial decision-making. ■

60 V. Haavisto, *Court Work in Transition. An Activity-Theoretical Study of Changing Work Practices in a Finnish District Court* (2002).