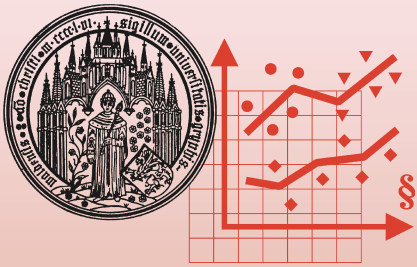
Schriften zum Strafvollzug,
Jugendstrafrecht und zur
Kriminologie

Herausgegeben von Prof. Dr. Frieder Dünkel
Lehrstuhl für Kriminologie an der
Ernst-Moritz-Arndt-Universität Greifswald

Band 50/2



Frieder Dünkel, Joanna Grzywa-Holten,
Philip Horsfield (Eds.)

Restorative Justice and Mediation in Penal Matters

A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries

Vol. 2

Forum Verlag Godesberg

Schriften zum Strafvollzug, Jugendstrafrecht und zur Kriminologie

Herausgegeben von Prof. Dr. Frieder Dünkel
Lehrstuhl für Kriminologie an der
Ernst-Moritz-Arndt-Universität Greifswald

Band 50/2

Frieder Dünkel, Joanna Grzywa-Holten,
Philip Horsfield (Eds.)

Restorative Justice and Mediation in Penal Matters

A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries

Vol. 2

The project was funded by the Criminal Justice Programme of the European Union (JUST/2010/JPEN/AG/1525)

With thanks to:
The Ernst-Moritz-Arndt University of Greifswald

MG 2015
Forum Verlag Godesberg

This publication has been produced with the financial support of the Criminal Justice Programme of the European Union. The contents of this publication are the sole responsibility of the editors and authors and can in no way be taken to reflect the views of the European Commission.

Bibliographische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Mönchengladbach 2015
DTP-Satz, Layout, Tabellen: Kornelia Hohn
Institutslogo: Bernd Geng, M.A., Lehrstuhl für Kriminologie
Gesamtherstellung: Books on Demand GmbH, Norderstedt
Printed in Germany

ISBN 978-3-942865-31-9 (Gesamtwerk Band 50/1 und Band 50/2)
ISSN 0949-8354

Contents

Volume 1

Volume 2

Northern Ireland

David O'Mahony

1. Origins, aims and theoretical background of restorative justice

Northern Ireland is unique in Europe with restorative justice and restorative practices having been mainstreamed within its juvenile justice system. Implanting restorative justice within its juvenile justice system came about following many years of conflict and the subsequent peace process in the late 1990s. As part of that process a series of reforms were made to criminal justice which saw the integration of restorative justice within the juvenile justice system.

However, the integration of restorative justice has not been easy, or unproblematic. Difficulties have arisen because the basic system of justice remains retributive in nature. The criminal law and criminal justice system is generally used to punish offenders and deal with defendants in an adversarial system. Restorative justice has challenged these traditional principles and assumptions and there have been tensions in trying to integrate a model of restorative justice in a system that is so strongly rooted in notions of punishment and retribution.

1.1 Overview on forms of restorative justice in the criminal justice system

Elements of restorative justice and restorative practices are evident across the whole of the juvenile justice system in Northern Ireland. The police have used restorative models to deal with juvenile offenders who committed minor criminal acts since the late 1990s. This has allowed the police to divert many minor acts of criminality away from the courts and deal with them through a system of restorative cautions and informal warnings. The police only prosecute

a minority of juvenile offenders - the majority are dealt with by informal means, especially first time offenders.[1]

In relation to how juveniles are prosecuted and dealt with through the courts, Northern Ireland has adopted a mainstreamed approach whereby legislation directs how they should be managed under the Justice (Northern Ireland) Act 2002. This legislation has enshrined restorative processes as a central plank of the juvenile justice system, particularly in relation to juvenile prosecutions (by the Prosecution Service) and how the courts deal with juvenile offenders. The juvenile courts still retain their power to impose the full range of traditional sentences, from fines, community and custodial sentences, where conditions are not met to use the restorative process (see Section 2 below).

Community based sentences (such as the Community Service Order) are available to the courts for both juvenile and adult offenders, however, these are not restorative disposals. Their primary purpose is to restrict liberty and provide community payback – rather than allowing restorative elements like victim involvement, apology or forgiveness.

Outside the criminal justice system, a number of community based restorative programmes operate across Northern Ireland, though these largely deal with community and neighbourhood based disputes. There is relatively little use of restorative justice for adult offenders within the criminal justice system, other than some restorative programmes which are used in the prisons.

1.2 Reform history

Much of the restorative justice that has emerged within the criminal justice system in Northern Ireland has its roots in the conflict and the subsequent peace process, as noted above. The police led restorative schemes emerged in the late 1990s[2] and these were developed as part of broader efforts to improve policing practices and to make the police more responsive to community needs. It was an effort to build community relations, against a backdrop of considerable hostility towards the police and criminal justice from some elements in the community. The programme also developed out of a broader agenda to divert minor juvenile offenders away from prosecution, which had been identified as a successful strategy.

The reforms leading to the mainstreaming of restorative justice within the prosecution and court system for juvenile justice was shaped by a series of reforms that were introduced as part of a 'Criminal Justice Review' in 2000 (which was part of the peace process).[3] The review made a series of recommen-

1 *O'Mahony/Deazley* 2000.

2 *O'Mahony/Deazley* 2000.

3 *Criminal Justice Review Group* 2000.

dations for changes across criminal justice in Northern Ireland, which included major changes to the police, but also saw the release of paramilitary prisoners and the introduction restorative justice within criminal justice.

The changes to the juvenile justice system were introduced under the Justice (Northern Ireland) Act 2002 and The Youth Conference Rules (Northern Ireland) 2003, which established the procedures to be followed when convening and facilitating a restorative youth conference.[4] The Youth Conferencing Service was introduced in December 2003 in the form of a pilot scheme and initially was only available for all 10-16 year olds living in the Greater Belfast area. In mid-2004 it was expanded to cover young people living in more rural regions. The Justice (Northern Ireland) Act allowed the youth justice system to extend to cover 17 year olds in 2005 and the restorative conferencing process was rolled out to all areas of Northern Ireland in that year.

Because the history of the restorative justice reforms in Northern Ireland was heavily shaped by the conflict, the reforms can be considered as being 'bottom-up' inspired. However, the actual shape of the reforms was by no means driven from the community. Though the criminal justice review group, which drafted a whole range of criminal justice recommendations, held a number of community based consultations, the actual shape of the recommendations was made by the review group and senior civil servants. The review group recommendations were also informed by a series of academic reports on the operation of the justice system.[5] So, in reality the criminal justice review group recommendations were developed through a top-down process, with the review group taking the lead and recommending the specific changes that led to the introduction of restorative conferencing. The new restorative provisions were mandated through legislation and considerable government resources were made available to ensure their successful implementation.

1.3 Contextual factors and aims of the reforms

The context of the criminal justice reforms leading to the adoption of restorative justice in Northern Ireland was based on the need to make significant changes to the apparatus of the criminal justice system.[6] This was a central part of the peace negotiations, as the criminal justice system was viewed by many as being part of the reasons for the conflict. Since the foundation of the State 1921, the police and courts were widely seen as unfair and despite various efforts over the decades to introduce enhanced transparency and accountability mechanisms these criminal justice institutions continued to be perceived in sections of the

4 *O'Mahony/Campbell* 2006.

5 *O'Mahony/Deazley* 2000.

6 *Dignan/Lowey* 2000.

community as instruments of oppression without any legitimate mandate.[7] This caused major problems for the legitimacy of the criminal justice system, and led to a lack of trust and reluctance to use the police, courts and criminal justice system. Indeed, throughout the worst years of the conflict or 'troubles', Republican and Loyalist paramilitaries responded to this criminal justice legitimacy deficit through paramilitary 'policing' of their areas and by punishment beatings, shootings and banishments.

Following the IRA ceasefire in 1994 and subsequent political negotiations, the opportunity to change the nature of policing and criminal justice arose following the Belfast Agreement of 1998. A fundamental review of the criminal justice system was established, with one of its core aims being to make the system more accountable and acceptable to the community as a whole and to encourage community involvement and be responsive to the community's concerns.[8] The Review, which was published in March 2000, made 294 recommendations for change across the criminal justice system. In recommending that a restorative justice approach should be central to how young offenders are dealt within the criminal justice system, the Criminal Justice Review proposed a conference model to be known as 'youth conferencing' to be based in statute for all young persons (10 to 17 year olds) subject to the full range of human rights safeguards.

1.4 Influence of international standards

The restorative youth conferencing model and the police based restorative interventions that have been developed in Northern Ireland have been strongly influenced by international standards and human rights norms. For example the Council of Europe Recommendation (99)19 'Concerning Mediation in Penal Matters'[9] was referred to by the criminal justice review group in Northern Ireland, as grounds to integrate restorative measures within the criminal justice system. These recommendations and principles helped identify a need for both victims and offenders to be actively involved in resolving cases themselves with the assistance of an impartial third party. The provisions generally reflect internationally recognised principles of best practice, including, the importance of specific training, the principle of voluntariness, the need for judicial supervision, and the need to ensure that procedural human rights guarantees are safeguarded.

7 *Mulcahy* 2006.

8 *Criminal Justice Review Group* 2000.

9 *Council of Europe* 1999.

Further external influences included the United Nations Vienna Declaration on Crime and Justice.[10] This helped in the introduction of action plans to support victims of crime and in the development of mechanisms for mediation and restorative justice. Moreover, it underlined the importance of ensuring restorative justice policies which are respectful of the rights, needs and interests of victims, offenders, communities and all other parties. The United Nations Congress on Crime Prevention, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[11] has also influenced restorative practices in Northern Ireland by stipulating that restorative justice programmes should be generally accessible across the penal procedure; that they should be used on a voluntary basis; that participants should receive all relevant information and explanation; and that differences in aspects such as power imbalances, age, and mental capacity need to be taken into account in devising processes.

2. Legislative basis for restorative justice at different stages of the criminal procedure

The core restorative measures available in Northern Ireland based in legislation relate to prosecution decisions and court decisions. Other areas where restorative measures are used do not generally have a legislative base that stipulates the use of such measures. Thus much of what happens in terms of restorative interventions prior to prosecution (by the police), or after sentence (by the prison service) is done so without specific enabling legislation.

2.1 Pre-court level

2.1.1 Adult criminal justice

In Northern Ireland the only restorative measure available to adults, set out in legislation at the pre-court stage of criminal procedure, is the conditional caution. This is a new order contained in the Justice Act (Northern Ireland) 2011. It allows for a conditional caution to be given to adults (18 years of age and older) which include opportunities to provide reparation and compensation to the victim or community and opportunities for the rehabilitation of the offender. The conditional caution is different to the traditional caution given by the police, in that it emphasises additional requirements that are attached to the caution and are required of the offender. These additional requirements emphasise some basic restorative principles, including reparation and compensation to the victim, as well as addressing the broader needs of the victim and

10 *Vienna Declaration on Crime and Justice* 2000.

11 *United Nations* 2002.

community. The new legislation makes the conditional caution available for adults who have committed less serious offences, when it is not considered necessary to prosecute them through the courts. The decision to offer a conditional caution is made by the Prosecution Service under the advice of the police.

The conditional caution is only available to adults in specific circumstances. Firstly it is only available to those who have committed 'summary' offences or 'either-way' offences. These are less serious types of offences, which are routinely dealt with in the lower courts (Magistrates' courts). It is not available to adults who have committed more serious 'indictable' offences, which are dealt with in the higher courts, by a judge and jury (Crown Courts). The conditional caution can only be made if the prosecutor is satisfied there is sufficient evidence to charge the offender with the offence and the conditional caution is suitable to deal with the offence and the offender. The third requirement is that the offender must admit guilt and responsibility in relation to the offence and fourthly the consequences of accepting a conditional caution must be explained to the offender and they must be cautioned that failure to comply with any of the conditions attached to the caution may result in the offender being prosecuted through the courts for the offence. Fifthly, the offender must sign an agreement accepting the terms of the condition caution, which includes details of the offence, the admission of guilt by the offender, the consent of the offender to comply with the requirements of the conditional caution and the conditions attached to the caution.

2.1.2 Juvenile justice

The police in Northern Ireland have used principles of restorative justice to guide the cautioning of juveniles since the mid 1990's. They have considerable powers of discretion and use specialist officers to deal with juvenile offenders. The use of a specialist team of officers to deal with juvenile offenders dates back to the mind 1970s when the police operated a Juvenile Liaison Scheme to manage all juveniles (then 10-16 year olds) who came to the attention of the police. This scheme was replaced in 2003 by the Youth Diversion Scheme and specialist officers review all juvenile cases coming to the attention of the police and make recommendation to the prosecutor on how they are best dealt with. The practice of cautioning juveniles is not set specifically out in legislation in Northern Ireland, instead it is directed by Home Office circulars, which provide guidance.

The decisions currently available to the police, in consultation with the prosecutor, include 'taking no further action', in which case proceedings against the juvenile (10-17 years of age) is halted. This decision is usually taken when there is insufficient evidence to establish that a crime was committed, or where the offence and circumstances do not require any further police involvement. Such decisions to stop proceedings against a juvenile may also be taken if it is

considered that proceeding with formal action is not in the public interest or interests of the juvenile. Alternatively, the police may decide (in conjunction with the prosecutor) to deal with a juvenile who has offended by way of an 'informed warning'. The informed warning is available for juveniles where there is evidence that a crime has been committed and the juvenile has admitted the offence. Informed warnings are usually used for less serious offences and for juveniles who have not offended before. The warning will normally take place in a police station and will be delivered by a trained police officer. The juvenile is accompanied by their parent or carer and a written record is taken, and all of those present are required to sign it. An informed warning is not a criminal conviction and a record of it will only appear on a criminal record for up to a year, unless further offending takes place.

The police may also decide to deal with a juvenile who offends by way of a restorative caution (in consultation with the prosecutor). The restorative caution is normally reserved for more serious offending (more serious than that given for informed warnings). Restorative cautions may only be given to juveniles if there is sufficient evidence to prosecute, they admit the offence and with their parents, they consent to the caution. The restorative caution will normally take place in a police station and will be delivered by a more senior and trained police officer, or a community representative. The restorative caution provides an opportunity for the young person and their parents to meet with the victim and anyone else who has been affected by the crime. Everyone at the restorative caution is given the opportunity to talk about the impact of the crime has had on them. A written record of the meeting is taken and signed by all of those in attendance. It is normal for the young person to apologise to the victim at the restorative caution meeting. Further conditions or obligations may be placed on the young person as part of the restorative caution. These may include an agreement to participate in work to make amends to the victim or community, or to attend classes to address their offending behaviour. The restorative caution is not a conviction, however a record of the caution will be kept on the criminal record for two and a half years and should the young person re-offend, it may be cited in court.

Lastly, the police may decide refer a juvenile who has offended directly for prosecution. This course of action is usually reserved for more serious offences, when the juvenile has denied the offence, or has previous offences on record. The Prosecutor will make the decision on whether to prosecute, based on the individual circumstances, evidence and offence(s) for which the juvenile has been charged. The prosecutor may then decide to prosecute the juvenile through the courts, alternatively the prosecutor may refer the case back to the police for further investigation, refer the case for a restorative youth conference, or close the without prosecution.

The framework for pre-court decision making by the prosecutor in Northern Ireland, above those relating to the cautioning of juveniles, is set out in

legislation in the Justice (Northern Ireland) Act 2002 and The Youth Conference Rules (Northern Ireland) 2003, which establishes the procedures to be followed when convening and facilitating a diversionary youth conference. The legislation provides for a diversionary youth conference which can be recommended by the prosecutor instead of prosecution through the courts. This is a pre-court restorative based intervention for juvenile offenders (10-17 years of age).

The Prosecutor may only refer a juvenile for a diversionary youth conference where he would otherwise have instituted court proceedings. Diversionary youth conferences are designed to be the next stage up in the tariff for dealing with juvenile offenders, beyond the diversionary actions that can be taken by the police – such as informed warnings and restorative cautions. Thus, the diversionary youth conferences are not intended for minor first time offenders. They are a next stage intervention to curb re-offending, particularly where there has been previous contact with the criminal justice system.

There are two preconditions which must be in place for a diversionary conference to occur. The young person must firstly consent to the process. Secondly the young person must admit that they have committed the offence. Where these conditions are not met the case will be referred back to the Public Prosecution Service for a decision on whether to continue and, if so, the case may be dealt with through the ordinary court process. Once the juvenile has been referred to the diversionary conference a conference will take place and the conference coordinator will then provide a recommendation to the prosecutor on how the juvenile should be dealt with for their offence.

2.2 Court level

2.2.1 Adult criminal justice

The adult criminal process at the court level in Northern Ireland has not adopted any significant restorative measures. The courts have the ability to make compensation orders to address the loss or damages that may result from an offence, however other than compensation orders there is little consideration of restorative interventions that are recognised in legislation for adults.

Consideration of restorative justice measures for adults was included in the criminal justice review report. The review group noted that restorative applications for older offenders should not be neglected or ignored. They recognised that schemes in other jurisdictions have targeted adults which have shown some promising results. They noted that there was less experience in other countries upon which to draw, but they believed that restorative interventions should be extended to adults. Indeed the Criminal Justice Review Group recommended that restorative justice schemes for young adults (18-21 years of age) should be piloted and evaluated before deciding how they might be applied across Northern Ireland. However, despite these recommendations, little progress has

been made in developing legislation to incorporate restorative justice for adults at the court level in Northern Ireland.

2.2.2 Juvenile justice

Northern Ireland has a very well developed and integrated system of using restorative justice at the court level for juveniles. Legislation has made restorative interventions in the form of the court ordered youth conference a mainstreamed approach that is routinely used to deal with juvenile offenders, as set out under the Justice Northern Ireland Act 2002 and The Youth Conference Rules (Northern Ireland) 2003. The court ordered youth conference is a restorative process that is used to recommend and inform the court how the juvenile should be dealt with in relation to their offending.

The juvenile system is distinctive in that a court must refer a young person to a youth conference. This is subject to certain restrictions. When a magistrate refers a case they must take into account the type of offence committed. Only offences with a penalty of life imprisonment, offences which are triable, in the case of an adult, on indictment only and scheduled offences which fall under the Terrorism Act are not eligible for youth conferencing. In effect, the vast majority of young offenders can be dealt with through court ordered conferencing. The mandatory nature of court ordered referrals highlights the importance of the conferencing process to the youth justice and court system in Northern Ireland.

The admission or establishment of guilt and consent of the young person are prerequisites for a court-ordered conference to take place. By law, a youth conference co-ordinator, the young person, a police officer and an appropriate adult must attend a youth conference. Where any of these parties are absent the youth conference cannot proceed. An 'appropriate adult' means a parent of the young person or, if the child is in care or no parent is available to take part, an appointed social worker. Where neither is available any responsible person over the age of 18 can assume this role. The young person is permitted to have legal representation at the conference, but a solicitor may only participate in an advisory capacity and cannot speak for the young person as they are expected to fully participate in the process. Where the young person is under supervision of a criminal justice agency the supervising officer is entitled to attend. Finally, where the Youth Conference Officer deems it appropriate any other person whose presence would be of value is entitled to attend a Youth Conference. In practice this may be a social worker, a teacher or a community representative.

A victim or victim representative, is entitled, but not required, to attend the conference. It is important that the victim is informed of the voluntary nature of the process so as not to result in any additional emotional distress or potential 'double victimization'.

Once it has been established who should attend the conference the youth conference co-ordinator must take reasonable steps to inform all parties, orally and in writing, of the time and place of the conference. If notice is not provided and the youth conference goes ahead, it may be declared invalid. The Youth Conference Rules stipulate that a declaration of invalidity will only occur where failure to give notice is likely to have materially affected the outcome of the youth conference. Where notice is not given to a party legally obliged to attend the conference cannot take place.

In addition to the court ordered restorative youth conference, the juvenile courts may also impose other restorative based interventions. The Reparation Order is one such sentence, which was introduced in England and Wales under the Crime and Disorder Act (1998) and expanded to Northern Ireland in Section 36(a) of the Justice (Northern Ireland) Act 2002. The Reparation Order requires the offender to make such reparation for the offence, otherwise than by the payment of compensation. These orders are available as a court disposal. The offender must be found guilty of an offence and consent to being subject to an order. Before making an order, a court must consider a written report made by a probation officer, social worker or other 'appropriate person' containing recommendations of suitable restrictions to be imposed on the offender. Such a report must take into account the attitude and consent of the victim to any reparation. There are a number of restrictions placed on the dispensing of Reparation Orders. For example, if the offender is under 14 years of age only two hours a day of reparation is permitted. A Reparation Order must be sensitive to the religious beliefs of a young person and "must avoid", as far as possible, any potential conflict with these. In addition, the order must take into account if the young person is in education and any disruption. However, little use of this type of order has been made by the courts (see *Section 4* below).

Community Responsibility Orders were also made available to the juvenile courts in Northern Ireland under the Justice (Northern Ireland) Act 2002, and are similar in nature to Reparation Orders, but have a particular focus on community and victim awareness. The order can be made by a court as the sole disposal for an offence and must be completed within six months of it being made. An order can only be made with the consent of the young person. As part of the order the young person is required to undertake 'instruction in citizenship' and practical activities which may involve some form of reparation to the victim or their community. A number of concerns have been voiced regarding these orders and they are generally used infrequently by the courts (see *Section 4* below).

2.3 Restorative Justice elements while serving sentences

There is no specific legislation that provides for restorative interventions for juveniles or adults in prison establishments in Northern Ireland. However, there are a range of programmes that have been used which have attempted to bring

restorative measures into prisons. These programmes have largely been run by charities and voluntary organisations. The prison service in Northern Ireland has cooperated with these organisations and has made resources available to promote the use of restorative measures in prison. However, none of the programmes are formally connected with the sentencing of offenders and participation in such programmes is not a requirement, nor are they part of the early release process for sentenced offenders.

One of the major charities that provide restorative interventions in prisons is the Prison Fellowship NI, which was established in 1981.[12] This Christian charity seeks to support prisoners, ex-prisoners and their families. The organisation uses the 'Sycamore Tree Project', which is an intervention that is restorative in nature and promotes victim awareness.[13] The project allows prisoners to engage with the consequences of crime. A range of issues are explored within the project including the consequences and impact of crime, taking responsibility for actions, and making apology and amends. The programme of intervention is based on a six weeks programme with small groups of prisoners who work with surrogate victims.

The Prison Service has also carried out restorative work with inmates. This includes restorative conferences within a traditional victim and offender context and programmes which seek to make offenders aware of the consequences of their crimes.

3. Organisational structures, restorative procedures and delivery

3.1 Restorative Cautioning

In Northern Ireland the restorative cautioning practice used by the police was influenced by the Thames Valley model developed in England. The model used in the delivery of the restorative caution was also influenced by Braithwaite's ideas of 'reintegrative shaming'.[14] In essence it seeks to deal with crime and its aftermath by attempting to make offenders ashamed of their behaviour, but in a way which promotes their reintegration into the community. The restorative model is different to the traditional police caution, which has been described as a

12 Further information about the Prison Fellowship Northern Ireland is available on their website at *http://pfni.org/*.

13 Information about the Sycamore Tree Project is available on the website *http://pfni.org/Projects/Project--1.aspx*. The author is unaware of any published evaluation of this project.

14 *Braithwaite* 1988.

'degrading ceremony'[15] in which the young person, most often a first-time and minor offender, is given a stern 'dressing-down' by a senior police officer.

Restorative cautions attempt to deal with the young person in a way that helps acknowledge the wrongfulness of their actions, when they have admitted the offence, but does not condemn them as individuals. It focuses on how they can put the offence behind them, for example by repairing the harm through such things as reparation and apology. It thereby allows the young person to move forward and reintegrate back into their community and family.[16]

The process of delivering restorative cautioning in Northern Ireland is normally facilitated by a trained police officer (though a community representative may also be used) and it often involves the use of a script or agenda that is followed in the conferencing process. The victim is encouraged to play a part in the process, particularly to reinforce upon the young person the impact of the offence on them.

An important aspect of police-led restorative cautioning is that is used as a diversionary method for cases where an offence has been committed and guilt established, but it is not deemed necessary to resort to prosecution through the courts. Such diversionary practices are used effectively for young people who have committed relatively minor offences, or have not offended before.[17]

3.2 Restorative Youth Conferencing

The restorative youth conference process is used do deal with cases that have been referred by the prosecutor as "diversionary youth conferences" or by the courts, as "court ordered youth conferences". The youth conferencing model has much in common with the New Zealand family group conferencing system, which has been in operation since 1989.[18] In a report commissioned as part of the Criminal Justice Review[19] the New Zealand model was highlighted as a potential restorative model for Northern Ireland and it was recommended by the review of the juvenile justice system, completed for the Criminal Justice Review.[20]

The youth conference process is facilitated by the Youth Conferencing Service (an organisation which is funded by the government and is a part of the wider criminal justice system), which uses youth conference co-ordinators to deliver conferences. The conference co-ordinators are experienced staff, trained

15 *Lee* 1998.

16 *O'Mahony/Doak* 2004.

17 *O'Mahony/Deazley* 2000.

18 *Maxwell/Morris* 1993.

19 *Dignan/Lowey* 2000.

20 *O'Mahony/Deazley* 2000.

in the delivery of restorative conferencing and many have backgrounds in probation and social work. The youth conference itself, involves a meeting in which a young person is given the opportunity to reflect upon their actions, and offer some form of reparation to the victim. The victim, who is given the choice whether or not to attend, can explain to the offender how the offence has affected him or her as an individual. This means that a conference gives the offender the chance to understand their crime in terms of its impact, particularly on the victim, and the victim to separate the offender from the offence. Following group dialogue on the harm caused by the young person's actions a 'conference plan' will be devised. This conference plan takes the form of a negotiated 'contract', with consequences if the young person does not follow through what is required of him or her. Agreement is a key factor in devising the 'contract', and the young person must consent to its terms. Ideally, the 'contract' will ultimately have some form of restorative outcome, addressing the needs of the victim, the offender and wider community, but contracts also usually contain requirements imposed on juvenile to address their offending.

The rules of the conference process require that, a youth conference co-ordinator, the young person, a police officer and an appropriate adult must attend a youth conference. If any of these parties are absent the conference cannot proceed. An 'appropriate adult' is defined as the parent of the young person or, an appointed social worker. A "responsible person" over the age of 18 can assume this role, if neither is available. The young person is permitted to have legal representation at the conference, but a solicitor may only participate in an advisory capacity and cannot speak for the young person as they are expected to fully participate in the process. Where the young person is under supervision of a criminal justice agency the supervising officer is entitled to attend. Finally, where the Youth Conference Officer deems it appropriate, any other person whose presence would be "of value" is entitled to attend a Youth Conference. In practice this may be a social worker, a teacher or a community representative.

A victim, or victim representative, is entitled, but not required, to attend the conference. Victim representatives are often used if there is no directly identifiable victim, such as where the offence is theft from a shop. Here an employee of a business may attend or a community representative may participate and explain the impact on the wider community where the offence is disorderly behaviour or criminal damage to public property. The victim is informed of the voluntary nature of the process. Where a victim chooses not to attend in person they may still contribute to the conferencing process either directly or indirectly. The Youth Conference Rules allows participation to be facilitated through a video conferencing or telephone link. Such participation can also be used where the young person is in secure accommodation at the time of the conference. Indirect participation may take the form of a letter, or recording explaining the impact of the crime or through a victim representative. The youth conference co-ordinator must inform all parties of the time and place of the conference. If the

parties have not been informed and the youth conference goes ahead, it may be declared invalid. The Youth Conference Rules state that where notice is not given to a party legally obliged to attend the conference cannot take place.

Once a referral has been made to the youth conferencing service, by the prosecutor or court, the process operates within a tightly defined timescale. The first party to be contacted by the conferencing service is the young person and the youth conference co-ordinator is required to visit the young person within five working days of the referral. On this first meeting the co-ordinator will assess the young person's perspective and establish whether they are ready and willing to engage in a conference and gain their consent to participate. The co-ordinator will advise the young person about the time and place for the conference and will provide them with information on how the whole process works (this includes information sheets and a DVD), so they fully understand what they will be committing to. Two meetings are normally held with the young person to prepare them for the conference. The co-ordinator may decide, following a referral and meetings, that the young person is not engaging with the process, or is not suitable for conferencing. If this occurs, the young person will be referred back to the court or prosecution and will be dealt with by another means. Similarly, if young person fails to attend pre-conference meetings or they are incapable of understanding the process, they will be taken out of the conferencing process and dealt by another means (they may be sentenced by the court in the normal manner, or the prosecutor may refer the young person for prosecution through the court).

Once the young person has consented to take part in the Youth Conference the victim will be informed and advised about the option of a conference. The conference co-ordinator will then visit the victim for the first time and highlight the voluntary nature of the process. The co-ordinator will explain the various means by which they can participate and provide them with information materials about the process.

The youth conference itself considers the offence and contributory factors that may have influenced the young person's behaviour. The conference co-ordinator will also have access to the young person's criminal record and will collect information and any reports which may necessary for conference. Previous offending may be revealed during the conference.

The format of conferences is usually similar to the model used in New Zealand.[21] However, there is flexibility and they are conducted in a manner most appropriate for those in attendance. Some co-ordinators follow the process as set out in the youth conference practice manual. This is a 'three-step' approach in which the offence, the consequences of the offence and what to do for the future are discussed. Conferences take place in a venue convenient to both the victim and offender. A 'neutral' venue is used (not a police station or

21 *Maxwell/Morris* 2002.

the home of the offender) and most conferences take place at the offices of the Conferencing Service.

At the conference, the co-ordinator is required to explain to the participants the procedure that will be adopted. Ground rules are established and the co-ordinator will emphasise the importance of respect and confidentiality amongst the participants. Conferences normally commence with an overview of the offence and facts by a police officer. The young person is then invited to explain their actions to all of the other participants at the conference. The victim will then be provided with an opportunity to ask any questions of the offender. The victim will be asked how the offence impacted them, to reinforce the consequences of the crime on the offender. The victim may bring a supporter, who can help explain the consequences and impact of the crime.

The offender is given the opportunity to apologise to the victim, after the victim has spoken. The apology should not be forced and it should only be made if the young person wishes to do so. The young person's family and supporters will be given the opportunity to speak up and highlight any aspects of the offender's background and qualities.

Once all of the parties have spoken, the focus of the conference will turn to conference plan and ways in which the young person can make amends for their offence(s). The conference plan will vary according to offence, circumstances of the offender and the needs of the victim. Conference plans typically include an apology (written or verbal) and some form of material or symbolic reparation to the victim or the community at large, as well as requirements placed on the offender. The plan, once agreed, must be completed within one year under the supervision of a youth conference officer.

The elements that may be contained in a conference plan are listed in the legislation and the juvenile is required to do one or more of the following: apologise to the victim, perform unpaid community work or service, make financial reparation to the victim, submit him or herself to the supervision of an adult, participate in activities addressing offending (e. g. drugs and alcohol education), be subject to physically restrictive sanctions (like curfews), and undertake treatment for a mental condition or for a dependency on alcohol or drugs. The conference may also recommend custody for the juvenile. For a plan to be valid at least one of the outcomes is required.

Diversionary conferences, ordered by the prosecutor, are intended divert the juvenile from formal prosecution through the courts, but a conference plan can still recommend formal prosecution. Similarly, a court ordered conference may recommend a range of diversionary measures, but may also recommend custody. If this is the case, the court will decide the length of the custodial term.

When the plan has been agreed it will be sent back to the prosecutor or court, as appropriate. If it was a diversionary conference (ordered by the prosecutor) it will be sent back to the prosecutor who will consider it and decide to either accept or reject it. If accepted, it will appear on the young person's

criminal record, but not as a conviction. If there is no agreed outcome, or the plan is rejected by the Prosecutor, the juvenile can be referred for prosecution and their case brought back into the formal court system. If the conference was court ordered, the plan will be sent to the court and the court may decide to: a) accept the plan as the juvenile's sentence b) it may accept the plan, but impose a custodial sentence (with consent of the young person and co-ordinator), or c) reject the plan and deal with the offence by exercising its sentencing powers.

An accepted court ordered plan becomes a 'youth conference order'. This will appear on a young person's criminal record as a conviction. The court must only agree to the conference plan when it is satisfied that the offence is serious enough to warrant it. This is to ensure conference plans are proportionate to the offence and the circumstances of the offender and victim.

The conferencing process is underlined by consent and agreement, so it is necessary for the young person to consent. If the young person withdraws consent at any stage, the process must be terminated. In addition, the young person must admit guilt or be found guilty for a conference to take place. The conference process may also be terminated by the co-ordinator if it is felt it will not serve a useful purpose. So the conference can be terminated if the young person refuses to engage with the process or if the parties are unable to co-operate.

Once the conference plan has been accepted by the court or prosecutor, the conference officer must monitor a young person's adherence to the order. If the young person fails to comply with the order the will be held to account by the conference officer. If there is continued non-compliance the conference officer must then make a report to the Public Prosecution Service or court explaining this. Proceedings may be taken if the plan has not been followed, whereby it may be varied or proceedings instigated against the young person. This may include ordering a new conference, or punishing the young person for non-compliance by way of an attendance centre order or community service order. If the youth conference order is revoked completely the young person will be re-sentenced in the same way as if they have just been found guilty of the offence.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

A limited amount of official data is available on the operation of the juvenile justice system in Northern Ireland in relation to disposals that have restorative elements. This basic data shows how the police and courts have made use of such disposals over recent years.[22]

22 For a general overview of the available statistics see *Department of Justice* 2012.

4.1.1 Restorative Cautioning

The police in Northern Ireland provide basic figures on the use of cautioning.[23] One of the major achievements of the Youth Diversion Scheme is that it only resorts to prosecuting a relatively small proportion of young people referred to it. Typically, only about 5-10% of cases dealt with through the Youth Diversion Scheme are referred for prosecution and only about 10-15% are given restorative cautions. The majority (about 75-80%) are dealt with informally, through 'informed warnings' or no further police action is taken.[24]

The most recent police statistics show 27,584 juveniles were referred to the Youth Diversion Scheme in 2010/11. Of these, 9,143 were for offences and 18,441 were for incidents that were not offences. In the same period, the police carried out 1,157 restorative cautions. Thus, about 13% of referrals for offences were given restorative cautions in 2010/11.[25]

It should also be noted that the concept of 'diversion' in Northern Ireland usually refers to diverting individuals out of the criminal justice system, rather than diverting them into some other programme or activity (which is often the case in other jurisdictions). Indeed, diverting young people away from the courts is generally seen as a more progressive response than formally prosecuting them. The police have been operating such a policy of promoting the diversion young people away from formal criminal processing for a number of years and they have encouraging reconviction data to support their policy, which shows that only about 20% of juveniles cautioned in Northern Ireland go on to re-offend within a one to three year follow-up period[26] whereas about 75% of those convicted in the juvenile courts were reconvicted over a similar period.[27]

4.1.2 Community Responsibility Orders

As can be seen from *Table 1* below, the courts make little use of Community Responsibility Orders.[28] These Orders require the offender to attend a specific place for a few hours at a time where they will receive "relevant instruction in citizenship". This part must be at least one-half of the total number of hours specified in the order. "Relevant instruction in citizenship" is defined as

23 *Department of Justice* 2012, p. 40.

24 See generally *O'Mahony/Deazley* 2000. More recent statistics on the operation of the Youth Diversion Scheme are published by *Department of Justice* 2012.

25 *Department of Justice* 2012, p. 40.

26 *Mathewson/Willis/Boyle* 1998.

27 *Wilson/Kerr/Boyle* 1998.

28 *O'Neill* 2013.

covering personal and social responsibility, the impact of crime on victims and any factors in the offender's life that may be linked to crime. The second part of the order requires the offender to carry out, for a specified number of hours, such practical activities as the responsible officer considers appropriate in the light of the instruction given to the offender. The legislation sets out the aggregate number of hours must be not less than 20 and not more than 40. Both aspects of the order must be completed within 6 months of the order being made and the community responsibility order can only be made with the offender's consent.

4.1.3 Reparation Orders

Table 1 reveals how infrequently the Reparation Order is used in Northern Ireland with juveniles.[29] In the past five years only five such orders have been made. The reparation to be made by the child is either to the victim of the offence or some other person affected by it, or to the community at large. The court decides to whom the reparation is to be made and what form it should take in any individual case. Forms of reparation may be as varied as the offences in respect of which they are imposed, but reparation could take the form of repairing property in cases of property damage or some worthwhile community work. A reparation order must not require the offender to carryout activities for more than 24 hours and the reparation must be made within 6 months of the order being made. Courts cannot make a reparation order unless the offender and, where reparation is to be made to a person, that person consents. The reparation order may only be combined with an attendance centre order, probation order or fine. Before making a reparation order, the court must obtain a report indicating the type of activity suitable for the offender and the attitude of the victim or victims of the offence to the requirements proposed to be included in the order. The court must also obtain a pre-sentence report before imposing a reparation order, unless it considers it unnecessary in the circumstances.

4.1.4 Diversionary Youth Conference Plans and Youth Conference Orders

As can be seen from *Table 1* below, both of these types of restorative orders are routinely used by the Prosecution Service and the courts in Northern Ireland. Slightly more youth conferences have been referred by the prosecution service than the courts. However, as evident in *Table 1* below, thousands of juvenile

29 *O'Neill* 2013.

offenders have now been through the restorative conferencing process in Northern Ireland.

4.1.5 Custody (Juvenile Justice Centre)

As a point of contrast to the figures on restorative disposals, it is important to mention the use of custodial sentences in Northern Ireland. Since 1995 there has been a very large reduction in the use of custodial sentences for juveniles. The combined effect of restrictive legislation greatly reduced the numbers of juveniles place in custody. The Children (Northern Ireland) Order 1995 removed welfare and educational cases from those who could be sent to custody. The Criminal Justice Act (Northern Ireland) 1996 curtailed the powers of the courts to impose custodial sentences, limiting them to more serious, violent and sexual offences and the Criminal Justice (Children) Order 1998 extended the right to bail for children except in the most serious cases and introduced a determinate 'Juvenile Justice Order'. The combined result of these legislative changes has seen the number of juveniles given custodial sentences drop very significantly.

In the mid 1980s around 200 or more juveniles were held in custody in the four training schools across Northern Ireland. The juvenile population (10-16 years) in custody decreased steadily from the 1990's to an average of only about 25-35 persons (held in the Juvenile Justice Centre) over the 2003/04 period (which equates to about 20 per 100,000 of the relevant population) – about half of which were held on remand and the other half were sentenced.[30] Currently only 30-50 juveniles are sentenced to custody per year in Northern Ireland (between 2008-2012) and the juvenile population in custody (held in the juvenile justice centre) has been less than 30 over the past five years (between 2008-2012).[31] These figures demonstrate how the introduction of restorative youth conferencing has also led to a further reduction in the numbers of juveniles given custodial sentences in Northern Ireland. The sustained fall in the numbers of juveniles receiving custodial sentences in Northern Ireland is a major achievement for the juvenile justice system, especially given the growth in the use of custody for juveniles in other jurisdictions (especially England and Wales).

30 *Lyness/Campbell/Jamison* 2006.

31 *O'Neill* 2013.

Table 1: Youth Justice Agency statutory orders, 2008/09 to December 2012[32]

Order	2008	2009	2010	2011	2012*
Community Responsibility Order	48	43	49	58	24
Reparation Order	1	1	2	1	0
Diversionary Youth Conference Plan	759	815	859	953	500
Youth Conference Order	646	701	748	612	402
Sentenced to Custody (Juvenile Justice Centere)	39	37	40	48	50

* 2012 data is provisional.

4.2 Findings from implementation research and evaluation

4.2.1 Restorative Cautioning

There has been relatively little research conducted on police restorative cautioning in Northern Ireland. The largest study of cautioning recently completed examined restorative cautioning practice in two different police areas.[33] This study showed that in the area where a restorative scheme evolved from traditional cautioning practice, the sessions appeared to be used as an alternative to the traditional caution. Here, similar to the Thames Valley evaluation in England, the vast majority of restorative cases were dealt with by way of a restorative caution without the presence of the victim, and only a small number were dealt with by a restorative conference including a victim. In the other area, however, the scheme had been developed from a local 'retail theft initiative', and generally dealt with shoplifting cases. Here, most of the cases resulted in a 'restorative conference', though these mostly used a surrogate victim who was drawn from a volunteer panel of local retailers, and some cases were dealt with by way of a restorative caution (without any victim representation).

The research demonstrated that the police were strongly committed to restorative ideals and had applied considerable effort in attempting to make it a success. There was clear evidence that the practice of delivering the restorative cautions was a significant improvement in police practice and participants were

32 *O'Neill* 2013.

33 *O'Mahony/Doak* 2004.

generally pleased with the way their cases were dealt with. However, a number of pertinent concerns were identified by the researchers including the lack of meaningful involvement of victims in many of the conferences. The restorative sessions were also found to be resource-intensive, as they took a considerable amount of police time to organise, set-up and administer – often for relatively minor offences. Furthermore, there was some evidence that they were unnecessarily drawing some petty first-time offenders into what was a demanding and intense process.

In relation to this latter point, the researchers expressed concern that the majority of conferences were not being used as an alternative to prosecution. Instead, they were used mostly for less serious cases involving young juveniles (12 to 14 years) that previously may not have resulted in formal action. For instance, over 90% of the restorative conference cases were for minor thefts, and 80% involved goods with a value of under £15. Indeed, in over half of the cases, goods were worth less than £5. The profile of those given restorative cautions and conferences was more similar to those given 'advice and warning' under the pre-existing regime. Some of the people dealt with under the scheme were very young, had no previous police contact or had only committed relatively trivial offences.[34]

The Northern Ireland findings highlight the danger that when informal alternatives are introduced into the criminal justice system they may serve to supplement rather than supplant existing procedures.[35] The question is thus raised, whether it is appropriate to use restorative conferences which directly involve victims, which are obviously costly and time-consuming, for mainly first-time offenders involved in petty offences.

4.2.2 Restorative Conferencing

The introduction of restorative youth conferencing has changed the face of the youth justice system in Northern Ireland and most of the research that has examined its operation has been generally positive. The youth conferencing scheme was subject to a major evaluation in which the proceedings of 185 conferences were observed and personal interviews were completed with 171 young people and 125 victims who participated in conferences.[36] This research allows us to reflect on the extent to which the scheme has been successful in achieving its aims and the extent to which it renders the justice system more accountable and responsive to the community as a whole.

34 *O'Mahony/Doak* 2004.

35 *O'Mahony/Deazley* 2000.

36 *Campbell et al.* 2006.

The research findings were positive concerning the impact of the scheme on victims and offenders, and found it to operate with relative success. Importantly, the research showed that youth conferencing considerably increased levels of participation for both offenders and victims in the process of seeking a just response to offending. The scheme engaged a high proportion of victims in the process: over two-thirds of conferences (69%) had a victim in attendance, which is high compared with other restorative based programmes.[37] Of these 40% were personal victims and 60% were victim representatives (such as in cases where there was damage to public property or there was no directly identifiable victim). Indeed, nearly half of personal victims attended as a result of assault, whilst the majority (69%) of victim representatives attended for thefts (typically shoplifting) or criminal damage.

Victims were willing to participate in youth conferencing and 79% said they were actually 'keen' to participate. Most (91%) said the decision to take part was their own and not a result of pressure to attend. Interestingly, over three quarters (79%) of victims said they attended 'to help the young person' and many victims said they wanted to hear what the young person had to say and their side of the story: 'I wanted to help the young person get straightened out'. Only 55% of victims said they attended the conference to hear the offender apologise. Therefore, while it was clear that many victims (86%) wanted the offender to know how the crime affected them, what victims wanted from the process was clearly not driven by motivations of retribution, or a desire to seek vengeance. Rather it was apparent that their reasons for participating were based around seeking an understanding of why the offence had happened; they wanted to hear and understand the offender and to explain the impact of the offence to the offender.

Victims appeared to react well to the conference process and were able to engage with the process and discussions. It was obvious that their ability to participate in the process was strongly related to the intensive preparation they had been given prior to the conference. A lot of work was put into preparing victims for conferencing and they were generally well prepared. Only 20% of victims were observed to be visibly nervous at the beginning of the conference, by comparison to 71% of the offenders. They were also able to engage and play an active part in the conferencing process; 83% of victims were rated as 'very engaged' during the conference; and 92% said they had said everything they wanted to during the conference.

Overall 98% of victims were observed as talkative in conferences and it was clear that the conference forum was largely successful in providing victims with the opportunity to express their feelings. Though most victims (71%) displayed some degree of frustration toward the young offender at some point in the conference, the vast majority listened to and seemed to accept the young

37 Compare with *Maxwell/Morris* 2002; *O'Mahony/Doak* 2004.

person's version of the offence either 'a lot' (69%) or 'a bit' (25%) and 74% of victims expressed a degree of empathy towards the offender. It is important to realise, though, that while a minority of victims were nervous at the beginning of the conference, this usually faded as the conference wore on and nearly all reported that they were more relaxed once the conference was underway. Also, the overwhelming majority (93%) of victims displayed no signs of hostility towards the offender at the conference. Nearly all victims (91%) received at least an apology and 85% said they were happy with the apology. On the whole they appeared to be satisfied that the young person was genuine and were happy that they got the opportunity to meet them and understand more about the young person and why they had been victimised. On the whole, it was apparent, for the victims interviewed, that they had not come to the conference to vent anger on the offender. Rather, many victims were more interested in 'moving on' or putting the incident behind them and 'seeing something positive come out of it'.

For offenders, it was evident that the conferencing process held them to account for their actions, for example, by having them explain to the conference group and victim why they offended. The majority wanted to attend and they gave reasons such as, wanting to 'make good' for what they had done, or wanting to apologise to the victim. The most common reasons for attending were to make up for what they had done, to seek the victim's forgiveness, and to have other people hear their side of the story. Only 28% of offenders said they were initially 'not keen' to attend. Indeed many offenders appreciated the opportunity to interact with the victim and wanted to 'restore' or repair the harm they had caused. Though many offenders who participated in conferences said they did so to avoid going through court, most felt it provided them with the opportunity to take responsibility for their actions, seek forgiveness and put the offence behind them. Youth conferencing was by no means the easy option and most offenders found it very challenging. Generally offenders found the prospect of coming face to face with their victim difficult. For instance, 71% of offenders displayed nervousness at the beginning of the conference and only 28% appeared to be 'not at all' nervous. Despite their nervousness, observations of the conferences revealed that offenders were usually able to engage well in the conferencing process, with nearly all (98%) being able to talk about the offence and the overwhelming majority (97%) accepting responsibility for what they had done.

The direct involvement of offenders in conferencing and their ability to engage in dialogue contrasts with the conventional court process, where offenders are afforded a passive role - generally they do not speak other than to confirm their name, plea and understanding of the charges - and are normally represented and spoken for by legal counsel throughout their proceedings. Similarly, victims were able to actively participate in the conferencing process and many found the experience valuable in terms of understanding why the offence had been committed and in gaining some sort of apology and/or

restitution. This too contrasts with the typical experience of victims in the conventional court process where they often find themselves excluded and alienated, or simply used as witnesses for evidential purposes if the case is contested.

Nearly all of the plans (91%) were agreed by the participants and victims were on the whole happy with the content of the plans. Interestingly, most of the plans agreed to centred on elements that were designed to help the young person and victim, such as reparation to the victim, or attendance at programmes to help the young person. Few plans (27%) had elements that were primarily punitive, such as restrictions on their whereabouts, and in many respects the outcomes were largely restorative in nature rather than punitive. The fact that 73% of conference plans had no specific punishment element was a clear manifestation of their restorative nature. But more importantly, this was also indicative of what victims sought to achieve through the process. Clearly, notions of punishment and retribution were not high on the agenda for most victims when it came to devising how the offence and offender should be dealt with through the conference plan.

Overall indications of the relative success of the process were evident from general questions asked of victims and offenders. When participants were asked what they felt were the best and worst aspects of their experience a number of common themes emerged. For victims, the best features appeared to be related to three issues: helping the offender in some way; helping prevent the offender from committing an offence again; and holding them to account for their actions. The most positive aspects of the conferencing were clearly non-punitive in nature for victims: most seem to appreciate that the conferences represented a means of moving forward for both parties, rather than gaining any sense of satisfaction that the offender would have to endure some form of harsh punishment in direct retribution for the original offence. Victims and offenders expressed a strong preference for the conference process as opposed to going to court and only 11% of victims said they would have preferred if the case had been dealt with by a court. On the whole they considered that the conference offered a more meaningful environment for them. While a small number of victims would have preferred court, identifying conferencing as 'an easy option', this view was not held by the offenders. The offenders identified the most meaningful aspect of the conference as the opportunity to apologise to the victim, a feature virtually absent from the court process. Yet, they also identified the apology as one of the most difficult parts of the process.

A clear endorsement of victims' willingness to become involved in a process which directly deals with the individuals that have victimised them was evident in that 88% of victims said they would recommend conferencing to a person in a similar situation to themselves. Only one personal victim said they would not recommend conferencing to others. For the vast majority who would, they felt the process had given them the opportunity to express their views, to meet the

young person face to face, to ask questions that mattered to them, to understand why the incident happened to them, and ultimately, it appeared to help them achieve closure.

A recent qualitative study, by Maruna (2007), of the longer-term impacts of youth conferencing process on young offenders in Northern Ireland has also found 'many of the post-conference outcomes were positive'.[38] However, this is not to suggest that restorative youth conferencing works well all the time and in all cases. Both the Campbell *et al* and Maruna *et al* studies, noted difficulties in the practice of delivering restorative conferences effectively. However, acknowledging such caveats, the research evidence has been positive and there is now a considerable international body of research evidence demonstrating the some of the advantages of restorative justice, particularly over 'traditional' and adversarial models of criminal justice.[39]

Furthermore, from a transitional justice standpoint, the new youth conferencing arrangements also appear to be capable of instilling legitimating effects in the wider community, as originally envisaged by the Criminal Justice Review. Although many observers have pointed to the potential of restorative justice to reinvigorate democracy through creating new community bonds and strengthening existing ones, this is only likely to be achieved if new structures are perceived by all communities as a fair and effective means of delivering justice.

Recent research from Northern Ireland has also looked at the re-offending rates of young people given a range of sentences, including those given restorative youth conferences.[40] It demonstrates that reoffending rates (one year after conviction) vary considerably by the type of disposal. This can largely be explained by differences in the characteristics of offenders given each disposal. For example, those given community disposals were generally at a lower risk of reoffending than those given custodial sentences. The research shows that those released from custody had the highest rates of reoffending (72%). Those given restorative conferencing had a relatively low level of reoffending (38%). Importantly, this rate was better than those given other community based disposals (47%), such as probation, community service and attendance centre orders.

---

38 *Maruna et al.* 2007.

39 See for example: *Miers* 2001; *Sherman/Strang* 2007; *Shapland et al*. 2011. However, see *Goldson* 2011, pp. 3-27. He is critical of restorative youth conferencing, especially as a model for criminal justice reform as proposed by the *Independent Commission on Youth Crime and Antisocial Behaviour* 2010 in England and Wales. Whilst he provides a thoughtful critique of the Commission's report, his specific thoughts on the drawbacks of restorative youth conferencing in Northern Ireland are not based on empirical evidence.

40 *Lyness* 2008.

More recently, statistics published in 2011[41] have shown a similar trend. The one year reoffending rate of those juveniles (10-17 years of age) released from custody was 68%. For community-based disposals (excluding youth conferences) it was 54%. For court ordered restorative youth conferences 45% reoffended, while only 29% of those given diversionary youth conferences reoffended within a year. These latest statistics are encouraging, in that reoffending rates for restorative youth conferences have been shown to be lower than for those given other types of community based sentences and considerably lower than those given custodial sentences.

5. Summary and outlook

5.1 Restorative Cautioning

The development and future of police led restorative cautioning in Northern Ireland is a complex issue. There is no doubt that the restorative practices used by the police have been a considerable achievement, particularly in advancing policing practice in a divided community, where significant elements of the community have been hostile to the police. The broader move to bring restorative principles into the policing of juveniles has been enthusiastically pursued. However, doing so has been difficult, against a political agenda which has focused very strongly on 'law and order' and an agenda of being seen to be tough on crime. Much of the recent legislation in the United Kingdom, around how juveniles are treated has focused on toughening up the approach to dealing with young offenders and limiting the number of times they can be cautioned by the police.

The police led restorative cautioning practice in Northern Ireland has had partial success of involving victims (similar to the experience in England and Wales). Even though victim involvement is a core element of providing restorative justice, the experience of achieving this in practice has been relatively poor. In England only a very small minority of cautions delivered by the Thames Valley police directly involved victims. Though these cautions are usually able to provide some form of alternative victim input and restorative theme, there is still little opportunity for a fully restorative process.[42] Similarly, the Northern Ireland schemes have had limited success in directly involving victims, and many participants were 'surrogate victims' or individuals brought into the process to represent the views of victims.[43] Low levels of victim participation

41 *Lyness/Tate* 2011.

42 *Hoyle* 2009.

43 *O'Mahony/Doak* 2004.

obviously limit the ability to provide a restorative process or restorative outcomes.

Related to low victim participation rates are questions around the extent to which victims are given an input in the restorative process and a role in deciding how the offence is dealt with. There is an important distinction between restorative justice, and what can be described as restorative practices. Restorative justice requires the victim to be able to play a part in collectively deciding how the offence is dealt with. Restorative practices, on the other hand, may include victim input (so the offender better understands the consequences of their actions), however, they often fall short of providing full restorative justice. In reality, the police restorative measures currently available generally facilitate a level of participation that can only be described as 'partially restorative'. Restorative cautioning usually only achieves limited involvement of victims in its decision making process. It can provide a swift response to offending, it is popular with police officers and it can deliver an apology to the victim (if involved). But there is little to suggest that restorative cautions involve any significant restorative intervention. Thus, as Hoyle (2009) laments, many of the police-led restorative interventions have only been able to provide a partial restorative process, usually with minimal victim involvement.

This raises a more fundamental question as to whether the police should seek to provide fully restorative interventions which wholly incorporate victims as the best way forward. The research evidence on police-led restorative interventions in the United Kingdom clearly shows they are used primarily for minor offences and first time offenders. Police cautioning, final warnings, restorative justice disposals and adult conditional cautions are all targeted towards less serious offences and first time offenders. However, the research evidence from Northern Ireland questions whether it is advisable to use a fully restorative practice, directly involving victims, when dealing with only very minor offences.[44] Fully restorative conferences take considerable resources to set-up and deliver. They are a very demanding and intense process, for both offenders and victims. As such, they may unnecessarily draw some petty first-time offenders into an overly onerous process. The research from Northern Ireland suggests that a more appropriate course of action might be to deal with such cases by way of a caution using a restorative framework, rather than attempting to provide a full conference with the victim present. Furthermore, since more serious offending is usually dealt with at a later part of the criminal justice process (for example at the prosecution, or court sentencing stage), it may be better to target a fully restorative justice process at these later stages. The research evidence relating to the effectiveness of restorative programmes in

44 *O'Mahony/Doak* 2004.

reducing recidivism also supports its use for more serious types of offences.[45] Thus, it is highly questionable whether the widespread use of restorative justice for minor criminal offences is either desirable, cost efficient, or effective in terms of its impact on offenders or victims.

There is now a strong body of research evidence showing the positive results of adopting restorative justice measures within policing, provided it is used for suitable cases and in the correct circumstances. The police are generally good at delivering restorative interventions and they are beneficial in terms of helping offenders appreciate the consequences of their actions. Research consistently shows participants are more satisfied with restorative process and outcomes, and police officers rate it as a considerable improvement on the old system of police cautioning.

At a broader level, one of the key advantages of using restorative cautioning, particularly in the Northern Ireland context, is the benefits to policing practice and police/community relations. Restorative cautioning can help foster better police community relations by allowing positive and constructive interactions to take place, thus complementing other community based policing practices which seek to develop a better partnership between the police and the broader community. In this context, the adoption of restorative models to deliver policing makes considerable sense.

5.2 Youth Conferencing

As the previous sections have argued, the conferencing arrangements in Northern Ireland have been generally successful in delivering core principles of restorative justice in their operation. It is evident that the youth conferencing arrangements deliver a fairer and more inclusive process, in line with the objectives of the Criminal Justice Review. The research reveals that the vast majority of participants (93% of offenders and 79% of victims) found them to be fair and were satisfied with conference plans (71% offenders and 79% victims).[46] A clear majority, 86% of offenders and 88% of victims, said they would recommend a conference to someone else in similar circumstances.

There are elements of the youth conferencing process, including how the outcomes have been used, which show their potential to also improve the delivery of justice. Firstly, the conferencing arrangements devolved some of the 'ownership' in the delivery and administration of justice back into the community and the hands of those most affected by crime.[47] The youth conferencing research revealed that the arrangements offered a process that allowed victims,

45 *Sherman/Strang* 2007.

46 *Campbell et al.* 2006.

47 *Christie* 1977.

offenders and the broader community to re-engage in the delivery of justice. This was evident in findings that demonstrated that the conferencing system facilitated attendance and participation in the process. In respect of democratic participation, the conferencing arrangements were largely successful in bringing together offenders, victims, supporters, the police and a conference coordinator, in a process that encouraged dialogue and conflict resolution. The arrangements involved a high proportion of victims and also opened the process to others, such as family supporters and community and social workers, thus expanding the levels of community involvement and engagement.

The research revealed the conferencing process to be effective in providing an inclusionary process that facilitated an active dialogue between those directly affected by the crime. Restorative processes can be used to strengthen and rebuild social relationships, affirm community norms, and provide an opportunity for stakeholders to work together.[48] Thus, participants were actively encouraged to participate in the conferencing process and the offenders were required to account for their actions and take responsibility for what they had done. Opening up a process of dialogue helped to engage and empower participants. It is starkly different to the traditional criminal court process, where offenders rarely speak other than to confirm their name, and are usually spoken for by their legal representative throughout proceedings. Similarly victims are rarely included in the traditional criminal process unless called as a witness, and often report the experience as exclusionary and alienating.[49]

The way conference plans are devised and delivered reinforced their potential to engage the broader community and participants in the process of delivering justice, by inspiring a sense of communal ownership. There was a strong emphasis placed on restorative elements, rather than punitive outcomes in the plans. By doing so, the plans were able to engage participants in a process that was much more positively focused around the needs of the victim, community and young offender. Moreover, the majority (86%) of the programmes that were used in the delivery of conference plans were based in the community and were provided by the community or voluntary sector. Thereby the process was able to provide additional opportunities to engage the community sector in the delivery of justice. Arguably this sense of ownership will help boost the very legitimacy of criminal justice in Northern Ireland, an essential step for the normalisation of society, as it moves forward through a process of transitional justice.[50]

There was also evidence that the youth conferencing process held the potential to break down some of the alienation towards the criminal justice

48 *Bazemore/Schiff* 2001.

49 *Shapland/Wilmore/Duff* 1985.

50 See *Call/Stanley* 2001.

system and the police.[51] The mandatory presence of a police officer in youth conferences was particularly important in the context of Northern Ireland. As noted by the Patten Commission, the police experienced highly strained relations with significant sections of the community over the duration of the conflict.[52] The Northern Ireland Community Crime Survey underlines this point, by demonstrating the extent of mistrust towards the police across differing communities.[53] Indeed, much day-to-day policing in Northern Ireland has been conducted under such heavy security that the possibility of positive police and community interactions has been severely limited.

The presence of a police officer in youth conferencing process opened up an opportunity for young offenders and their supporters to interact with the police in the conferencing environment. The observations from the research showed these interactions were usually positive. As such, it allowed a rare opportunity for participants to engage with the police in a generally productive dialogue. Such encounters have the potential to break down strongly held barriers towards the police. They create a space where individuals who feel alienated and antagonistic towards the police may be able to see them in a more positive light. The opening up dialogue with police officers can also help foster a greater understanding of the police. Australian research has shown the presence of a police officer in conferencing can help engender a greater respect for the police and law.[54]

More generally, it appears that the youth conferencing arrangements in Northern Ireland offer considerably enhanced levels of involvement between individuals, communities and the criminal justice system. The process is helping to deliver a fairer and more effective system of justice, which has the potential to inspire confidence in the criminal justice system in the community as a

51 See *Criminal Justice Review Group* 2000, pp. 16-20, which outlines research that showed Catholics in Northern Ireland have considerably less confidence in the criminal justice system and police than Protestants.

52 *The Patten Commission* 1999.

53 See *O'Mahony et al.* 2000. This research conducted by Queen's University, Belfast, looked at attitudes in different types of community – Protestant and Catholic small towns, Protestant and Catholic lower working class areas, and mixed middle class areas. It found that Catholic lower working class communities had by far the most negative view of whether the police treated people fairly in their local area – only 36% approval, as opposed to around 70% in Catholic small towns and other areas. Moreover, only 19% in Catholic lower working class areas thought the police treated people equally in Northern Ireland as a whole, compared with 73% in Protestant lower working class areas. Interestingly, only half the respondents in Catholic small towns gave a positive response on this point, much less than the 70% approval rating they gave to their local police. The research shows that perceptions and experiences of policing differ greatly across communities in Northern Ireland.

54 See *Sherman et al*. 2005.

whole.[55] This is particularly relevant to Northern Ireland, given the significant legitimacy deficit suffered by the institutions of criminal justice over the duration of the conflict.

Youth conferencing in Northern Ireland provides a process that if often perceived as being fairer and more likely to foster confidence in the criminal justice system. The conferencing process is also able to provide a process that imbeds core restorative justice principles in its delivery within criminal justice. The conferencing arrangements hold young offenders to account for the offences they committed and provide an acknowledgement of the truth and opportunities to accept responsibility that are simply not available in the traditional court process. Youth conferencing has provided opportunities for symbolic reparation and restitution through conference plans, over retributive and punitive outcomes used by the traditional court process. The way conference plans are devised facilitates consent, whereby victims and offenders are actively involved in devising and agreeing to plans and outcomes, underlining their restorative potential. Restorative goals of healing and reconciliation were addressed in conferences through the giving and receiving of apologies – which were particularly important for offenders and victims – and the plans opened up opportunities for offenders to re-connect with their communities, by utilising community based programmes and resources. The conferencing arrangements also support the restorative principle of democratic participation in the delivery of justice. This was achieved through the inclusionary nature of the process, which empowered participants, by giving them opportunities and space to have their say and by making offenders account for their actions themselves.

5.3 Outlook

The outlook for restorative justice in Northern Ireland is positive. But there are challenges for the future. For example, there are significant costs in providing quality restorative justice at a time of economic austerity. Much of the cost is due to the time necessary to convene and facilitate high quality restorative conferences using professional facilitators. Whilst there are types of programmes which may provide elements of restorative justice cheaply, these usually fall well short of delivering the essential elements of restorative justice, such as victim involvement, dialogue, apology and reconciliation. The restorative youth conference process in Northern Ireland was properly funded from the outset by government (similar to that in New Zealand). Questions arise of whether restorative justice should be used with first time offenders who have committed relatively minor offences, given it is an expensive and demanding process. Also,

55 *Criminal Justice Review Group* 2000.

there are questions whether it should be used with offenders who have gone through repeated restorative interventions in the past.

It is important to recognise that restorative youth conferencing is not a 'silver bullet' for all the problems of criminal justice. Unfortunately, some young people who offend are not willing participate in the process and some are not ready to make amends for their wrong doing. Restorative justice is not appropriate in these circumstances and such offenders are dealt with through the traditional court process and sentencing options. However, the experience from Northern Ireland shows many offenders are willing to engage, as are victims, and that restorative conferencing can be used effectively with serious types of offending.

Integrating a restorative youth conferencing model in a juvenile justice system based around retribution and an adversarial system of justice has been challenging. There was resistance from criminal justice professionals who found the restorative process difficult to come to terms with. But the experience from Northern Ireland shows that it can be done and that there are considerable benefits of doing so.

The integration of restorative justice in Northern Ireland juvenile justice has developed with strategies that successfully divert many young people away from prosecution through the courts. The Northern Ireland juvenile justice system has also been very successful in reducing the numbers of young people held in custody – at the same time as similar jurisdictions have seen a sharp rise in their custodial populations. Moreover, restorative justice has shown itself to be a process that can help offenders, victims and communities. It has had significant beneficial impacts in terms of giving victims and broader society a stake in dealing with crime. It has also helped open up the process of delivering justice, so it is more devolved to those directly impacted by crime. However, the most important result of integrating restorative within juvenile justice in Northern Ireland has been the realisation that justice can be achieved by other means than increasingly harsh punishment.

References:

Bazemore, G., Schiff, M. (2001): Understanding restorative community justice: What and why now? In: Bazemore, G., Schiff, M. (Eds.): Restorative Community Justice. Cincinnati: Anderson Pub Co.

Braithwaite, J. (1988): Crime, Shame and Reintegration, Cambridge: Cambridge University Press.

Call, C., Stanley, W. (2001): Protecting the People: Public Security Choices after Civil Wars. Global Governance Vol. 7, pp. 151–72.

Campbell, C., Devlin, R., O'Mahony, D., Doak, J., Jackson, J., Corrigan, T., McEvoy, K. (2006): Evaluation of the Youth Conference Service. Belfast: Northern Ireland Office, Statistics and Research Report No.12.

Christie, N. (1977): Conflicts as Property. British Journal of Criminology. Vol 17.

Council of Europe (1999) Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters. Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies).

Criminal Justice Review Group (2000): Review of the Criminal Justice System. London: HMSO.

Department of Justice (2012): Digest of Information on the Northern Ireland Criminal Justice System. Belfast: Northern Ireland Statistics and Research Agency.

Dignan, J., Lowey, K. (2000): Restorative Justice Options for Northern Ireland: A Comparative Review. Criminal Justice Review Research Report No. 10, Belfast: HMSO.

Goldson, B. (2011): Time for a Fresh Start. Youth Justice. Vol. 11, 1, pp. 3-27.

Hoyle, C. (2009): Restorative Justice in Thames Valley. Journal of Police Studies Vol. 2009-2.

Independent Commission on Youth Crime and Antisocial Behaviour (2010): Time for a Fresh Start. London: The Police Foundation.

Lee, M. (1998): Youth Crime and Police Work, London: MacMillan Press.

Lyness, D. (2008): Northern Ireland Youth Re-offending: Results from the 2005 cohort. Belfast: Northern Ireland Office, Research and Statistics Bulletin 7/2008.

Lyness, D., Tate, S. (2011): Northern Ireland Youth Re-offending: Results from the 2008 cohort. Belfast: Youth Justice Agency, Statistics and Research Branch.

Lyness, D., Campbell, P., Jamison, C. (2006): Digest of Information on the Northern Ireland Criminal Justice System 5. Northern Ireland Office, Research and Statistics Branch. Belfast: Northern Ireland Office.

Maruna, S., Wright, S., Brown, J., van Marle, F., Devlin, R., Liddle, M. (2007): Youth Conferencing as Shame Management: Results of a Long-term Follow-up Study. Belfast: Youth Conferencing Service.

Mathewson, T., Willis, M., Boyle, M. (1998): Cautioning in Northern Ireland. A Profile of Adult and Juvenile Cautioning and Re-offending Rates. Northern Ireland Office, Research and Statistics Branch. Research Findings 4/98. Belfast: Northern Ireland Office.

Maxwell, G,. Morris, A. (1993): Family, Victims and Culture: Youth Justice in New Zealand. Wellington: Social Policy Agency and Institute of Criminology, Victoria University of Wellington.

Maxwell, G., Morris, A. (2002): Restorative Justice and Reconviction. Contemporary Justice Review, 5(2), pp. 133-146.

Miers, D. (2001): An International Review of Restorative Justice. London: Home Office.

Mulcahy, A. (2006): Policing Northern Ireland Conflict, legitimacy and reform. London: Willan Publishing.

O'Mahony, D., Campbell, C. (2006): Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland. In: Junger-Tas, J., Decker, S. (Eds.): International Handbook of Juvenile Justice. The Netherlands: Springer.

O'Mahony, D., Deazley, R. (2000): Juvenile Crime and Justice. Criminal Justice Review Group Research Report 17, London: HMSO.

O'Mahony, D., Doak, J. (2004): Restorative Justice – Is More Better? The Experience of Police-led Restorative Cautioning Pilots in Northern Ireland. The Howard Journal Vol. 43 No. 5, pp. 484-505

O'Mahony, D., Geary, R., McEvoy, K., Morrison, J. (2000): Crime, Community and Locale: The Northern Ireland Communities Crime Survey. Aldershot: Ashgate.

O'Neill, N. (2013) Youth Justice Agency Provisional Workload Statistics. Belfast: Youth Justice Agency, Statistics and Research Branch.

Shapland, J., Robinson, G., Sorsby, A. (2011): Restorative Justice in Practice. London: Routledge.

Shapland, J., Wilmore, J., Duff, P. (1985): Victims and the Criminal Justice System. Aldershot: Gower.

Sherman, L., Strang, H. (2007): Restorative Justice: The Evidence. London: The Smith Institute.

Sherman, L., Strang, H., Angel, C., Woods, D., Rossner, M., Barnes, G., Bennett, S., Inkpen, N. (2005): Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials. Journal of Experimental Criminology, Vol. 1, pp. 367-395.

The Patten Commission (1999): A New Beginning: Policing in Northern Ireland. London: HMSO.

United Nations (2002): Economic and Social Council. Commission on Crime Prevention and Criminal Justice (UN Doc E/CN.15/2002/5).

Vienna Declaration on Crime and Justice (2000): Meeting the Challenges of the 21st Century (UN Doc A/CONF.187/4).

Wilson, D., Kerr, H., Boyle, M. (1998): Juvenile Offenders and Reconviction in Northern Ireland. Northern Ireland Office, Research and Statistics Branch Research Findings 3/98. Belfast: Northern Ireland Office.

Norway

Jenny Maria Lundgaard

1. Origins, aims and theoretical background of restorative justice

1.1 Overview on forms of restorative justice

In Norway, Restorative Justice is first and foremost institutionalized through the victim-offender mediation systems (VOM), presenting an alternative to the traditional justice system available for all inhabitants. The Mediation Service has its legislative basis in the *Law on Mediation* from 1991. Victim-offender mediation is organized by the National Mediation Service, within the civil department of the Ministry of Justice. The Mediation Service provides a nation-wide system of voluntary mediators, located in each municipality of Norway. As the name indicates, these mediation processes are based upon face-to-face meetings between the victim and the offender, and are guided by a neutral mediator from the Mediation Services. In this paper, in referring to these processes, the terms "victim-offender mediation" (VOM) and "mediation boards" are used interchangeably.

The ideas of restorative justice are practiced in several ways, through different systems and organisations. The main actor is the National Mediation Service (NMS) that organizes and runs the mentioned mediation boards. But they also hold *grand meetings*, work on *youth contracts* and are involved in the development and implementation of various new measures at different stages of the criminal justice system (pre-trial, after sentencing and in prisons). The main goal is to provide alternatives to traditional criminal justice processes, measures and punishment. The examples above are all organized by the NMS. Restorative justice is first and foremost practiced through the mediation boards, and this is also the basis for other forms of restorative justice in Norway. Mediation as part of a community sentence is also a possibility in Norway, as is mediation as a

condition of suspended sentences. Regarding community service, it has been debated as to whether or not it is a form of restorative justice. Community service in Norway is called "community punishment", and is an alternative to prison sentences of less than one year. It is carried out in work for a number of hours, and is regarded as an option especially for young offenders. It is not covered more closely in this article as I have chosen to focus on the personal meetings between the victim and the offender that fall within an encounter-based, narrow definition of RJ.

Alongside the NMS, restorative practices are also provided and delivered by other organisations. Examples of this are the project *"Street Mediation"* – carried out by the Red Cross, where youths mediate in conflicts between other youths, groups or individuals – and the "*Minhaj Mediaton Service*", organized by Minhajul Quran International. The street mediations are carried out by volunteers and employees of the Red Cross, and typically address violent conflicts among youth. This type of mediation is mostly carried out by other youth, trained in handling conflicts by mediators from the Red Cross. This is not a nationwide system, but is found in some large cities in Norway, were the Red Cross is working together with schools, the police and other institutions working with youth and crime prevention. The Minhaj Mediation Service operates in three of the larger cities in Norway, and is a voluntary organisation. According to their web page their work consists of many different measures, a large part of which involve providing guidance to people contacting them with questions concerning parenthood, violence, conflicts between generations, marriage counselling, forced marriage and other issues. They also work on improving the cooperation between parents and schools, they have a street mediation project among youths and they wish to be a link between the Muslim minorities and society as a whole.[1] These two organisations are not part of the formal criminal justice system, and will therefore not be discussed further in this article.

The police also carry out different measures for juveniles, which are founded in the ideas of restorative justice and mediation, such as contracts for youths regarding drug use (where one is voluntarily tested for drug use and if clean one does not face prosecution) and "follow up teams", where the young offender is offered participation in an interdisciplinary team working to prevent new offences. The restorative aspect of these teams lies in the initial meeting with the victim of their crime early on in the process for those having committed more serious or repeated crimes. The police have also been testing the effect of police mediating in youth conflicts and such. The ideas from restorative justice are also part of the Norwegian Police Academy's curriculum on crime prevention.

This paper focuses mainly on the nationwide victim-offender mediation system, as this is the predominant form of restorative justice in Norway. This

1 Source: *www.minhajkonfliktraad.no.*

mediation is also provided by law, unlike many of the experiments and projects concerning restorative justice in other areas.

1.2 Reform history

Restorative Justice in Norway is greatly influenced by *Nils Christie's* ideas presented in his article "Conflicts as Property".[2] Stating that conflicts play an important role in society, he claims that conflicts should not be silenced and hidden away in a courtroom, but nurtured and made visible in the local society. Building on the ideas from a small village in Tanzania and their way of handling conflicts, he argues for a change to the way in which contemporary society deals with conflicts. The conflicts should be owned by the parties involved, but according to *Christie* they are, in today's society, "stolen" by professionals, i. e. the justice system, prosecutors and counsels of defence. This theft is a problem, according to *Christie*, for both the offender and the victim of crime. They lose control over their conflict and are deprived of the possibility to influence the development and the solution of their case. It is also a problem for the community, as this type of theft reduces the social control in the society and makes them unable to handle their own problems in a constructive manner. *Christie* thus argues that the conflict should be returned to its owners: the offender, the victim, and the local community. Mediation processes are influenced by this idea, and the main ideal is to give the conflict back to its participants and society, thus giving them back their right to their own conflict, and to find a possible solution.

In the years following *Christie's* "Conflicts as Property", we find the first implementation of the idea of restorative justice in Norway. This is closely linked to questions concerning youth crime and the way society should react to it. In 1978 the Government presented a report on criminal justice in which these questions were raised. As this point the imprisonment of youth came to be questioned and alternative reactions were being sought. The report proposed raising the age of criminal responsibility from 14 to 15 years, and it also stated a necessity of creating alternative measures for dealing with youth crime. As a result of this, the mediation projects were started. At this early stage, victim-offender mediation was regarded as a child-care measure.[3] VOM had originally been limited to offenders up to 18 years of age. In 1989, however, this age limit was removed, though mediation is still mostly used for offences where the offender is young. According to a directive[4] from the Director of Public Prosecutions, VOM is considered to be most suitable for people under the age of

2 *Christie* 1977.

3 *Paus* 2004.

4 See *Paus* 2004.

25. The reason for this is that mediation is considered to be less stigmatizing than traditional punishment, and as heightening the offender's level of learning.[5] Even if young people are still the largest group by far in practice, a current trend is that increasing numbers of adults have attended mediation.[6]

Initially, the National Mediation Service Centre was founded in 1987, and was at first located at the Department of Criminology of the Faculty of Law at the University of Oslo, but has since become a governmental responsibility within the Ministry of Justice.[7] The first victim-offender mediation project took place from 1981 to 1983 in Lier, a small municipality in the county of Buskerud. In the early years, the number of cases was low, and an evaluation report proposed closing the mediation service due to the low number of cases, the fact that the cases were minor offences and the weak routines of the services.[8] The Director of Public Prosecutions saw this as a challenge, and initiated a process of creating a law on mediation.[9] Despite the uncertainty regarding the results of mediation during the test period, in the political sphere there was broad mutual agreement that the arrangement ought to be made permanent; the arguments though, were of both pragmatic and ideological character.[10] *Paus* states that this process was dominated by the political elite and academics, and not by the general public as such. The Norwegian Parliament passed the Law on Mediation on 15 March 1991. This law was implemented nationwide between 1992 and 1994. Thus *Christie* and *Dullum* show that the law created a close connection between the mediation system and the penal system, despite the fact that mediation is not regarded as a penal sanction.[11] *Kemény*, too, regards this as a challenge in the development of restorative justice, seeing a need to work for the continued independence of the Mediation Service from the Criminal Justice System.[12]

Instead of seeing mediation as punishment, it is often considered to be a measure of crime prevention. This is linked to the two underlying principles of mediation in Norway: including the local community in problem solving, and the aim to avoid the use of prison sentences for young offenders.[13] The first

5 *Paus* 2009.

6 *Ibid*.

7 *Kemény* 2005.

8 *Pabsdorff* 2010.

9 *Ibid*.

10 *Paus* 2009.

11 *Christie/Dullum* 1996.

12 *Kemény* 2005.

13 *Paus* 2004.

principle is based on the aim to involve the civil sphere and the local community in solving conflicts, which is why victim-offender mediation is carried out by non-professionals from the local municipality. The second principle is to avoid serious penal measures, such as imprisonment, for young offenders, as it is regarded as increasing their risk of recidivism. Mediation is believed to be more educative, easier to adjust to the individuals involved, making it more plausible to achieve a real solution for a conflict as well as paying more attention to the victim involved.[14] *Paus* states that both of these viewpoints rest on humanitarian principles; the wish to limit punishment forces us to think of alternative solutions to conflicts and crime.[15] Despite the influence of *Christie's* ideas, the mediation system has been criticized for its close connection to the traditional justice system, making it less of an alternative than a supplement.[16]

1.3 Contextual factors and aims of the reforms

The article "Conflicts as Property"[17] and the early development of mediation systems in Norway can be said to be a clear result of the contemporary debates and the climate in the discourse on justice and punishment. The context of these reforms can be viewed as a result of the Norwegian debates on incarceration, youth crime and victims' rights. The critique of punishment as such, and of custodial sentencing in particular, was dominating in the 1960s and 1970s, showing a debate somewhat representing *Garland's* ideas of the "nothing works" paradigm,[18] and thus a call for new measures in the field of justice and sanctioning.

Part of this paradigm and debate was closely linked to the question on how to respond to youth crime, since neither incarceration nor other traditional justice procedures and responses were deemed suitable due to their unfortunate and detrimental effects for the youth's future. More preventive measures were sought, and the idea of reintegrating juvenile delinquents into society became a goal.

Combined with this debate concerning prisons and youth crime we find another dominating aspect of the 1970's political debate on crime – the discussion regarding the interests of victims. *Pabsdorff* shows how these tendencies were an influence on the criminal policies, especially pushed forward by

14 *Kemény* 2005.

15 *Paus* 2004.

16 *Christie/Dullum* 1997.

17 *Christie* 1977.

18 *Garland* 2001.

questions concerning the rights and interests of women subjected to violence and other crimes linked to gender and power.[19]

The paradigm formed by these contemporary debates is at least part of the discourse which laid the basis of implementing restorative justice measures and victim-offender mediation within the Norwegian penal systems.

1.4 Influence of international standards

The first steps towards implementing and establishing restorative practices as a means for responding to offending were made at a point in time where international standards on restorative processes, practices and outcomes had not yet been developed. The processes leading up to the passing of the Law on Mediation in 1991 came prior to the majority of the relevant international instruments. However, in the later years the international standards have been discussed and there is currently debate concerning the pros and cons of implementing the different standards from the European Council's Recommendation No. R (99) 19. This discussion is referred to later in this paper (see *Section 4* below).

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

The Law on Mediation is open for civil matters as well as for penal matters, and there is no limitation as regards the age of persons who are eligible. Logically, for penal matters the offender must be over 15 years of age, as this is the minimum age for criminal responsibility in Norway (the case can still be investigated if the offender is younger, but there is no charge, and the police may notify the child welfare services). For an offender below the age of criminal responsibility the case is classified as a civil case, and if not resolved by mediation there will be no further consequences in the criminal justice sphere.[20] If either party is under the age of majority (18 years) a parent or legal guardian must also consent to mediation and also has the right to be present during meetings. There is no separate juvenile justice system in Norway, and VOM is part of the justice system in general.[21] This paper will therefore not maintain a strict structural distinction between the measures for adults and juveniles as in the majority cases the same provisions and procedures apply. The only specific measure for juveniles is the new measure whereby a young offender can be referred to the NMS upon conviction in court (see below).

19 *Pabsdorff* 2010.

20 *Kemény* 2005.

21 *Ibid*, p. 3.

The NMS receives cases both from prosecutors transferring cases from the penal system, from civil cases brought to VOM by the parties involved, or by the municipality or by private parties,[22] or as a result of the courts making mediation a condition in a suspended sentence (an opportunity that is rarely used).[23] The law has a broad understanding concerning which matters may be mediated by VOM. This includes matters which would otherwise qualify for fines, the dismissal of criminal proceedings or conditional prison sentences.[24] Theft, vandalism, and assault/battery where there has been a prior conflict between the parties, are amongst the types of offences considered suitable for VOM. Because the Norwegian structure regarding restorative justice is first and foremost organised trough the mediation system, and not trough the traditional justice system, I will only in part follow the structured outline in this section of the paper.

In Norway, there is a clear link between the penal system and the mediation system, at least in the early stages of a case. When a case is brought to the police, the offended is to be asked if he/she would consent to victim-offender mediation, rather than following the traditional path through the justice system. If both parties consent to mediation, and we are dealing with a penal matter, the prosecuting authority of the police makes the decision whether a case is suitable for the mediation system (the conditions for suitability are not defined by law). If the case is not regarded as suitable by the prosecuting authority the case will not be transferred. The parties may still contact the Mediation Services and ask for mediation, though this rarely occurs. In civil matters, the NMS decides whether to mediate the case or not. In penal matters, referral can only take place when guilt is considered proven, because of the demand that the parties must, before the mediation process takes place, have a somewhat mutual understanding of the facts of the case. This implies that the recommendation of the Council of Europe, stating that participation should not be regarded as admission of guilt, may be discussed. However, this is said not to be a problem in the practice of mediation. The demand that both parties agree on the main facts of the case implies that in most penal cases the offender has admitted to the facts.[25] Also, if one party withdraws from the mediation process, the case will be transferred back to the court, and the question of guilt will be dealt with as in a "new" case. Both parties must consent to mediation, as the principle of voluntarism states. Another demand for transferring the case to the mediation system is that the case should be considered suitable. This means that it is believed that the case will be have a positive and preventive effect for the

22 *Paus* 2009.

23 *Libell* 2011.

24 *Paus* 2009.

25 *Strandjord et al.* 2011.

offender, while there are no strong considerations of general deterrence speaking against referral to the NMS.[26]

VOM has its legal basis in the Law on Mediation from 1991. There have also been regulations in 1992 and a circular letter from the Director General of Public Prosecutions in 1993.[27] *Kemény* also shows how the Criminal Procedure Act of 1998 gives the prosecution authority at the police level the possibility to refer a case to the NMS.[28]

There are especially two aspects of the Norwegian mediation system which could differ from many other systems in Europe. One is that mediation is carried out by volunteers, the other, and perhaps the one which influences this part of the paper the most, is the fact that mediation is not regarded as punishment, but as an alternative to such measures.[29] This affects who transfers cases to mediation, and how the mediation is carried out. This is also why the court is not asked to approve of the agreement made by the parties. If a case is transferred to mediation, in general, it is out of the criminal justice system as such – there are some exceptions to this, as shall be shown below.

2.1 Pre-court level

Mediation boards *can* be used both as a substitute and as a complement to the traditional criminal procedure *at a pre court level*. *Kemény* points out that mediation cannot really be regarded as available at all stages of the criminal justice process, as this is such a rarely used option at the pre-court level. If a case is to be mediated before sentencing or before the investigation is finished, it is made explicit that the mediation service does this on a purely civil basis.[30] *Kemény* states that this rarely used possibility of mediation before sentencing or the finishing of investigation is only found in very few cases, and that these cases are brought to VOM by the parties themselves.

If a case is successfully mediated there will be no further legal proceedings. Though, if one party is no longer interested in continuing mediation, the case is transferred back to the regular prosecution system. The aim is for the victim and the offender to reach a mutual agreement that is co-signed by the mediator. If victim-offender mediation is completed, both parties sign the agreement and neither of the parties withdraws within the time limit set for reflection (one week after the mediator has accepted the agreement), the case is closed and no longer

26 Director of public prosecutions' circular letter nr 4/2008, cited in *Pabsdorff* 2010.

27 *Kemény* 2005.

28 Ibid.

29 *Kemény* 2005.

30 *Kemény* 2005, p. 6.

in the justice system, as long as the agreement is adhered to. The prosecuting authority may only continue with criminal justice proceedings if there is a significant breach of the agreement. If the mediation is successful, there will be no entry in the offender's criminal record.

The so-called *Grand Meeting* is another form of restorative practice offered by the NMS. Such meetings are suitable for the same kinds of offences as the mediation boards, but the number of offenders and victims may be higher than in traditional victim-offender meetings. 37 meetings were arranged in 2009 throughout the country, but the aim is to increase the use of such meetings.[31] These meetings are more extensive than the traditional mediation meetings as they include a larger group of people. This can also be a measure when a larger group of youths has offended together and where it is unclear who is in committing the crimes and who is "only hanging around", i. e. when the question of individual guilt is not proven or relevant.

2.2 Court level

Kemény states that only a very small number of cases are referred to the NMS by the court or by the probation services.[32] § 52.3 of the Law on Mediation states that mediation can also be used as a special condition in suspended sentences, and may as such function as a supplement to criminal court proceedings and sanctions. This indicates that the mediation process takes place in a case which is also a penal matter in the justice system. This has been the case in some domestic violence cases, both as a supplement to court proceedings, but also as a measure when the offender has been given restrictions by the police or the court, and may not make contact with the victim.[33] Judges may thus refer a case to VOM with the parties' pre-trial consent.[34] Mediation as a condition of suspended sentences is a possibility, but one that is rarely used, and *Holmboe* has raised the question of whether or not this is a forgotten possibility.[35] Victim-offender mediation can also be an element of community sentences, where mediation is carried out alongside the community sentence, but this too is used only rarely in practice. This has been a possibility since 2001.[36]

A new form of intervention for youths aged between 15 and 18 years is currently being piloted, starting with four counties of Norway in 2010, and with

31 NMS website: *www.konfliktraadet.no.*

32 *Kemény* 2005.

33 *Paus* 2009.

34 *Kemény* 2005.

35 *Holmboe* 2011.

36 *Kemény* 2005, p. 4.

eight more counties and municipalities following in 2012. Building on the so called "Follow-up Teams", mentioned in *Section 1.1*, this measure is defined as a *Grand Meeting for Youth with a Youth Plan*. This special form of grand meeting is a voluntary alternative to traditional criminal justice that aims to reach young people who have committed serious and/or repeated crime, and who are at a high risk of reoffending.[37] This sort of conferencing is called "stormøte". The youth is convicted in a regular court room, but the case is then transferred to the NMS if the offender agrees.[38] The young offender is closely supervised by a team consisting of representatives from the NMS, the justice system and social services (departments with a joint responsibility for the young offender). The aim is to prevent the development of a criminal career and to support the young offender in making positive progress in his/her development. The focus of this particular form of Grand Meeting is somewhat different from traditional victim-offender mediation. The aim is reconciliation, understanding and restoring the harm done, and coming to an agreement with the youth, similar to how things are done in VOM. One difference is that the victim him/herself is not necessarily present and that, instead, the role of victim is filled by the community representatives present. The agreement is also a plan of action which may consist of requirements regarding school, drug control, work, follow-up dialogues and so on. The plan is made for a specific period of time, and if the plan is not carried through by the youth, the result may be a traditional form of sentencing.

There can be said to be elements of restoration in sentences to community service (constituting a form of reparation to the community at large through work), and in civil cases where the court mediates between the parties. However, regarding the former, community service is a form of punishment that does not involve a restorative process as such, and regarding the latter, it is not victim-offender mediation as such, does not involve an impartial facilitator or mediator, and is not connected to the NMS.

2.3 Restorative justice elements while serving sentences

Bringing this overview of forms of restorative justice in penal matters in Norway to a close, the last point of interest is the use of restorative processes and practices in prisons. In Norway, such practices have to date been limited to pilots in a select few prisons. The experiment began in 2003 in a prison in the small municipality of Arendal, and was later extended to other prisons nearby. The aim of the pilot is to make it possible for inmates to resolve unsolved conflicts prior to their being released. In this process mediators arrange meetings

37 NMS website, *www.konfliktraadet.no*.

38 *Ibid*.

for inmates, providing them with information regarding the possibilities of mediation. Inmates can then receive support if they wish to meet their victims, witnesses or other persons with whom they are in conflict.[39] There is currently a desire on behalf of the Government to expand the use of such processes, and there is an ongoing inquiry based on a report to the Norwegian Parliament, called "Punishment that works", discussing how this can be achieved.[40] These experiments are also carried out by the NMS in collaboration with the prisons.

3. Organizational structures, restorative procedures and delivery

A brief overview of the mediation process after a case has been transferred can be summed up shortly: during mediation the offender, the victim and the mediator come together. In advance, the mediator will have spoken to both of the parties, and neutrally help the parties find a mutual agreement. Sometimes the parties meet only once, while in other cases more than one meeting can be necessary. The goal is to reach a mutually satisfactory agreement between the parties. The agreement may imply monetary compensation, reconciliation, work, a symbolic gesture or a blend of these. This is then written down, signed by the parties and the mediator, and if the agreement is adhered to, and neither party withdraws within the one-week time limit, the case is closed and there are no entries on the offender's criminal record.

Since the implementation of the Law on Mediation in 1992-1994, the NMS has been under the Ministry of Justices' civil division[41], and since 2004 it has been a fully state-run organization. The NMS is financed through its own post in the state budget, and is fully funded by the State.[42] *Kemény* shows that the legislation makes it compulsory for the municipalities to run the Mediation Services, thus making implementation rather easy.[43] She finds though, that the restraint exerted by a circular letter from the Director General of Public Prosecution in 1993, stating which cases are deemed "suitable", and that less serious offences are regarded as such, is problematic.

The Law on Mediation states that a coordinator is responsible for the mediation services, the offices differ in size, from one to ten full-time employed coordinators.[44] At these offices the cases are administered, and they organize

39 *Hydle* 2005, cited in *Pabsdorff* 2010, p. 51.

40 NMS website: *www.konfliktraadet.no*.

41 *Paus* 2004.

42 *Kemény* 2005.

43 *Ibid*.

44 *Ibid*.

the mediation carried out by the volunteers. There are 22 regional mediation offices that each serve approximately 22 municipalities, and a total of about 650 mediators in Norway.[45]

The mediators are local volunteers appointed for four year terms by a group consisting of representatives from the municipality, the NMS and the police. In order to become a mediator one has to be a Norwegian citizen over the age of 18 and have received training from the NMS.[46] There are some restrictions as to who can be a mediator if the applicant has prior convictions: more than five years must have elapsed since the sanction resulting from the conviction was carried out, and in case that sanction was a sentence to imprisonment, more than ten years must have passed since sentence was served. After applying for the position as mediator the applicants are interviewed and, if found suitable, offered a course in mediation arranged by the Mediation Service at no expense to the mediators, as well as gatherings for mediators and guidance during the course of their period as mediators. Employees of the police or prosecution authorities cannot apply to be mediators, nor can people in certain higher posts in the public sector. Who can become a mediator is regulated by the same law that also defines who can run for elections in municipalities. Since the Law on Mediation states that mediators should be laity, they are chosen based on their general suitability, and not on their education or professional position. As a mediator one recievescounselling by the Mediation Service. In choosing suitable mediators, the intention is for them in their totality to reflect the general population as such, though it must be said that mediators with immigrant background are underrepresented.[47] Each volunteer mediates in about 1.5 cases per month, and in complicated cases there might be two mediators present.[48] The remuneration that mediators receive is not very large, they are paid by the hour and mediation is carried out in their spare-time, and the activities are regarded as a duty to the local community.

There is still dynamic debate concerning restorative justice in Norway, and there are several on-going experiments and current proposals showing us the vivacity of the field. In 2011, a report was delivered to the Ministry of Justice,[49] titled “Increased Use of Mediation Boards”. The key focus of the report was on how to increase the use of mediation boards, to address questions regarding lawmaking concerning the organisation and principles of mediation boards, and to prevent these forms of restorative justice from becoming just another penal

45 *Ibid*.

46 *Paus* 2009.

47 *Ibid*.

48 *Kemény* 2005.

49 *Strandjord et al.* 2011.

system. The report examines the existing forms of restorative justice, points to new areas and contexts in which RJ may suitably be implemented and also raises the issue of a possible new law on mediation. The outcome of this report is expected to be presented as a proposition for a new law in mid-2014.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

Statistics provided by the Ministry of Justice and analysed by the Mediation Service[50] show us which types of cases are brought to the Mediation Services: An analysis of the cases from the year 2001 shows that 11,888 persons below 18 years of age were charged with criminal offences, as were another 23,314 in the group from 18-24. In the same year, 5,520 cases were received by the Mediation Services, and 2,598 of these involved an offender below the age of criminal responsibility. The rest of the cases can be divided into three groups: in 2,069 cases the offender was aged 15-17, in 700 he/she was aged between 18 and 24 and in 153 cases the offender was aged 25 or older.[51] This shows us that even though mediation is meant to be for all ages, the great majority of offenders are still juveniles and young people.

When it comes to the type of case mediated in 2001, the two dominating forms of offending were vandalism (23%) and shoplifting (21%) (ibid.) – crimes that are typically committed more frequently by young offenders. Among the other types of cases we find violence (10%), serious theft (7%), common theft (7%), bullying, defamation and menace (threats/nuisance) (5%), economic crimes (5%), other crimes (5%), neighbour disputes (4%), other conflicts (4%), family disputes (3%), burglary (2%), stealing motor vehicles (1%) and a combination of several offences (1%).[52]

Roughly half of the cases dealt with by the NMS are civil matters, and half are penal matters.[53] 80% of the cases between 1994 and 2007 came from the police prosecution authorities, the courts transferred 41 cases as a condition for suspended sentences, and 44 cases were a part of sentencing to community service (absolute numbers). The total number of cases varied between 3,272 in 1994 and 9,120 in 2007.[54]

50 From *Kemény*, 2005.

51 *Ibid*.

52 *Ibid*., p. 10.

53 *Paus* 2004, p. 19.

54 *Ibid*.

Kemény further shows that about 4,500 of the cases in 2003 were actually mediated, of which 91% resulted in an agreement, and 95% of the agreements were fulfilled. In terms of the elements of the agreements, they were dominated by forms of monetary compensation (41%), different forms of work (21%), reconciliation with the victim (21%), a combination of monetary compensation and work (7%) and miscellaneous (10%).[55]

4.2 Findings from implementation research and evaluation

According to *Kemény* the mediation services themselves have evaluated and discovered that a high percentage of parties are satisfied with the mediation, in an evaluation initiated by the Ministry of Justice in 1996 (referred to by *Kemény*) 98% of the offenders would recommend mediation to others, as would 95% of the victims, but she also points out a lack of research into recidivism. While some student work has been done, the results it has yielded cannot be regarded as statistically significant. She points out nonetheless that this research has shown the same findings as international studies, in that "it seems as if recidivism is slightly lower with VOM than with the traditional penal responses", but reliable knowledge here is only very limited.[56]

When discussing the implementation of different international instruments, I choose to refer to the discussion by *Strandjord et al.*[57] In their report, commissioned by the Norwegian Government, they compare Norwegian restorative justice practice with international recommendations from the European Council and UN. The report is the result of a working group given the task by the Department of Justice to look at the possibility of an increased use of restorative processes and practices in Norway. They discuss seven articles from the European Council's "Recommendation No. R (99)19 of the Committee of Ministers to Member States concerning mediation in penal matters". The articles discussed are: free consent (art. 1), confidentiality (art. 2), that participation in a restorative process should not be regarded as proof of guilt (art. 14), the right to restorative justice at any stage of the penal process (art. 6), the right to apply for legal assistance (art. 8), the right to interpretation (art. 9) and finally that the prosecution authorities should decide which penal matters should be solved through mediation. This discussion shall be elaborated in a little more detail here, as it will probably be the basis for any future changes in the Norwegian law regarding mediation.

Regarding the principle of free voluntary consent, and the possibility for both parties to withdraw from the process at any time, the Norwegian Law on

55 *Ibid*.

56 *Ibid.*, p. 11.

57 *Strandjord et al.* 2011.

Mediation states that both parties must consent throughout the entire process, which implies that they can withdraw at any time. This also applies to agreements between the offender and the victim. Making such agreements is voluntary in Norway, and the report by *Strandjord et al.* sees no reason to make this a part of the law.[58] The Law on Mediation states that the agreement made cannot favour one party beyond reason – otherwise the mediator cannot accept the contract and is forced to reject it. If one or both parties regret making the contract, they can withdraw within one week, starting when the mediator accepts the agreement.

The second question raised in the report by *Strandjord et al.* is that of confidentiality. In contrast to a public court process, mediation is of a private character. In the Norwegian Law on Mediation and the Administration Act, only mediators and those working for the NMS are governed by this, while public employees are governed by their obligation to maintain secrecy. This problem is also the reason why the report wants to prohibit employees of the police from being mediators.[59] The working group that drafted the report does not wish to restrain other authorities' use of information gathered from the mediation, as they state that some of the intention for "grand meetings" and "follow-up teams" is that information may be shared by the parties, public and private networks. They accentuate the importance for the parties to be informed of this prior to the meeting, including information regarding the police's possible use of information concerning legal offences. If the Child Care Service is present, information must be given concerning their right and duty to use information concerning the living-conditions of children. The report also points to the fact that only the discussions should be confidential, while actions occurring in the course of mediation should not, an example being if one party hits the other. The exception in the Council of Europe's article, regarding the mediators role when information of imminent serious crimes comes to light, is reflected in § 139 of the Criminal Code, which states exceptions from professional secrecy. There are no restrictions regarding what parties to VOM may report in a later court case.

The third article discussed is the recommendation that participation in a restorative process should not be used as evidence of an admission of guilt in legal proceedings (art. 14). This is not explicitly stated in Norwegian law, as the mediation process is based upon the premise that both parties are in agreement of the facts of the case, and this implies that the person charged has admitted to the actual conditions and accepts the role of "offender" in VOM. This however should not be regarded as an admission of guilt. The report states that this has not been a problem in practice.

58 *Ibid*.

59 *Strandjord et al.* 2011.

The fourth article discussed is the right to mediation at any level of the criminal procedure (art. 4). This is discussed in the report, and the recommendation is that this should be established by law.

The fifth article discussed in the report is article 8 of the Council of Europe's Recommendation from 1999, regarding the right to legal assistance. In the report, this is understood as a right for the parties involved to apply for legal assistance, but it does not meant that the authorities have a duty to put this into action. Norwegian law does not explicitly state the right of the parties to apply for legal assistance, but it is still a fact that this can be done. Since one of the basic principles of mediation is not to involve professional participants, such as lawyers, the parties cannot use an attorney in the mediation meetings. They must solve their own conflict together with the mediator. Still, the working group's report claims that legal assistance could in fact be called for when more serious matters are dealt with in mediation processes. They propose to establish the right to legal assistance by law, but without effecting that lawyers are present during the actual mediation process.

They also discuss the right to an interpreter as stated in the Council of Europe's art. 9, and conclude that this right is met by § 22 of the Norwegian Law on Mediation.

The final article discussed in the report is the recommendation that the criminal justice authorities should decide which penal matters should be dealt with through mediation. In Norway, this means the prosecution authorities or the court of justice. This is also clearly stated in Norwegian law. They wish for this practice to continue, and are thus sceptical towards a recurring proposition from Norwegian discourse on mediation, namely that all matters where court proceedings are not an alternative, due to the low age of the offender, should be transferred to victim-offender mediation, as there is a need for judicial assessment regarding which cases are suitable for such mediation. There has been some criticism claiming that the mediation system has become an elongation of the penal system (net-widening), catering for a large number of young offenders who have committed smaller offences and against whom proceedings would otherwise not have been instituted anyway.[60]

5. Summary and outlook

Studies on restorative justice and victim-offender mediation in Norway are somewhat limited. Evaluations have been conducted in 1990 and 1996, some of the findings have been presented above,[61] but very little work has been done on recidivism, though the findings from some student research have shown

60 *Strandjord et al.* 2011.

61 *Kemény* 2005.

similarities to those of international studies.[62] *Pabsdorff* elaborates on the discourse of restorative justice and victim-offender mediation.[63] In recent years though, there seems to have been a rising interest in the development of new measures based upon restorative justice. Examples of this are the trials with victim-offender mediation in cases of violence in close relations[64] and the possibilities of mediation services in schools.[65] *Holmboe* raises the question of an increased use of mediation as a condition of suspended sentences.[66]

There are relevant critiques of mediation and how it is working in Norway. Some point to fundamental dilemmas regarding ideology and the possibly problematic demands facing the victims, and the difficulties concerning power and inequality and how this can affect the mediation process and its outcomes. Other critiques state that the number of cases is too low, and that the cases mediated only involve minor offences.[67] Another dilemma has been that the large amount of cases where the offender is under the age of criminal responsibility is too high, thus indicating that mediation is a supplement of, rather than an alternative to, the regular system of criminal justice and could have net-widening effects. Another challenge has to do with the fear of constructing another system of professionals and experts, thus withdrawing from the ideas in *Christie's* "Conflict as Property",[68] the owners of the conflicts, the parties and the communities.[69]

The Mediation Services are currently involved in many projects, trials and measures, which were non-existent some years ago. The ideas of restorative justice can thus be said to be alive and active in the development of new actions both in and alongside the criminal justice systems. The report by *Standjord et al.*[70] that the Government commissioned at the time shows that there is a desire for more extensive use of victim-offender mediation, and for developing the existing measures even further. At times the actions and the criminal justice system are closely linked, at others mediation fills gaps in this system, and sometimes it deprives this system of cases which used to be regarded as non-suitable for mediation.

62 *Ibid*.

63 *Pabsdorff* 2010.

64 *Elvegård et al.* 2011.

65 *Welstad/Herlofsen* 2012.

66 *Holmboe* 2011.

67 See *Kemény* 2005.

68 *Christie* 1977.

69 *Pabsdorff* 2010.

70 *Standjord et al.* 2011.

References:

Christie, N. (1977): Conflict as property. In: British Journal of Criminology, 17 (1).

Christie, N., Dullum, J. (1996): KonfliktrådeneOslo: Instituttforkriminologi, UiO.

Elvegård, K., Frigstad, S., Thorshaug, K. (2011): Tilrettelagtesamtalerved-familievold: evalueringavfamilievoldprosjektettilkonfliktrådeti Trondheim Trondheim: Mangfoldoginkludering, NTNU Samfunnsforskning AS.

Garland, D. (2001): The Culture of Control: Crime and Social Order in Contemporary Society. Chicago: University of Chicago Press.

Holmboe, M. (2011): Konfliktråd som vilkår for betinget dom: en glemt mulighet? In: Tidsskrift for rettsvitenskap, pp. 1-5.

Kemény, S. (2005): Victim-offender mediation with juvenile offenders in Norway In: Mestitz, A., Ghetti, S. (Eds.): Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries. Dordrencht: Springer Netherlands.

Libell, H. P. (2011): Bruker ikke konfliktrådsmegling. Available: www. juristkontakt. no/nyheter/bruker-ikke-konfliktrådsmegling.

NMS Website: Available: www.konfliktraadet.no.

Pabsdorff, M.-L. (2010): Rom fordialog: omkonflikthåndteringoggjenop-prettenderett. Institutt for kriminologiogrettssosiologi, Detjuridiskefakultet, UiO.

Paus, K. (2004): Victim-offender mediation in Norway. Paper from The European Forum for Victim-offender Mediation and Restorative Justice, 27-29 October 1999, held in Leuven, Belgium.

Paus, K. (2009): Restorative justice iNorden, regelverkogiverksetting. In: Johansen, P. O., Nilsen, M., Wårum, M. (Eds.): Restorative justice in the Nordic Countries. NSfK's 22. Contact Seminar 2008, Reykjavik, Iceland. Conference report.

Strandjord, K., et al. (2011): Øktbrukavkonfliktråd [Increased use of mediation boards].Oslo: The Department of Justice and Police.

Welstad, T., Herlofsen, C. (2012): Konfliktrådiskolen. In: Jakhelln, H., Welstad, T. (Eds.): Utdanningsrettsligeemner: artikler med utvalgtetemafraskoleogutdanningsrettensområde, Oslo: CappelenDamm.

Poland

Wojciech Zalewski

1. Origins, aims and theoretical background of restorative justice

1.1 Overview of forms of restorative justice in the criminal justice system

It is known that there is no single notion of restorative justice, just as there is also no single model of lawsuit and no one theory[1]. In the case of restorative justice there are two possible approaches – a narrow one and a wide one. In case of the narrow approach, restorative justice can be defined as a group of institutions complementary to the traditional model of the judiciary and ways of overcoming problems resulting from offences with active participation of all concerned parties, especially with the victim and the offender. A wide definition, on the other hand, essentially equates restorative justice to all criminal law institutions that serve to carry out a compensatory function.

In Poland, when restorative justice is understood in the narrow sense, it is generally limited to mediation. Up until now other restorative processes and practices like restorative conferences have been held only incidentally and experimentally. When restorative justice is defined widely, however, it appears that there are many legal institutions that are connected to repairing the harm caused by offences. In this regard, polish substantive criminal law stipulates:

- the duty to redress the caused damage as a punitive measure (additional penalty) (Article 46 Criminal Code);
- damages or "smart money" as a punitive measure (additional penalty) (Article 47 Criminal Code);

1 *Ashworth* 2002, pp. 578 f.

- a number of probation conditions of compensatory character: redressing the damage as a measure of probation, apology to the victim, obligation to provide maintenance (Article 72 Criminal Code);
- the court is obliged to take into consideration attempts of the offender to redress the damage (active repentance) when imposing a penalty (Articles 15 Criminal Code);
- the Law also provides for a so-called "adhesion claim" (Article 62 Criminal Procedure Code) and for the awarding of damages *ex officio* (Article 415 § 5 Criminal Procedure Code).
- Since 2005 there has also been a limited and accessorial possibility for claims to be vindicated on the part of the State (a form of Crime Victims Compensation Fund).

A large number of compensatory measures brings with it various interpretation problems and problems in the application of the law.

1.2 Reform history

The notion of mediation first appeared in Polish law in 1991 in labour law in the "Act on the Settlement of Collective Disputes". The next stage of changes in law was preceded by an experimental pilot programme which referred to juvenile proceedings, where mediation was introduced. However, the programme was carried out 'next to' the functioning traditional institutions of juvenile law.

Mediation in Poland was introduced with the participation of non-government institutions. In 1995 the "Team for Introducing Mediation in Poland" started its work in cooperation with several non-government organizations. The Team was supported by the Heinrich Böll Foundation from Cologne, Germany, and was based on the work of volunteers and cooperated with authorities in the field of law. In 2000 the Team was transformed into the independent non-government association named the "Polish Mediation Centre".

The course of the experiment was as follows:[2] In September 1995 the 'Experimental Program of Mediation between the Juvenile Offender and the Victim' was elaborated. In October 1995 the project was approved by the Ministry of Justice, which expressed its permission for the project to commence in March 1996. The Ministry recommended mediation for Family Courts and confirmed to support such initiatives. The Family and Juvenile Department of the Ministry of Justice promoted the idea of mediation during nationwide trainings for judges who adjudicate in family and juvenile matters, and during trainings for the staff of juvenile detention centres. Five experimental mediation centres were set up, one each in Zielona Góra, Skarżysko Kamienna, Piła, Poznań and Warsaw. In 1998 three further centres were established in Brodnica,

2 *Bieńkowska* 1995.

Lublin and Żory. Mediation was to be conducted outside of court buildings – mediation centres used premises offered by: 1) local authorities (Zielona Góra, Skarzysko Kamienna), 2) non-government institutions ('Patronat' Warsaw Association) and 3) diagnostic and consulting centres (Piła, Poznań).

In the course of three years of the experiment 110 mediation proceedings were held with the participation of 174 offenders. The perceived positive results and effects of the experiment (see *Section 4.2* below) resulted in an amendment of the juvenile law and the introduction in the year 2000 of Article 3a to the 1982 Act on juvenile proceedings.[3]

It is a paradox that the introduction of mediation in adult criminal matters (i. e. offenders aged older than 17) was not preceded by any form of pilot programme. Rather, the decision to introduce mediation to criminal proceedings was made quickly while working on the new Codes. It is worth underlining that the government draft Criminal Procedure Code of 18 August 1995 made absolutely no mention of mediation at all.[4] Rather, mediation appeared only in the final version of the Act from 1997. In December 1996 a "Team for Introducing an Experimental Program of Mediation between the Victim and the Offender" was appointed, but its activities were never implemented and thus the experimiental programme never actually took up work in practice. It seems that the positive recommendations and results of the experiment in juvenile matters were sufficient for legislators.

The positive results of the pilot-programme in the context of juvenile offenders gave rise to introducing mediation procedures to the new Criminal Code and Criminal Procedure Code in 1997. Both Codes came into force in 1998, which means that mediation has been available in Poland in criminal law for 16 years.

Polish regulation was accepted top-down in the whole country, without any great publicity for the issue and without preparing the relevant staff suitably. Up until the end of 1999, 212 mediators[5] had undergone training in one-day or five-day courses. At first, in criminal law there was no obligation to undergo any sort of training. However, it seems the weakness of the so-called third sector (NGO) was and still is the biggest problem. It is a well-known fact that restorative justice requires social involvement. Meanwhile, Polish social organizations that deliver mediation are still very weak despite great commitment and devotion of the individual entities. There is not enough support from the state, local authorities and the private sector. Mediation organizations started competing with one another to increase their caseloads, which according to mediators has

3 Compare *Waluk* 1999, pp. 106 ff.; *Czarnecka-Dzialuk* 1999, pp. 121 ff.

4 See Government Bill Criminal Procedure Code (print no 1,276 dated August 18th 1995-08-18).

5 *Waluk* 1999, p. 109.

had the effect of worsening the conditions of the mediation movement, instead of improving cooperation and looking for wider support together.

1.3 Contextual factors and aims of the reforms

As already stated above, mediation first appeared in the Criminal Code and the Criminal Procedure Code in 1997. The prepared criminal regulations had a specific purpose and context. Apart from the obvious goal of modernizing legislation, the authors faced a bigger challenge to cut off from the communist past and from the tradition of harsh penalty.

The changes in law aimed in a few directions. Firstly, the repressiveness of substantive criminal act was commuted, forinstance by abolishing forfeiture and capital punishment (which had not been executed since 1988 following a moratorium). Mitigation of punishment was introduced for over two hundred types of offences.[6] Non-custodial penalties were ordered to be used (fines, non-custodial alternative sentences) before prison sentences. Automatically regarding prior convictions as an aggravating factor in sentencing was abolished. The catalogue of punishment measures was expanded by compensatory interventions – the duty to redress the caused damage, and paying damages or "smart money" according to Art. 47 CC were introduced. Secondly, civil guarantees in criminal proceedings were increased. The reform of regulations dealing with pre-trial detention is especially to be mentioned. Thirdly, procedural safeguards for the injured party were increased in the criminal proceedings. Finally, mediation was introduced.

It can be said that the introduction of elements of restorative justice was an excerpt of a wider, coherent legislative idea of prosecutors and judges taking the interests and views of victims more into account in their sentencing decisions. However, the interest in the injured party had a wider context than only victimology. The fight for the rights of the victim was an element of the course of events in the fight for human rights. In Poland there are many organizations that offer help to victims. Definitely, the Polish Mediation Centre (PCM) has the greatest services in promoting the idea of mediation. However, movements for the benefit of victims of crimes have not been very strong in the last twenty years and in their history they have sometimes had populist character. They appeared *ad hoc,* and organized the public opinion around a chosen traumatic event, like, for instance, a serious crime.[7]

---

6 In 131 cases the maximum sentences were lowered, in 203 cases the minimum sentences were lowered, in 50 cases both the maximum and minimum sentences were lowerded, and in eight cases the death penalty was abolished, see *Kochanowski* 2000, p. 18.

7 The *Jolanta Brzozowska* Association against Crime is the most well-known example. 22 year old *Jolanta Brzozowska* was murdered on 19 January 1996 in Warsaw (district of

As far as the academic context of introducing restorative justice to Polish criminal law is concerned, it has to be underlined that there are academics who were dealing with victimology long before the 1997 Codes were introduced. But the institution of mediation appeared only in the course of the parliamentary work through intercession of the involved people, including *Dr. Janina Waluk.*[8] The academic interest in the problems of victims was the intellectual backup of the carried out changes and the support for social organizations.

Certainly, one of the purposes of introducing restorative justice was to seek alternatives for the prevailing system. It is an important task to persuade practitioners that the new law – with its focus on diversion as a means of avoiding imprisonment – is better than the old, communist, oppressive law. Meanwhile, the judiciary followed the beaten track. The number of mediations in Poland has oscillated in recent years around 5,000 a year. It means that restorative justice has not had a chance up until now to become a real alternative to the traditional methods of the judiciary. The current limited interest in mediation should be seen in a wider context. In Poland, non-custodial penalties (fine, non-custodial sentence) are rarely applied. In spite of the progress that has been made, the traditional, repressive attitude still prevails.

Although the changes are occuring slowly, they nonetheless have a permanent character, as the structure of convictions has changed. The number of sentences to imprisonment has been reduced to one third from 1990 to 2008: while in 1990, at the beginning of the system transformation, the coefficient of prison sentences had been 27%, in 2006 it had dropped to 9%, and after two further years, in 2008, it was at 9.1% (38,495), which indicates a certain stabilization at below 10%.[9]

1.4 Influence of international standards

International standards have played a major role in the context of restorative justice in Poland. Their role should be seen at two levels: 1) legislative and 2) persuasive.

At the legislative level, international instruments are considered to have an inspiring influence on legislators changing the law, and sometimes actually force changes in law. However, these changes do not take place simply and easily.

Tarchomin) according to the Rzeczpospolita newspaper of 25 January 2001. She died from injuries suffered from a baseball bat and a kitchen knife. The chairman of the association, *Krzysztof Orszagh*, was appointed Victims' Rights Spokesman (in the years 2000 and 2001) by the Ministry of Internal Affairs and Administration. In the elections in 2011 he was on the ticket of Nowa Prawica in the Bydgoszcz district.

8 *Płatek* 2009, p. 171.

9 See *Siemiaszko/Gryszczyńska/Marczewski* 2009, pp. 94 ff.

The criminal law reform from 1997 onwards was based on a different philosophy of penalization. The essential component of the changes was the enforcement of the position of the victim and 'privatization' of penalization in contrast to previous "nationalization". International standards played a great role in this change, to which references were made in the official *Statement of Reasons for the Draft Criminal Code,* which quoted the UN declaration from 29 November 1985, the European Convention of 24 November 1988 dealing with restitution and compensation for victims of crimes, as well as resolution 11/85.[10] The justification mentions the 'conflict' between the victim and the offender, but the word "mediation" is not used as such. It is not surprising as mediation was not mentioned in the Draft Criminal Code or the Draft Criminal Procedure Code. Instead, mediation appeared only in the very last stages of the parliamentary work, and the changes were prepared in haste.[11]

The history of implementing standards elaborated on the grounds of the European Convention on the Compensation of Victims of Violent Crimes from 1983 is an example for the influence of international law on changes in Polish criminal law. Poland has never ratified this convention although it has been a member of the Council of Europe since 1991.[12] One of the reasons for the delay was most probably the high costs connected with the necessity to set up state compensation funds for victims of crimes, as was also indicated in Statement of Reasons for the Draft Criminal Code.[13]

Resolutions of the convention were accepted by adjusting Polish law to EU requirements, especially to the Directive of the Council of the European Union of 29 April 2004 referring to compensation for victims of crimes. It was indicated in the justification of the State compensation system for victims of certain intentional crimes that its quick introduction is necessary due to Poland's accession to the European Union, where there is an idea of unified rules of state compensation for victims of crimes in all Member States.[14] Finally, on 7 July 2005, the Act on State Compensation for Victims of Certain Crimes was adopted (Journal of Laws No 169, item 1415). Although the act has been in force for almost 10 years it is still not particularly well known, evidenced by the small number of motions to courts for compensation to be granted in this way.[15]

---

10 Statement of Reasons for the Draft Criminal Code, 1997, p. 147.

11 Compare *Fajst/Niełaczna* 2005, book 2, p. 182.

12 See *http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=116&CM=8&DF=& CL=ENG*, status as of 6 April 2012.

13 Statement of Reasons for the Draft Criminal Code, 1997, p. 147.

14 Print No. 3859 dated 31 March 2005.

15 Compare *Janda/Kiełtyka* 2010.

International standards were also referred to when Article 3a of the Act on Proceedings in Juvenile Cases from 1982 was introduced; on the basis of the act the institution of mediation between the juvenile and the victim was established in 2001. In the justification of the government's draft of amendments to the act, it was underlined that the introduction of mediation is a sign of its acceptance as an alternative measure, and that it also meets the demands stated in international documents, for instance in UN resolution No. 40/33, Rule 11 (the so-called 'Beijing Rules').

A lot of research studies and works for the general public in Poland devoted to mediation and restorative justice in criminal cases refer to international standards. In particular, they emphasize that, while the majority of international standards are so-called "soft law", they nonetheless serve a persuasive function that can convince people of the significant role of restorative justice and its universal character.[16]

References to international standards also appear in the guidelines of the Public Prosecutor General[17] which, although not legally binding, constitute essential indications in the work of law enforcement bodies.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

2.1 Pre-court level

2.1.1 Adult criminal justice

The pre-trial proceedings in the Polish model of criminal proceedings are not adversarial – rather the inquisitorial system is in force. The public prosecutor is responsible for the proceedings and it is he/she who decides about the course of the proceedings.

The Polish model of pre-trial proceedings provides relatively few possibilities for the compensation of damages caused by crimes. It may be expected that at this stage the offender will redress the damage voluntarily in hopes of achieving a mitigation of sentence by the court, essectially taking advantage of the institution of active repentance (compare, for instance, articles 295, 307 of the Criminal Code). To benefit from the indicated regulations the offender should compensate the damages on his/her own initiative. The participation of the victim may be limited here to consenting to receive financial reparation or,

16 Compare *Ręka*s 2004 , pp. 6-7; *Bieńkowska/Kulesza* 1997.

17 Compare draft of Guidelines of General Prosecutor dated 21 February 2011 dealing with principles of proceedings in counteracting family violence, draft of guidelines dated 6 October 2011 dealing with mediation in criminal cases.

for example, to make it possible for the offender to "restore the previous condition" (*restitutio in integrum*).

There is a possibility of mediation in the pre-trial proceedings. The law makes no limitations regarding the types of offences for which mediation can be applied. According to § 1 of Article 23a Criminal Procedure Code 1997, in pre-trial proceedings, the public prosecutor – on his/her own initiative or upon a respective request or motion by the victim and the accused – may refer the case to a relevant institution or trustworthy person for mediation proceedings to be carried out between the victim and the accused. The mediation proceedings should last no longer than one month and the time of pre-trial proceedings is not included. This regulation is intended to guarantee that the time devoted to mediation does not exceed the short two month period within which the inquiry stage of the proceedings has to be concluded, and thus to prevent that prosecutors are discouraged from offering mediation.

According to Article 325i § 2 Code of Criminal Procedure, besides the prosecutor other authorities conducting inquiries (mainly the police[18]) are also entitled to institute mediation proceedings. Order No. 1426 of the Chief of Polish Police Headquarters dated 23 December 2004 contains a separate chapter 9 dealing with mediation. According to the rules in force the police officer is independent and is not obliged to inform the prosecutor about initiating mediation proceedings. The regulations impose the duty on the police to initiate mediations even in the prosecutor's investigations. Before initiating mediation the police officer informs the victim and the suspect about the course of mediation proceedings and the possibly resulting benefits thereof. It is indicated that the general criterion to initiate mediation proceedings is the interest of the injured person and the interest of the judiciary.[19] After informing the parties of the essence, aims and principles of mediation the police give the parties the necessary time to give the option of mediation due consideration and make a decision on whether or not to initiate mediation proceedings. Order No. 1426 of the Chief of Polish Police Headquarters states no specific time limits in this regard, as the whole mediation procedure is "unofficial" at this stage. Once it becomes "official" (i. e. the prosecutor makes the decision) the one month time limit stated above applies. The police may also send the suspect and the injured person to the mediator to be informed about the essence, aims and principles of mediation, but it has to be agreed with the mediator. Voluntary consent for mediation, which should be properly documented, is underlined in the police regulations.

---

18 According to Article 312 Criminal Procedure Code, the powers/entitlements of the police in this context are also bestowed upon: 1) bodies of Border Guard, the Internal Security Agency, the Customs Office and the Central Anti-Corruption Bureau, and also 2) by other authorities provided for by specific statutory regulations.

19 Compare *Dziugieł* 2011, pp. 14 ff.; *Matejuk* 2011, p. 14.

Police regulations referring to mediation in pre-trial proceedings prohibit the use of the mediator as a source of evidence. The mediator cannot be examined as a witness, and in particular, to confirm offence circumstances and collect evidence (§ 155 point 1 of Order No. 1426). The written report on the carried out mediation presented by the mediator together with the settlement, if reached, is enclosed to the records of investigation. The costs of mediation proceedings are covered by the police station, or by the respective prosecutor's office when the decision to initiate mediation was made (§ 155 point 3 of Order No. 1426) and when the mediation was initiated by the prosecutor.

The Order of the Chief of Polish Police Headquarters from 2004 also contains the general norm according to which the police, after initiating the mediation proceedings, carry out activities the need for which results from the mediation proceedings (§ 156). The range of activities is not directly indicated in the Order, but it is possible to provide legal order protection, including protection of the people taking part in the mediation by providing police presence in the premises where mediation is being carried out, especially when the injured person is afraid of the offender, but still regards mediation as necessary.

2.1.2 Juvenile justice

Polish juvenile proceedings are regulated by a separate Act from 1982 (the Act on Juvenile Delinquency Proceedings, AJDP). In Polish law any person under 17 is regarded as a juvenile. Juvenile proceedings are unique and differ in many points from adult proceedings. There are two differences from the point of view of the carried out analysis. Firstly, the interests of the juvenile, and not his/her punishment or even positive influence on society, are the basic purpose of the proceedings (Article 2 AJDP). Secondly, juvenile proceedings at every stage, also in the explanatory proceedings, are carried out only by the Family Court (Articles 15 and 16 AJDP). The task of the police is to collect and secure material evidence of punishable activities enumerated in the act, and only at the utmost urgency, and then forward the information to the Family Court (Article 37 sections 1 and 3 AJDP). Neither the police nor other investigatory bodies are entitled to initiate mediation in juvenile cases.[20]

Juvenile proceedings stipulate two ways of influence: didactic and corrective. *Didactic* or *educational* measure activities can be ordered with regard to juveniles who demonstrate moral corruption. Circumstances proving moral corruption are not expressly listed. For example, Article 4 AJDP mentions violation of principles of social existence,[21] committing a prohibited act, systematicaly

20 Compare *Klaus* 2004, p. 19.

21 "Social existence principles" are unofficial norms that underpin social bonds and social coexistence and cohabitation (for instance social traditions and customs). It should be borne in mind that the Polish AJDP was drafted and put into effect in the Communist era.

avoiding compulsory education or vocational training, consuming alcohol or other abusive substances leading to intoxication, prostitution, vagrancy, participation in criminal groups. The law provides a wide, open catalogue of didactic measures (Article 6), including: a warning; conduct requirements/prohibitions; requirement to repair damages/harm; delivery of an apology to the victim; undergo education or vocation; to avoid certain places or persons; to refrain from consuming alcohol or other addictive substances.

Among *corrective* measures, juveniles who have committed punishable acts can be placed in a detention centre for corrective training (Article 190 AJDP). The court may also use correctional measures if a juvenile is aged between 13 and 16 years and has committed a criminal act (an offence), shows a high level of demoralisation (maladjustment) and the circumstances and character of the offence are serious, especially where previously applied educational measures have proven ineffective. The correctional measures are: suspended placement in a correctional institution (the court can consider applying educational measures during the suspension or "probation" period), or unsuspended placement in a correctional institution. Correctional and educational measures are adjudicated for an unspecified time: their duration depends on the progress of rehabilitation, but they cannot be applied beyond a person's 21st birthday.

According to Article 3a AJDP the Family Court, on its own initiative or upon a motion or request from the injured person and the juvenile offender, may refer the case to a relevant institution or trustworthy person for the conduction of mediation proceedings. According to the Act, the Family Court may refer the case to mediation at every stage of the proceedings, and thus also during the explanatory proceedings. Secondary legislation to the Act[22] defines legal requirements. § 2 of the Order of the Minister of Justice of 18 May 2001 states that mediation proceedings are carried out, in particular, in matters where there are no doubts as to the essential circumstances and facts of the case. It is underlined in the literature that mediation proceedings cannot replace explanatory proceedings. The identity of the offender and the injured person, as well as circumstances of the event (such as time, place, particularities of the commission of the offence, approximate loss value) must be fixed. On the other hand, the law does not require that the juvenile confesses to having committing the act, which means that consenting to mediation does not have to be equated to an admission of guilt.[23] In essence, this means that mediation proceedings are generally possible at the final stage of the explanatory proceedings.

Formally, there are no legally prescribed or guaranteed consequences of successfully participating in mediation. In the end, it is up to the Family Court

22 Order of Minister of Justice dated May 18th 2001 dealing with mediation proceedings in juvenile cases (Journal of Laws 3001.56.591).

23 See *Gaberze/Korcyl-Wolska* 2002, pp. 31 ff.

judge to decide what weight should be attributed to successful VOM. Nor are there any limitations in terms of offence severity. Up until 2003, the law had stated that VOM was only applicable in cases of offences that could attract prison offences of up to five years.

Mediation is carried out only in case the juvenile committed a prohibited act, while the doctrine indicates that mediation should also be carried out in other manifestations of moral corruption (stated above).[24]

As can be seen, the Polish literature does not anticipate any other forms of restorative justice, for instance restorative justice circles or conferences, that allow for criminal matters to be discussed with a wider group of participants.

2.2 Court level

2.2.1 Adult criminal justice

As has already been shown, within a narrow definition of restorative justice, the basic form of restorative justice in Polish criminal law is mediation. In case of court proceedings it is the ruling court or the president of the court who refers the case to mediation at the preparatory stage to the trial. The conditions and principles of carrying out mediation are fixed by regulations dated from 13 June 2003 concerning mediation proceedings in criminal cases (Journal of Law No 108, item 1020).[25]

The positive course of the mediation proceedings may have different influences on or consequences for the final decision of the court. Firstly, in cases in which the injured person has reconciled with the offender, when the offender has redressed the damage or when the injured person and the offender have agreed on the way to redress the damage, the court may conditionally discontinue the proceedings (probation) when the offender faces a penalty not exceeding five years of deprivation of liberty (article 66 § 3).[26] It is a benefit for

24 Compare *Harasimiak* 2004, p. 5; Similarly *Górecki/Stachowiak* 2007.

25 Compare *Hofmański/Sadzik/Zgryzek* 2011.

26 There are three measures relating to placing an offender on probation in the Polish Criminal Code: 1.) Conditional discontinuance (Art. 66 CC), 2.) Suspended sentence (Art. 69 CC), 3.) Release on licence (Art. 77 CC). The court may conditionally discontinue criminal proceedings (Art. 66 CC) if the degree of guilt and the social consequences of the act are not significant, if there are no doubts about the circumstances under which it was committed, and if the attitude of the offender, who has not previously been penalised for an intentional offence, as well as his or her personal characteristics and way of life to date, provide reasonable grounds to assume that even if the proceedings are discontinued, he or she will observe the legal order, and particularly that he or she will not commit an offence. In principle: there will be no conditional discontinuance in cases of offences for which the statutory penalty exceeds

the offender, as in all other cases conditional discontinuance may be decided only when the offender faces a penalty not exceeding three years of deprivation of liberty. Mediation or redressing the damage thus increases the offender's chances of avoiding punishment.

In coming to a sentencing decision, the court is obliged to take into consideration the offender's behaviour after committing the offence, most importantly his/her attempts to redress the damage or to compensate the social feeling of justice in any other form, as well as the behaviour of the injured person. When awarding punishment, the court shall also take any positive outcomes from mediation between victim and offender or the settlement reached between them in the court proceedings or in the prosecutor's proceedings into consideration (Article 53 §§ 2 and 3).

The literature indicates that the real settlement with the injured person justifies the belief that there is no need to punish the offender. Settlement should result in the application of legal institutions and regulations that reduce criminal responsibility or that generally result in the renouncement of punishment with regard to the offender. It mostly refers to such mediations that ended in an agreement. In such cases, the aim of any imposed penal sanction should mostly be to facilitate or guarantee that said agreement is put into practice by the offender.[27]

Redressing the damage or attempts of the offender to compensate the damage should generally have an influence on the social assessment of the need for punishment. Such behaviours do not reduce the degree of guilt or degree of noxiousness of an act to society. Restoring the previous condition or payment of compensation are simple legal consequences of committing the prohibited act. Only freedom of decision to redress the damage and a real will to compensate for the harm caused can have an actual influence on sentencing. On the other hand, a lack of attempts to redress the damage by the offender cannot be treated as an aggravating circumstance. Such a thesis results from the belief that all circumstances within the right to defence cannot have adverse effects on the offender.[28]

Mediation and redressing damage can be the basis for an extraordinary mitigation of punishment. According to article 60 § 2 Criminal Code, the court may also apply extraordinary mitigation of punishment in well-grounded cases when even the lowest punishment provided for the offence would be disproportionally harsh, in particular: 1) when the injured person has reconciled

three years' imprisonment. But: If the aggrieved party has been reconciled with the offender, the offender has redressed the damage, or the aggrieved party and the offender have agreed on the method of redressing the damage, conditional discontinuance may apply to an offender of an offence for which the statutory penalty does not exceed five years' imprisonment (§ 3 Art. 66).

27 Compare *Wróbel* 2004, pp. 852 ff.

28 See *Wróbel* 2004, p. 853.

with the offender, the damage has been redressed or the injured person and the offender have agreed on how to repair the damage, 2) due to the attitude of the offender, especially when he/she has tried to redress the damage or to prevent it.

In Polish criminal law, repairing the damage can be adjudged alongside other interventions, or independently as a standalone "punitive" measure. According to Article 46 § 1 of the Criminal Code, in case of sentence for any offence where the injured person appears, the court may decide, and on request of the injured person or other entitled person, about the obligation to redress the damage wholly or partly or compensation for the sustained injury; civil law regulations concerning the limitation of claims due to lapse of time or possibilities for awarding "pension" are not applied. Instead of the indicated duty, the court may impose the sanction of payment for the benefit of the injured or to the public purse. What is more, repairing the damage may become a separate sanction. If the offence carries a penalty of imprisonment not exceeding three years and when the offence implies a low degree of damage to society, the court may refrain from imposing a penalty if it decides instead to impose a coercive measure and the aim of punishment can be achieved by this measure (Article 59 of Criminal Code).

All regulations anticipating the obligation to repair the damage, either imposed as a punitive measure (Article 46 Criminal Code) or as probation condition (Article 67 § 3 Criminal Code and Article 72 § 2 Criminal Code) mention repairing the damage wholly or partly.[29] It is assumed that when imposing the obligation to repair the damage as a punitive measure, as well as a probation condition, the court should take into consideration all directives of appropriate criminal policy, and most of all, all circumstances which are connected with criminal and political functions of the measure.[30]

Among the legal provisions/institutions of the Criminal Procedure Code the so-called "adhesion claim" should be the first mentioned. According to Article 62, the injured person may file a civil complaint against the accused up until the moment that judicial proceedings begin to pursue in criminal proceedings a pecuniary claim resulting directly from the committed offence. In practice, the most significant is Article 415 of the Criminal Procedure Code, which says the

29 Art. 67 § 3 states: If criminal proceedings are conditionally discontinued, the court will require the offender to redress all or part of the damage, and may impose the obligation specified in Article 72 § 1 sections 1-3 or 5-6a, 7a or 7b, or exemplary damages, and may also adjudicate a monetary performance as specified in Article 39 section 7, and disqualification from driving a vehicle, as specified in Article 39 section 3, for up to two years. When imposing the measure mentioned in Article 72 § 1 section 7b on an offender of an offence using violence or the unlawful threat of violence towards a next of kin, the court sets out the method for contact between the offender and the aggrieved party.

30 Compare *Gostyński*, 1999, pp. 179 ff.

court may decide in civil claims only when the offender is convicted or the proceedings have been conditionally discontinued. What is more, the court is obliged to drop the civil claim without hearing when the evidence material revealed in the course of court proceedings is not sufficient to settle civil action, and supplementing the evidence would cause significant delays of the proceedings (Article 41 § 3). However, the adhesion claim is rarely used in practice.[31] Article 415 § 5 of the Criminal Procedure Code provides for awarding damages *ex officio*.

2.2.2 Juvenile justice

In case of juvenile proceedings, apart from mediation, which has already been mentioned under *Section 2.1.2* above, other compensatory measures can be taken. According to article 6 of the Act of 1982, the Family Court may oblige the juvenile to undertake certain activities, for instance: 1) to repair the damage, 2) to carry out certain work or service for the benefit of the injured person or local society, 3) to apologize to the injured person. Mediation can be used as a means for fulfilling these measures, implying that they can involve direct contact and communication between victim and offender.

Moreover, the Family Court may oblige parents or guardians of juvenile offenders to repair the damage wholly or partly (article 7 point 2). Inhowfar this latter issue can be regarded as truly restorative remains to be seen, since transferring the duty to pay away from the juvenile to his/her parents alleviates that young offender from assuming responsibility him/herself for his/her own actions. At the same time, it prevents insolvent offenders from being excluded from the scope of this measure, and thus prevents inequality before the law on the basis of socio-economic factors.

2.3 Restorative Justice elements while serving prison sentences

2.3.1 Adult criminal justice

The Code on the Execution of Sentences provides possibilities for taking the result of mediation into account in the context of conditional early release (article 162 § 1 of Executive Criminal Code). According to the contents of the regulation, before release the penitentiary court should listen to the opinion of the representative of the penal institution as well as the opinion of the court-appointed custodian (probation officer) when he/she applied for conditional release and take agreements resulting from mediation into consideration.

31 Compare Statement of Reasons for the Criminal Procedure Draft Code, p. 401.

The ambiguity of this regulation has aroused controversies. Some have regarded the regulation as the basis for carrying out mediation proceedings in the penal institution.[32] Others say the regulation refers to agreements stemming from mediation processes that have been carried out in preparatory proceedings and before the court, i. e. mediation *prior* to imprisonment.[33] The additional argument against the former perspective is the lack of executory provisions referring to carrying out mediations in penal institutions. It is indicated that the proper application of regulations of Executive Criminal Proceedings has its limits.[34] In practice, article 162 is defunct.[35]

On this basis it is to be assumed that mediations in penal institutions can be carried out at most as an additional action and, as all activities of the convict for the benefit of the victim, should be taken into consideration in coming to a prognosis regarding their likelihood of desistance. It is clear that mediation agreements, their contents and the course of mediation are relevant in this regard.

2.3.2 Juvenile justice

In case of conditional release of a juvenile from detention, according to article 87 of the Act of 1982, the Family Court can apply didactic (educational) measures (see *Section 2.1.2* above). As there is no limitation in this respect, measures of compensatory character are also considered and can thus also involve VOM. Failing to fulfill any ordered didactic measures can result in a revocation of early release and thus recall to the institution (Art. 87 § 3 AJDP).

2.4 Enforcing mediation agreements and agreements regarding the delivery of compensation

The enforcement of concluded agreements and the compensation of damages that such agreements usually entail is still a bottleneck in mediations in Poland. Until 2005, mediation agreements were treated as a single agreement, which resulted in the necessity of separate civil proceedings to enforce the claims. Changes to the Civil Procedure Code in 2005 made mediation agreements enforceable, but it remains unclear whether the regulation of the Civil Procedure Code refer to all mediation agreements or only those stemming from "civil" cases (and not criminal cases).

32 *Szymanowski* 2004, p. 40.

33 See *Hołda/Postulski* 2005, pp. 43-44.

34 Compare *Lelental* 2010, p. 660.

35 Compare *Dobijewska/Rękas* 2009, p. 187.

The difficulties with enforcement actually apply to all measures in Polish criminal law that serve the payment of compensation. The Executory Criminal Code does not provide a separate enforcement procedure, but *in extenso* refers to civil law enforcement, together with all consequences resulting from it, also regarding the order in which claims have to be fulfilled.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

In Poland, mediation can be carried out either by institutions (in practice these are NGOs like the Polish Mediation Centre, or PCMPP, a mediation service in Gdańsk) or so-called "trustworthy persons". An Order of the Minister of Justice dealing with mediation proceedings in criminal cases dated from 13 June 2003 (Journal of Laws No. 108, item 1020) determined detailed conditions that should be fulfilled by such institutions and persons.

To be eligible to conduct mediation proceedings the institution should 1) have a mission to carry out tasks that serve the purposes of mediation, resocialization/reintegration, protecting the public interest, protecting significant individual interests or protecting freedom and human rights; 2) have organizational and personnel conditions that make them appropriate and adequate for conducting mediation proceedings; 3) be listed in the register of the District Court. The mediation process itself is not carried out by the institution as a whole, but by an authorized representative (mediator) who fulfills the requirements provided by law for eligibility as a "trustworthy person", namely: 1) have Polish citizenship, 2) be in full possession of his/her civil rights and citizen's rights, 3) be over 26 years of age, 4) speak fluent Polish, 5) have a clean criminal record (intentional offences), 6) have conflict resolution skills and the necessary knowledge, especially in psychology, pedagogy, sociology, resocialization or law, 7) give warranty to fulfill the obligations, 8) be listed in the register of the District Court.

Mediators in juvenile cases must also have formal education in psychology, pedagogy, sociology, resocialization or law and have experience with regard to the education and resocialization of youth. Furthermore, they have to have completed mediator training,[36] which includes: 1) legal and organizational aspects of the implementation of mediation procedures between victims and offenders; 2) psychological tool for escalating and resolving conflicts; 3) training of mediation skills, methods and abilities in this respect. The requirements referring to the institutions and people carrying out the training of mediators are strict.

36 Order of Minister of Justice dealing with mediation proceedings in juvenile cases dated 18 May 2001 (Journal of Laws No. 56, item 591).

People conducting training with regard to juvenile cases should have the following qualifications: A. higher education, B. a minimum of two years of mediation training, C. didactic experience in conducting classes and trainingsin conflict resolution, D. knowledge and acceptance of principles of professional ethics of the mediator profession. The regulations also determine detailed requirements with regard to the organization of trainings.

Mediators in adult criminal cases are not required to undergo any formal training, which stands in contrast to mediators acting in cases involving juvenile offenders.

In contrast to mediation in civil proceedings, which can be carried out not only by professional judges but in fact also by every person who has the full capacity to enter into legal transactions (compare article 183^1 and further in Criminal Procedure Code), the criteria for the selection of mediators in criminal and juvenile proceedings in a concrete case are restrictive. They can be divided into two groups distinguished according to objective and subjective criteria. The first group (A) includes impediments that make a candidate ineligible for the role of mediator in a given case due to doubts regarding impartiality. The second group (B) includes people who have functions or carrying out professions connected to the judiciary (judges, public prosecutors, etc.). This second distinction is particularly important in order to maintain a personal separation between mediation and the traditional criminal judiciary, while at the same time increasing impartiality and perceptions of fairness.

The course of mediation proceedings is formalized and regulated in criminal law.[37] The regulations determine: 1) conditions which should be fulfilled by institutions and people entitled to carry out mediations, 2) how people entitled to carry out mediation proceedings are appointed and dismissed, 3) the range and conditions of providing institutions and "trustworthy persons" with access to the relevant criminal files.

In criminal case the offender, the victim and the mediator are parties to the mediation process. Offenders and victims who are juveniles can also have their parents or legal guardians present.

Immediately after the delivery of the decision the mediator carries out the following activities:

37 Order of Minister of Justice dealing with mediation proceedings in criminal cases dated 13 June 2003 (Journal of Laws No 108, item 1020) issued on the grounds of Article 23a § 5 Act dated 6 June 1997 – Criminal Procedure Code (Journal of Laws No. 89, item 555 with further amendments), Order of Minister of Justice dealing with mediation proceedings in juvenile cases dated 18 May 2001 (Journal of Laws No. 56, item 591).

1) gets in contact with the victim and the offender to determine a time and place for initial individual meetings with each of them;
2) carries out these individual meetings, in the course of which the essence, principles, objectives and entitlements inherent to and stemming from the mediation process are explained to victim and offender;
3) carries out the main mediation meeting with the simultaneous participation of victim and offender;
4) helps to formulate the content of the agreement between the parties and monitors the fulfillment of the resulting obligations.

Polish law provides for indirect mediation as well. If direct contact between victim and offender is not possible or undesirable, the mediator may carry out mediation proceedings in an indirect fashion, commuting to each party the proposals and the opinions of the other party about the agreement (§ 12). Once the mediation procedure has gone as far as it can go (ending either in an agreement or ending for another reason) the mediator prepares a written report and immediately delivers it to the body that made the initial referral to mediation. Where an agreement has been reached and put to paper, it is attached to said report.

As can be taken from the legal provisions described above, the model of restorative justice that has come to be accepted in Poland is inflexible, greatly formalized and one-sided. In criminal cases the mediation procedure is strictly definite and closely defined and regulated, which makes restorative conferences or shuttle/substitute mediation impossible where such an approach may in fact be desirable. In criminal cases the only permitted form of mediation is such that only the victim and the offender are involved. A larger number of participants can be present in mediation involving juveniles (as victims and offenders), where the parents or guardians can also be involved in the process, allowing for the potential positive effects of "reintegrative shaming".[38] However, even juvenile mediation strongly lacks the community element as representatives of the local community cannt take part – the community is thus not truly represented. Restorative justice has an ambitious purpose of constituting an overall alternative to traditional criminal jurisdiction[39] and as such requires constant adjustment to the changing environment, social, economic, cultural and criminal policy context of the time.

The costs of mediation in criminal and juvenile cases are covered by the state treasury.

38 Compare *Braithwaite* 1989.

39 See *Zalewski* 2006.

3.2 Group conferencing

Restorative justice conferences are still at the experimentation stage in Poland[40]. Several restorative conferences are reported to have been conducted at an experimental level in Warsaw, however the details, caseloads and functioning of this project have not (yet) been published.

3.3 Restorative measures in prison

As already described in *Section 2.3* above, there are no formal grounds to carry out mediation in penal institutions. However, the Code on the Execution of Sentences provides statutory possibilities to take the result of mediation into account in the context of conditional early release (article 162 § 1 of Executive Criminal Code). This *theoretically* implies that VOM *could* be performed inside institutions, but in practice the legislative provision is defunct. There are reports of a small experiment in a prison in Jastrzębie Zdrój in 2001, but – again – no respective evaluations or results have published that could shed any light on the specificities of the experiment.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

The statistical list below presents the number of mediations in criminal and juvenile cases in Poland since the moment the regulations came in force.

40 Compare *Czarnecka-Dzialuk* 2005.

Table 1: Mediation proceedings on the grounds of article 23a of Criminal Procedure Code in organizational units of prosecutor's office

Years	Cases referred for mediation	Cases concluded in result of mediation proceedings	
		Total	Agreement
Sept.-Dec. 1998	2	2	1
1999	42	40	32
2000	53	51	43
2001	40	38	30
2002	35	34	30
2003	71	60	46
2004	211	325	230
2005	721	699	522
2006	1,447	1,376	1,074
2007	1,912	1,919	1,438
2008	1,506	1,612	1,225
2009	1,296	1,390	1,042
2010	1,217	1,326	960

Source: Ministry of Justice.

Table 2: Proceedings in adult criminal cases in civilian courts concluded in result of mediation proceedings in years 1998-2013

Detailed list	Total number of cases	Result of mediation proceedings		
		agreement	lack of agreement	other way
1998				
Total (Sept. 1st – Dec. 31st)	**10**	**7**	**3**	**-**
Carried out by institutions	-	-	-	-
Carried out by trustworthy persons	10	7	3	
1999				
Total	**366**	**232**	**115**	**19**
Carried out by institutions	5	2	1	2
Carried out by trustworthy persons	361	230	114	17
2000				
Total	**771**	**481**	**200**	**90**
Carried out by institutions	7	4	3	-
Carried out by trustworthy persons	764	477	197	90
2001				
Total	**786**	**471**	**254**	**61**
Carried out by institutions	221	118	62	41
Carried out by trustworthy persons	565	353	192	20

Detailed list	Total number of cases	Result of mediation proceedings		
		agreement	lack of agreement	other way
2002				
Total	**1,021**	**597**	**365**	**59**
Carried out by institutions	26	4	10	12
Carried out by trustworthy persons	995	593	355	47
2003				
Total	**1,858**	**1,108**	**617**	**133**
Carried out by institutions	190	80	52	58
Carried out by trustworthy persons	1,668	1,028	565	75
2004				
Total	**3,569**	**2,123**	**1,119**	**327**
Carried out by institutions	533	251	193	89
Carried out by trustworthy persons	3,036	1,872	926	238
2005				
Total	**4,440**	**2,755**	**1,445**	**240**
Carried out by institutions	610	298	226	86
Carried out by trustworthy persons	3,830	2,457	1,219	154

Detailed list	Total number of cases	Result of mediation proceedings		
		agreement	lack of agreement	other way
2006				
Total	**5,052**	**3,062**	**1,721**	**269**
Carried out by institutions	1,402	680	636	86
Carried out by trustworthy persons	3,650	2,382	1,085	183
2007				
Total	**4,178**	**2,753**	**1,220**	**205**
Carried out by institutions	711	303	319	89
Carried out by trustworthy persons	3,467	2,450	901	116
2008				
Total	**3,891**	**2,551**	**1,110**	**230**
Carried out by institutions	701	311	252	138
Carried out by trustworthy persons	3,190	2,240	858	92
2009				
Total	**3,714**	**2,505**	**993**	**216**
Carried out by institutions	574	293	182	99
Carried out by trustworthy persons	3,140	2,212	811	117

Detailed list	Total number of cases	Result of mediation proceedings		
		agreement	lack of agreement	other way
2010				
Total	**3,480**	**2,274**	**1,051**	**155**
Carried out by institutions	590	242	269	79
Carried out by trustworthy persons	2,890	2,032	782	76
2011				
Total	**3,251**	**2,071**	**1,035**	**145**
Carried out by institutions	456	188	205	63
Carried out by trustworthy persons	2,795	1,883	830	82
2012				
Total	**3,252**	**2,251**	**874**	**127**
Carried out by institutions	412	236	142	34
Carried out by trustworthy persons	2,840	2,015	732	93
2013				
Total	**3,696**	**2,332**	**1,146**	**218**
Carried out by institutions	537	268	172	97
Carried out by trustworthy persons	3,159	2,064	974	121

Source: Ministry of Justice.

For adults, there was an observable continued increase in the number of cases referred to mediation from 1998 up until 2006. This was followed by a drop up until 2012 to 3,352 cases. In 2013, the figure rose again to 3,696. The decline since 2006 can to a certain degree be explained by decreases in the numbers of recorded offences and the overall number of cases in which procee-

dings were initiated, and overall, mediation accounted for only 0.3 to 0.4% of all cases in which proceedings were initiated since 2006. Thus, the decline need not be regarded as an indicator for a less frequent application of mediation, but at the same time, these low shares show that mediation plays only a very minor role in the context of adult criminal justice practice.

Table 3: Proceedings in juvenile (family) cases in civilian courts concluded in result of mediation proceedings in years 2004-2011

Detailed list	Result of mediation proceedings		
	agreement	lack of agrement	other way
2004			
Total	**220**	**24**	**10**
Carried out by institutions	109	9	4
Carried out by trustworthy persons	111	15	6
2005			
Total	**281**	**37**	**25**
Carried out by institutions	85	14	11
Carried out by trustworthy persons	196	23	14
2006			
Total	**298**	**44**	**24**
Carried out by institutions	82	12	6
Carried out by trustworthy persons	216	32	18
2007			
Total	**276**	**28**	**22**
Carried out by institutions	82	5	9
Carried out by trustworthy persons	194	23	13
2008			
Total	**223**	**20**	**18**
Carried out by institutions	70	4	7
Carried out by trustworthy persons	153	16	11

Detailed list	Result of mediation proceedings		
	agreement	lack of agrement	other way
2009			
Total	**256**	**22**	**15**
Carried out by institutions	65	6	2
Carried out by trustworthy persons	191	16	13
2010			
Total	**261**	**50**	**26**
Carried out by institutions	62	17	7
Carried out by trustworthy persons	199	33	19
2011			
Total	**253**	**35**	**24**
Carried out by institutions	28	4	7
Carried out by trustworthy persons	225	31	17
2012			
Total	**260**	**41**	**21**
Carried out by institutions	46	5	5
Carried out by trustworthy persons	214	36	16
2013			
Total	**218**	**35**	**25**
Carried out by institutions	52	10	5
Carried out by trustworthy persons	166	25	20

Source: Ministry of Justice.

The picture is similar for juveniles but not entirely congruent. The absolute number of cases has oscilated around 220 to 270 per year since 2004, and 0.3 to 0.4% of all punishable juveniles took part in mediation. What is interesting in this regard is that the majority of the mediation caseload is in fact in cases of adults rather than juveniles, which is a different picture of practice compared to many other European countries. Likewise, as can be taken from the preceding tables, the “success rate” (in terms of whether or not an agreement was reached through mediation) has been significantly higher among juveniles than among adults.

4.2 Findings from implementation research and evaluation

Despite the increase in the application of mediation and restorative justice in Poland, there is nonetheless only a limited reservoir of empirical research on the issue to date.[41] The available studies generate an ambiguous impression. On the one hand, the research confirms the effectiveness of restorative justice, mostly in juvenile proceedings.[42] On the other hand, the research also shows a lack of interest in restorative justice on behalf of employees of the broadly defined judiciary system.[43]

There have been efforts to evaluate the success of mediation in Poland. In 1996-2001, the experiment with mediation in the criminal justice system was assessed in eight Family Courts across the country. The rates to which mediation resulted in agreements between victim and offender were high. In 1999, 37 agreements resulted from 50 total referrals and in the year 2000, 49 agreements resulted from 63 referrals. Overall agreement rate estimates range from over 75%[44] to over 60%,[45] and it has been estimated that approximately 80% of the agreements are fulfilled.[46] Some problems with the mediation process encountered in Poland were that in over 20% of cases there was no consent from at least one party, over 33% of cases involved no introductory talks, and 31% of mediations were conducted in a non-neutral location. Agreements most often involved financial compensation (40%), about 20% involved an apology, and 11% involved alcohol treatment. Just over 20% of the offenders returned to court within three years, which is similar to the number of offenders who did not participate in mediation.[47]

Evaluations of mediation with juveniles in Poland have also been favorable. In the evaluation of juvenile cases from 1997 to 1999, 145 cases were mediated with 137 resulting in an agreement. 130 of those agreements were carried out. Agreements involved financial compensation (57.8%), an apology (32.1%), and working for the victim (10.1%). 14.4% of the offenders committed an offence that resulted in their reappearance in court within one to two years, compared to 22-24% of juveniles who did not participate in mediation.[48] There was approxi-

41 For a review of literature see *Wójcik* 2010, pp. 350 ff.

42 Compare in particular *Czarnecka-Dzialuk/Wójcik* 2001, pp. 140 ff.

43 Compare *Wójcik* 2010, pp. 223 ff.

44 See *Czarnecka-Dzialuk/Wojcik* 2002.

45 *Czwartosz* 2004; *Restorative Justice Consortium* 2005.

46 *Restorative Justice Consortium* 2005.

47 *Restorative Justice Consortium* 2005.

48 *Miers/Williemsens* 2004; *Restorative Justice Consortium* 2005.

mately 90% victim satisfaction with the mediation process. After the mediation, about 23% of victims changed their opinion of the offender and about 65% of offenders changed their opinion of the victim. 4% of offenders and 9% of victims showed high levels of hostility during the process and 3.2% of offenders and 18.7% of victims attempted to dominate the discourse at some point.[49]

The effectiveness of the rights of victims in criminal proceedings depends, to a great extent, on law enforcement agencies obeying the obligation to inform victims about these rights in accordance with Article 16 of the Criminal Procedure Code. Research has proven that this obligation is not being fully adhered to in practice. The attitude of police officers is indifferent, sometimes even reluctant, which results in a low level of activity of victims in preparatory and court proceedings.[50]

Apart from the above, there are still striking geographical discrepancies in the use of mediation in Poland. There are places where mediation is used relatively often (Bialystok), but there are also places where mediation is carried out exceptionally rarely in criminal proceedings. There are strong differences in the statistics from the prosecutor's office, where courts subordinated to the Appeal Court in Białystok pride themselves on prevailing over the other 10 Appeal Court districts. The difference is best illustrated by looking at the number of cases sent to mediation in the course of preparatory proceedings in this area, and the number of cases that were concluded in the course of such proceedings: for example, in 2007, in relation to the whole country the rates were 81.7% and 82.5% respectively. Regarding the courts, the disproportions in the number of mediation proceedings among are not as shocking as is the case for the prosecutor's offices. In five areas subordinated to appeal courts in Poland, the rates ranged from 14.9% to 22.5% of all mediations at the stage of court proceedings. Neither of the other six areas subordinated to appeal courts reaches two-figure percentage rates.[51]

Restorative justice plays a particularly minor role in regard to juveniles. In 2011 only 253 cases were referred to mediation in relation to over 20 thousand acts with the participation of juveniles. The problem is not limited to mediation. The obligation to redress damage is also seldom applied. Research on practice in Olsztyn has shown that of 2,392 cases in the years 2006 to 2009, redressing damage was ordered in only 12 cases.[52]

Research has also been conducted to measure the perceptions and attitudes of mediators. In surveys carried out in 2001 and 2002 mediators provided many

49 *Hansen* 2004, *www.rjp.umn.edu*; *Miers/Williemsens* 2004.

50 Compare *Dudka* 2006, p. 154; *Biederman* 2007, No. 4, p. 154.

51 Compare. *Kużelewski* 2009, p. 260.

52 Compare *Chlebowicz/Kotowska* 2010, p. 383.

interesting answers.[53] 50 mediators (77%) encountered a lack of understanding of mediation's significance on behalf of judges and prosecutors. The work of mediators has never been and still is not. In the course of mediation emotions are revealed. The parties tend to seek to dominate the process in a not insignificant share of cases (offenders seek to dominate the process in 42% of cases, victims in about 1/3 of cases (29%)). In almost half of the cases the parties showed aggressive attitudes and were demanding (43%). 19 mediators (29%) encountered an adverse social attitude towards mediation. Almost half of mediators did not have a suitable room for conducting mediation. Over half of them observed financial insecurity, and 2/3 (65%) feel there is a general lack of support from the State.

41 (63%) mediators confirmed mediation brought financial compensation to the victim, 59 (91%) confirmed that the injured party received moral satisfaction, 54 (83%) said that mediation had helped to reduce levels of fear in victims, 58 (91%) said that the victim had regained a sense of dignity, 52 (80%) stated that victims reported to have recovered self-confidence and finally 44 (68%) confirmed that, due to mediation, victims recovered confidence in law and order.

The surveys revealed a significant group of mediators who did not carry out mediation at all in practice, i e. complained about low caseloads. They shifted the blame for this to judges and prosecutors and to lawyers in particular, stating opinions along the lines of: "*in my opinion mediation threatens the interests of lawyers, this is why it is being boycotted (of course not openly) by legal circles*" (Katowice), or "*mediation requires acceptance from lawyers. I think there is a sort of silent plot among the above not to allow mediation. I think this attitude is not in accordance with the law*" (Cracow).

The answers of many mediators were pessimistic. They claimed that: "*There is no chance to make mediation a permanent element of Polish legal reality*" (Bielsko-Biała). "*I feel that mostly judges do not believe in the sense of mediation. They often institute mediation proceedings in completely hopeless cases or they make their decisions too late, when the conflict has already gone too far or not been attended too for too long*" (Łódź). "*On the basis of my own experience I confirm there is a complete lack of understanding of the institution of mediation*" (Poznań).

Despite these opinions, since the moment mediation came into force in Poland, there has been a slow but constant rise in the number of referred cases, only recently dipping off somewhat in 2013.

Research into mediation institutions carried out by the Arbitration and Mediation Research Circle at the Faculty of Law and Administration at the Uni-

53 Compare *Zalewski* 2003.

versity of Gdańsk[54] in 2008 and 2009 yielded an interesting image of mediation in criminal cases. In contrast to the research carried out in 2001 and 2002, this time not only mediators were surveyed, but also judges and prosecutors.

Mediators answering the questions stated the following: 66% of mediators felt that one party sought to dominate the process; 56% reported aggressive, demanding attitudes among the parties; 76% of questioned mediators pointed out that there was a lack of knowledge in society about mediation; almost 100% of the surveyed mediators said that mediation has a positive influence on the parties; 70% reported that mediation had fulfilled its their role. Reservations to and problems with mediation included: complex cases, limited knowledge about mediation, courts refer too small a number of cases to mediation. Many mediators (74%) confirmed that there was, in their opinion, a lack of understanding of the significance and the role of mediation on behalf of judges and prosecutors. Almost 53% said that they encountered skeptical or infavourable attitudes in legal circles with regard to mediation.

The survey was carried out among all prosecutors in the area subordinated to Gdańsk Court of Appeal. Answers from 122 prosecutors were received. The question: "*How often do you refer a case to mediation?"* was answered in the following way. Almost 72% said that they made referrals very rarely, and a further 20% said they did so only rarely. When asked the question whether mediation fulfills its purpose, 31% replied positively, while 43% stated that they felt it did not. The last answer is interesting in the context of the next question, which referred to the qualifications of mediators. Only 18% of the surveyed prosecutors felt that mediators were sufficiently qualified. The striking thing is that 67.7% of the surveyed were not able to assess the work of mediators – on the one hand, because they do not make referrals (and thus have no tangible experience with mediation), and on the other hand because they do not know how to assess the role and qualifications of the mediator.

Prosecutors are declared traditionalists. They think that mediation cannot be applied to all offences (95% not or rather not) and that it cannot replace traditional punishment (83.6% not or rather not).

Particular attention should be paid to the last two questions. The majority of the surveyed prosecutors gave the following answer to the question: *Is it possible to achieve the effect of resocialization through mediation?* – the answer was negative overall (62% not or rather not, 27% yes). The majority also thought that mediation did not fulfill the social sense of justice (66.4% not or absolutely not, 24.5% yes).

Judges from the area subordinated to Gdańsk Appeal Court were surveyed, but also judges from Mińsk and Białystok. A total of 62 judges responded. Judges rarely encounter mediation (73% rarely or very rarely), but they think that mediation is generally a good method of solving disputes (56%) although it

54 Compare *Zalewski* 2009.

is rarely effective. It results from their experience that mediation is not a fixed ground for resolving a dispute. Judges face great social ignorance and a lack of initiative in this respect, since, when asked how often the parties themselves asked for mediation, 72% of the surveyed judges stated "never".

Judges have a more positive attitude towards mediation than prosecutors have. According to the judges, mediation contributes to civic society (79% yes or rather yes) and fulfills its role (yes or rather yes – 40.3%; not or absolutely not – 29%), which is rather surprising, as they think that mediation does not solve disputes permanently. In terms of their opinion on the adequacy of mediators' qualifications, 40% regarded mediators as being highly or sufficiently qualified for the task (40%), and 24% felt they were inadequately qualified. In spite of this, almost 30% of judges felt to be unable to assess the work of mediators. Similar to the replies provided by the surveyed prosecutors, the majority of judges, too, felt that mediation was not appropriate for all kinds of offences (almost 74%).

Judges have a different opinion from prosecutors with regard to the possible effect on resocialization. The majority of judges thinks that mediation can have positive effects on offender rehabilitation (51%), while 37% felt it did not or would rather not. Nonetheless, the majority of stated to feel that mediation did not fulfill the social sense of justice (yes – 30.6%, not or rather not – 54.8%).[55]

In the context of the above data one cannot be surprised that the results of empirical research on mediation carried out by *Kruk/Wójcik*, published in 2004, conclude with recommendations to include the problem of mediation in the curriculum of legal studies, to indicate the need to support conciliation methods in society and to underline the need for a wider application of mediation between victims and offenders not only by the courts, but especially by the prosecutor's offices and the police.[56]

In Poland there have been no other, more recent studies on the implementation of restorative justice measures, comparative recidivism analyses, victim participation levels, satisfaction levels among stakeholders, stakeholders' perceptions of the procedure and the intervention, (economic) cost-benefit analyses, staffing and funding levels etc.

55 See *Zalewski* 2009.

56 *Kruk/Wójcik* 2004, pp. 156 f.

5. Summary and outlook

Mediation is still an institution of marginal practical significance in Poland. It does not interfere with, but also does not help criminal justice. According to criminal justice practitioners (like prosecutors and judges) mediation does not satisfy the social sense of justice, which may be taken as a confirmation of the traditional retributive understanding of justice in criminal law. As the data in *Section 4* above have shown, judges tend to initiate mediation more frequently in practice, so they have wider experience in this respect. Accordingly, in their opinion mediation can indeed have a positive effect on offender resocialisation. Mediation requires in-depth case analysis and detailed research, which is why (according to lawyers) it is rather not to be used as grounds for permanently resolving criminal disputes. Opinions of barristers about restorative justice have still not been researched, yet their role in looking for alternatives for traditional criminal justice and spreading prosocial attitudes is not to be underestimated, as it is they who advise their clients on which path to take in order to resolve an offence.

In light of these findings, and indeed what has been stated in the report in general, it appears appropriate and necessary to intensify the eduation and training of lawyers so as to include training on restorative justice, and to promote the idea of restorative justice in society. It also seems desirable to amend the law and practice to apply restorative conferences more frequently (due to their appropriateness for more serious types of offences, and their focus on community involvement) and to change enforcement regulations (in particular articles 25 and 196 of Executive Criminal Code).

A reform of criminal law is currently being prepared that seeks to make discontinuance of legal proceedings possible only when mediation has ended positively.

The aims of restorative justice exceed the framework of the aims of criminal law. When thinking about the place of mediation in criminal law, another question about the place of restorative justice comes to mind. There are no fundamental arguments that would stand in opposition to including ideas of restorative justice into criminal law and to reconstruct our thinking about social reactions to crime.[57]

57 See *Zalewski* 2009, pp. 662 ff.

References:

Ashworth, A. (2002): Responsibilities, rights and restorative justice. British Journal of Criminology, No. 42.

Biederman, A. (2007): Rzetelna informacja a aktywność pokrzywdzonych w procesie karnym. Prokuratura i Prawo, No. 4.

Bieńkowska, *E.* (1995)*:* Teoria i praktyka pojednania ofiary ze sprawcą. Materialy konferencji międzynarodowej (Warszawa 26-27 styceń r.), Stowarzyszenie Penitencjarne „Patronat". Białymstok, Warsaw.

Bieńkowska, E., Kulesza, C. (1997): Europejskie standardy kształtowania sytuacji ofiar przestępstw. Białystok.

Braithwaite, J. (1989): Crime, shame and reintegration. Cambridge.

Chlebowicz, P., Kotowska, M. (2010): Obowiązek naprawienia szkody w postępowaniu w sprawach nieletnich – uwagi na tle teoretycznym i praktycznym. In: Ćwiąkalski, Z., Artymiak, G. (Eds.): Karnomaterialne i procesowe aspekty naprawienia szkody. Warsaw.

Czarnecka-Dzialuk, B. (1999): Eksperymentalny program mediacji między nieletnim sprawcą a pokrzywdzonym. Podstawowe założenia i pierwsze doświadczenia. In: Mediacja. Nieletni przestępcy i ich ofiary.

Czarnecka-Dzialuk, B. (2005): Poland. In: Meeting the challenges of introducing victim-offender mediation in Central and Eastern Europe. Final Report of Agis Project. JAI/2003/AGIS/088, p. 42.

Czarnecka-Dzialuk, B., Wójcik, D. (2001): Mediacja w sprawach nieletnich świetle teorii i badań. Warsaw.

Dobijewska, E., Rękas, A. (2009): Mediacja po wyroku skazującym – mediacją bezpieczną. In: Mazowiecka, L. (Ed.): Mediacja. Warsaw.

Dudka, K. (2006): Skuteczność instrumentów ochrony praw pokrzywdzonych w postępowaniu przygotowawczym w świetle badań empirycznych. Lublin.

Dziugieł, I. (2003): Mediacja w postępowaniu przygotowawczym. Szczytno.

Fajst, M., Niełaczna, M. (2005): System mediacji w Polsce – słabość prawa czy organizacji? CPKiNP, vol. 2.

Gaberle, A., Korcyl-Wolska, M. (2002): Komentarz do ustawy o postępowaniu w sprawach nieletnich. Arche: Gdańsk.

Górecki, P., Stachowiak, S. (2007): Ustawa o postępowaniu w sprawach nieletnich. Komentarz. Warsaw.

Gostyński, Z. (1999): Obowiązek naprawienia szkody w nowym ustawodawstwie karnym. Kraków: Zakamycze.

Hansen, T. (2006): Restorative Justice in Eastern Europe. Centre for Restorative Justice and Peacemaking, University of Minnesota, Saint Paul, Minnesota: University of Minnesota: Available: *http://www.cehd.umn.edu/ssw/rjp/*

resources/rj_dialogue_resources/RJ_Dialogue%20Approaches/RJ_%20in_Eastern_Europe.pdf

Harasimiak, G. (2004): Mediacja w polskim modelu postępowania z nieletnimi. Przegląd Prawa Karnego. No. 23.

Hofmański, P., Sadzik, E., Zgryzek, K. (2011): Kodeks postępowania karnego. Komentarz do art. 297-467. Vol. II., 4. Ed., Warsaw.

Hołda, Z., Postulski, K. (2005): Kodeks karny wykonawczy. Komentarz.

Janda, P., Kiełtyka, A. (2010): Ustawa o państwowej kompensacie przysługującej ofiarom niektórych przestępstw. Komentarz. Warsaw.

Klaus, W. (2004): Policja wobec instytucji mediacji. Przegląd Prawa Karnego No. 23.

Kochanowski, J. (2000): Redukcja odpowiedzialności karnej. Warsaw.

Kruk, M., Wójcik, D. (2004): Postępowanie mediacyjne w sprawach karnych. Wyniki badań empirycznych. Warsaw.

Kużelewski, D. (2009): Mediacja w procesie karnym w opinii sędziów i prokuratorów – wybrane zagadnienia. In: Kulesza, C. (Ed.): Ocena funkcjonowania porozumień procesowych w praktyce wymiaru sprawiedliwości. Warsaw.

Lelental, S. (2010): Kodeks karny wykonawczy. Komentarz. Warsaw.

Matejuk, A. (2011): Mediacja karna jako forma sprawiedliwości naprawczej. In: Mediacja karne jako forma sprawiedliwości naprawczej. Warsaw.

Miers, D., Williemsens, J. (Eds.) (2004): Mapping Restorative Justice: Developments in European Countries. Belgium: European Forum for Victim-Offender Mediation and Restorative Justice.

Płatek, M. (2009): Dlaczego w Kazachstanie nie rosną banany – czyli o mediacji w Polsce. In: Mazowiecka, L. (Ed.): Mediacja. Warsaw.

Rękas, A. (2004): Mediacja w polskim prawie karnym. Warsaw.

Siemaszko, A., Gruszczyńska, B., Marczewski, M. (2009): Atlas przestępczości w Polsce 4. Warsaw.

Szymanowski, T. (2004): Kodeks karny wykonawczy: po nowelizacjach z 2003 r. Państwo i Prawo 3/2004, pp. 32-43.

Waluk, J. (1999): Kto i dlaczego wprowadza w Polsce mediacje? In: Czarnecka-Dzialuk, B., Wójcik, D. (Eds.): Mediacja. Nieletni przestępcy i ich ofiary. Warsaw, p. 106.

Wójcik, D. (2009): Poglądy sędziów na temat mediacji w sprawach karnych. In: Mazowiecka, L. (Ed.): Mediacja. Warsaw.

Wójcik, D. (2010): Rola mediacji między pokrzywdzonym a sprawca przestępstwa. In: Marek, A. (Ed.): System prawa karnego. Vol. I. Zagadnienia ogólne. Warsaw.

Wróbel, W. (2004): In: *Bogdan, G., Cwiakalski, Z., Kardas, P., Majewski, J., Raglewski, J., Szewczyk, M., Wróbel, W., Zoll, A.* (Eds.): Kodeks karny. Część ogólna. Komentarz. Vol. I. Komentarz do art. 1-116 k.k. Krakow: Zakamycze.

Zalewski, W. (2003): Mediacja w polskim prawie karnym – teoria i praktyka. Przegląd Sądowy, No. 6.

Zalewski, W. (2008): Przeciw mediacji w prawie karnym, czyli o rzeczywistych i urojonych granicach sprawiedliwości naprawczej. In: Jakubowska-Hara, J., Nowak, C., Skupiński, J. (Eds.): Reforma prawa karnego, propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej – Michalskiej. Warsaw.

Zalewski, W. (2009): Sprawiedliwość naprawcza w Polsce, Iuris Effectus. Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury Numer specjalny. Warsaw.

Zalewski, W. (2006): Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego? Gdańsk.

Portugal

Anabela Miranda Rodrigues, Cláudia Cruz Santos

1. Origins, aims and theoretical background of restorative justice

1.1 Overview of forms of restorative justice in the criminal justice system

Portuguese legislation has established different solutions for restorative procedures for adults and "juvenile delinquency" – given that such procedures presuppose the direct intervening parties' willingness to participate in the criminal conflict and are aimed at redressing damages in the manner sought by these parties.

It is possible to distinguish three restorative solutions in relation to crimes committed by *adults*. Firstly, penal mediation (between victim and offender) is available for crimes against persons or property that require a complaint or private accusation (complainant's crimes) and that are punishable by a prison sentence of no more than five years. Such mediation is available as a diversion mechanism during the inquest stage of the proceedings.[1] Secondly, and solely for crimes of domestic violence, the law foresees a "restorative meeting" between the offender and the victim of the crime, assisted by a mediator, wherein this meeting will always be held after the offender has been convicted or the proceeding has been provisionally suspended. Finally, the legislator foresees restorative programmes within the prison context, in particular via mediation sessions with the victim.

In relation to juvenile delinquency, the 1999 Educational Guardianship Law ("Lei Tutelar Educativa") contemplates recourse to mediation whenever this

1 Concerning the relationship between mediation and the penal proceeding, see *Rodrigues* 2006a, p. 129 onwards.

may contribute to the goals of the proceedings – above all, education of the minor towards respecting the law – at the initiative of the judicial authority, the minor, his parents, legal representative, *de facto* guardian or legal defence counsel of the offender. This constitutes a very broad possibility that has hardly been regulated, either in terms of the precise moment of its application, or the specificities of the procedure itself. Nonetheless, in practice, mediation-based restorative measures aimed at reducing juvenile delinquency are primarily related to two hypotheses: either they appear as a diversion mechanism enabling the proceeding to be suspended (Article 84, no. 3 of the Educational Guardianship Law); or as a means of obtaining a consensus, in the preliminary hearing, in relation to the guardianship measure that should be applied (Article 104, no. 3, paragraph b of the Educational Guardianship Law).

Notwithstanding the above, it is important to note that since the 1980s Portuguese penal law and penal procedural law "for adults" has included various other precepts aimed at redressing the damages caused to the victims of crimes - by inculcating a sense of responsibility in offenders. These precepts are also not "totally restorative" since they are not solely based on voluntary procedures,[2] but instead are the fruits of a criminal justice strategy that aims, as far as possible, to redress damages.

In substantive law, it is worthwhile emphasising the figure of an alternative penalty, i. e. suspension of the execution of the prison sentence, which may be constrained to redress, by the offender, the damages caused to the victim (Art. 51 of the Penal Code). In addition, the existence of a serious effort by offender to achieve such redress should be considered as a factor that will be valued by the court at the time of sentencing (Art. 71, no. 2 paragraph e) of the Penal Code). "Demonstrative acts of the offender's sincere repentance, in particular redress, as far as he could achieve, of the damages caused" were also specified by the Portuguese legislator as a mitigating circumstance enabling special attenuation of the penalty (Art. 72, no. 1, paragraph c) of the Penal Code). In addition, redress of the damage caused is one of the assumptions underpinning dispensation from a penalty (Art. 74, no. 1, paragraph b) of the Penal Code). The Portuguese sanctioning system also makes provision for community service as a substitute penalty for a prison sentence of up to two years, under the condition that the convicted person provides his consent thereto (Art. 58 of the Penal Code). Finally, regarding crimes against property, exemption from criminal liability is admitted in various hypotheses, provided that the

2 Although they do not always require voluntary involvement, several of these precepts are guided by an idea of consensus. The clearest examples are provisional suspension of the process and the highly summary proceeding (a special proceeding called "sumaríssimo" which the defendants may agree to receive a non-custodial sentence, without the realization of any trial). On this matter, see *Fidalgo* 2008, p. 277 onwards.

stolen or illegitimately appropriated object has been returned/replaced or the incurred losses have been redressed in full (Art. 206 of the Penal Code).

Legislation governing procedural law allows an injured party to request an indemnity payment in the penal proceeding itself by virtue of the principle of adhesion (Art. 71 of the Penal Procedural Code). In addition, the legislator also admits the possibility that when such a civil indemnity payment request has not been filed, the court, in the event of conviction, may "decide by arbitration an amount in the form of redress for the losses suffered, when this is necessary in the light of specific demands for protection of the victim" (Art. 82-A of the Penal Procedural Code). On the other hand, there are also precepts that enable procedural diversion which avoid the case going to judgement, even where there is evidence that the crime has been committed, for example closing the case without the imposition of a penalty (Art. 280 of the Penal Procedural Code) and provisional suspension of proceedings (Art. 281 of the Penal Procedural Code) – "provisional suspension of proceedings" means that proceedings can be suspended on the condition that certain obligations are fulfilled by the offender. One of the requirements for closing the case without the imposition of a penalty is redress of the damages caused to the victim. In relation to provisional suspension of proceedings, to which both the formal suspect (*arguido*) and the amicus curiae (*assistente*) must agree, the injunctions and rules of conduct that may be ordered against the formal suspect include "indemnifying the injured party", "giving suitable moral satisfaction to the injured party" or "delivering a certain amount to the State or to private social solidarity institutions or carrying out provisions of public interest".

1.2 Reform history

The first mechanisms of restorative justice arose in the framework of responding to juvenile delinquency, wherein the addressees were minors under the age of 16 years who, due to their age, cannot be held liable for their acts under the terms of Art. 19 of the Penal Code.[3] These mechanisms were introduced by the Educational Guardianship Law of 1999, in which an attempt was made to go beyond an exclusively assistance-based model in which intervention was implemented in the name of the minor's interest, while devaluating the need for demonstrating the wrong of the behaviour. In *Gersão's* opinion, this model is based on the perception of minors being persons who cannot be held legally liable for their

3 According to *Rodrigues* 1997, p. 355 onwards, "the capacity for culpability is a problem associated to the maturity process of the personality, that should not, however, fall outside criminal policy considerations". It should be added that "the maturity process of the minor, the fact that his personality is still being formed, makes it advisable to ensure that the age of legal liability coincides with the age of majority (16 years)".

behaviour, and who need to be protected on the basis of the authoritarian decisions of third parties.[4]

As a result of the new Educational Guardianship Law[5] (Law no. 166/99, of 14 September 1999), acceptance of the participation of the minor in restorative mediation practices[6] already presupposes a different model, namely one that recognises the importance of hearing the minor in the context of determining how the ills that he has caused should be responded to. In this model, it is believed that education of the minor towards upholding the law will be favoured by raising his awareness of the damage he has caused and inculcating a sense of responsibility. One should state in this regard that an essentially educational intervention model that aims to inculcate responsibility has been opted for. This is confirmed in Article 2 of the Educational Guardianship Law, which establishes that "educational guardianship measures […] are aimed at educating the minor to uphold the law and foster his dignified and responsible insertion in community life". Within this spirit, the law delineates a new space attributed to mediation in the context of the judicial reaction to juvenile delinquency.

Penal mediation "for adults" was introduced in Portugal by Law no. 21/2007 of 12 June.[7] Before this law was enacted, a pilot-programme of penal mediation was implemented through a joint initiative between the University of Oporto's Faculty of Law, the Oporto District Attorney General's Office and the Oporto Department of Penal Action and Research.[8] These entities signed a protocol on 16 July 2004, under the terms of which they proposed to encourage the practice

4 See *Gersão* 1997, p. 577 onwards. That assistance-based model – which is a maximalist protection model – meant that identical interventions would be applied to minors at risk (because they have been forsaken, abandoned or mistreated) and minors that commit acts that are qualified as crimes. In the legal regime that is currently in force in Portugal, by contrast, a distinction is made between minors who require protection and minors who require an intervention in terms of educational guardianship.

5 The Educational Guardianship Law sets its scope of application in Article 1.: "the practice, by a minor aged between 12 and 16 years, of a fact that is qualified by law as a crime, gives rise to the application of an educational guardianship measure".

6 Under the heading "mediation", no. 1 of Article 42 of the Educational Guardianship Law establishes that "for organisation of the objectives of the proceeding, and with the effects specified in this law, the judicial authority may determine the cooperation of public or private mediation entities". In no. 2 of the same Article, it is added that "the mediation will occur at the initiative of the judicial authority, the minor, his parents, legal representative, de facto guardian or legal defence counsel of the offender".

7 In relation to the Draft Bill that preceded this Law and which was more ambitious than the latter, given that its material framework of application covered not only private offences, but also several public crimes, see *Santos* 2006, p. 85 onwards. *Leite* 2008 provides a detailed analysis of Law no. 21/2007 of 12 June.

8 Concerning this programme, see *Morais* 2006, p. 135 onwards and *Castro* 2006, p. 145 onwards.

of mediation during the inquest stage of the penal proceeding in those cases in which it was possible to use mechanisms of celerity and consensus, like for instance the provisional suspension of proceedings. The programme, known as the "Oporto Project", began in November 2004, and the procedure that was generally adopted presupposed that the Oporto Department of Penal Action and Research would send a letter to the direct intervening parties involved in the criminal dispute, providing an overview of the facts under inquest and explaining the objectives and procedural steps of mediation. When mediation occurred as a consequence, the sessions took place in an office specifically intended for this purpose, located at the University of Oporto's Faculty of Law.

After the entry into force of Law no. 21/2007 of 12 June, the public mediation service began its effective operation on 23 January 2008 on an experimental basis during a two-year period and only in four districts (Aveiro, Oliveira do Bairro, Porto and Seixal), under the terms of Administrative Rule no. 68-C/2008 of 22 January. Subsequently, the public penal mediation service was extended to other districts by Administrative Rule no. 732/2009 of 8 July.[9]

Via Article 39 of Law no. 112/2009 of 16 September a possibility for holding a "restorative meeting" after the provisional suspension of the proceeding or the conviction was introduced for cases of domestic violence. These crimes, by virtue of their public nature, are excluded from the framework of application of Law no. 21/2007 of 12 June, and for this reason it is not possible for mediation to arise as a procedural diversion mechanism in the inquest stage of such crimes.

Also in 2009, as a result of Law no. 115/2009 of 12 October that approved the Code for Execution of Penalties and Measures involving Deprivation of Liberty, it became possible for prisoners to participate, with their consent, in restorative justice programmes, in particular via mediation sessions with the aggrieved party (Article 47, no. 4).

1.3 Contextual factors and aims of the reforms

Providing the possibility of mediation as a response to juvenile delinquency is primarily associated with the intentions underlying the Educational Guardianship Law, i. e. education of the minor by inculcating a sense of responsibility and limitation of recourse to more serious and desocialising measures. This lies within the framework of abandonment of the "consideration of the minor as an incomplete being, object/addressee of the assisting intervention of the State […] rather than a subject with rights".[10]

9 For a description of the evolution of the public penal mediation system in Portugal, see *Reis* 2010, p. 573 onwards.

10 *Fonseca* 2010, p. 1.

In relation to penal mediation "for adults", one of the objectives pursued is related to obtaining greater celerity and efficiency in the resolution of criminal disputes. The explanatory memorandum preceding Administrative Rule no. 732/2009 of 8 July states that "the Ministry of Justice assumed the priority to broaden the use of mediation as a means of helping to decongest courts and to provide parties with closer, faster and cheaper means of resolving disputes". In addition, however, the option for penal mediation fell within a prior political-criminal movement that sought to strengthen diversionary mechanisms for crimes of minor and medium gravity, that recognises the advantages – both for offenders and victims – of criminal dispute resolutions that avoid full formal proceedings and guarantee the possible redress of the damages caused to the victims.

In relation to post-sentencing penal mediation, the grounds for acceptance of such mediation should be primarily related to the relevance attributed to inculcating a sense of responsibility in the prisoner, from the perspective of his socialization, wherein positive special prevention constitutes the goal that is essentially taken into consideration when the sanctions are executed.

1.4 Influence of international standards

It was the Portuguese legislator itself that recognised, in the exposition preceding Law no. 21/2007 of 12 June, that by means of this law it "created a penal mediation regime that transposes Article 10 of the Framework-Decision no. 2001/220/JAI of the Council of 15 March in relation to the standing of the victim in penal proceedings". In this manner, this Framework Decision assumes a core role in understanding the Portuguese legislator's policy decision to admit penal mediation "for adults".

In relation to minors, in the context of analysis of the genesis of the Educational Guardianship Law of 1999, emphasis should be placed on the reference, in its explanatory memorandum, regarding acceptance of the restorative proposal: "mediation or, in a broader sense, 'redress-based' measures or 'restorative justice' have been considered, by several observers, to constitute a new and promising modality of response to crime". On the other hand, Portuguese legal doctrine emphasises the incorporation of the suggestions contained in Council of Europe Recommendation Rec (87) 20E of 1987 concerning social responses to juvenile delinquency. The convenience of mediation in all stages of minors intervention should also be related to Rule 12 of the European Rules for Juvenile Offenders Subject to Sanctions or Measures contained in Recommendation CM/REC (2008) 11 of the Council of Ministers to the Member States.[11]

11 *Fonseca* 2010, pp. 11, 13.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

2.1 Pre-court level (police and prosecution services)

2.1.1 Adult criminal justice

The Penal Procedural Code specifies diversion mechanisms that make it possible to redress the damages caused to the victim and thus avoid the need to hold the judgement hearing. Unlike restorative solutions, in the strict sense of the term, these mechanisms are modelled by the judicial authorities and orientated towards the pursuit of the goals of special prevention and general prevention. Hence, the provisional suspension of the proceedings in cases of crimes punishable with a prison sentence of up to five years presupposes that the Public Prosecution Service and the procedural judge agree, and that the formal suspect (*arguido*) and the *amicus curiae* (*assistente*) consent to it (article 281 of the Penal Procedural Code). "Closing the case without imposing a penalty" (article 280 of the Penal Procedural Code), which requires redress of those damages and applies to crimes of lesser gravity, also does not forego the need for a decision by those judicial authorities.

Since the entry into force of Law no. 21/2007, however, the Portuguese legal framework has begun to encompass restorative practices in the strict sense of the term, wherein penal mediation is admitted as a penal procedural diversion mechanism that avoids subjecting the case to judgement, if it culminates in an agreement equivalent to desistence from the complaint and this agreement is homologated by the Public Prosecution Service.

During the inquest stage, if there is evidence of the crime, the Public Prosecution Service may send the proceeding for mediation at its own initiative or at the request of the formal suspect (*arguido*) and the aggrieved party (*ofendido)*. Such mediation is only applicable for crimes that are only prosecuted upon complaint or on a complaint and a private accusation (i. e. private offences in the broad sense, *complainant's crimes*), which have been committed against persons or against property and for which the law foresees a prison sentence not exceeding five years. The legislator excludes crimes against sexual liberty or sexual self-determination from the scope of applicability of such mediation, even though the criminal procedure depends upon a complaint. This mediation only applies to crimes committed by offenders who are at least 16 years old, against victims who are also at least 16 years old.

There will only be mediation if the formal suspect and the aggrieved party agree that it should occur. This consent may be revoked at any time. Mediation also presupposes a certain level of recognition of the facts of the case by the formal suspect. However, if the mediation does not result in an agreement, said

mediation may not be valued at a subsequent moment in time, in particular in the penal proceeding that may follow. For penal procedural purposes, participation of the formal suspect in the mediation process does not constitute a recognition or assumption of criminal responsibility for the crime in question.

Mediation sessions are attended by the formal suspect and the aggrieved party, assisted by a dispute mediator and also, if they choose so, by their attorneys. The law recognises that "when this proves to be useful for correct resolution of the dispute, other interested parties may be asked to participate in the mediation process."

The content of the agreement at the end of the penal mediation process is freely established by the formal suspect and the aggrieved party, aided by the dispute mediator who aims to facilitate communication. The limits established by law for the content of the agreement consist of the prohibition of "sanctions involving deprivation of liberty or duties that offend the dignity of the formal suspect or whose compliance should extend for more than six months" (Article 6, no. 1 and 2 of Law no. 21/2007, of 12 June). If an agreement is reached, it will be signed by the persons participating in the mediation process. Then the Public Prosecution Service examines whether the agreement is in line with the provisions established in the aforementioned Article 6. If so, the Prosecution Service will homologate the withdrawal of the complaint and thus terminate the proceedings. Nonetheless, if the agreement is not upheld within the established deadline, the aggrieved party has one month to renew his complaint, which in turn leads to the inquest being reopened. In this case, "the Public Prosecution Service will check non-compliance with the agreement, and for this purposes may have recourse to the social reinsertion services, the criminal police authorities and other administrative entities" (Articles 5, no. 4 and 6, no. 3 of Law no. 21/2007 of 12 June).

When it is not possible to reach an agreement, the penal proceeding follows its normal procedural steps: "if the mediation does not lead to an agreement between the formal suspect (*arguido*) and the aggrieved party (*ofendido*) or if the mediation proceeding is not concluded within three months after the date on which the case was referred to mediation, the mediator will inform the Public Prosecution Service of this fact, and the formal penal process will continue". However, the possibility is considered that the mediator may request from the Public Prosecution Service a two months extension, when he considers that there is a high probability of reaching an agreement within this time period (Article 5, no. 1 and 2 of Law no. 21/2007, of 12 June).

2.1.2 Juvenile justice

The Portuguese model established by the Educational Guardianship Law of 1999 is convergently influenced by the minimum intervention model and the

restorative justice model.[12] In this regard, *Fonseca*[13] refers to "the possibilities of preliminarily archiving the inquest, archiving due to the lack of a need to apply an educational guardianship measure and suspension of the proceeding, and also archiving founded on compliance with a plan of conduct presented by the young person". Under the terms of Art. 84 of the Educational Guardianship Law, an option is granted to the young person, his parents, legal representative or *de facto* guardian to obtain the cooperation of public or private mediation services in order to draw up a plan of conduct that may be presented to the Public Prosecution Service. The objective is to highlight the minor's commitment to refrain from offending in the future, thus facilitating the option of suspension of the proceeding (which is possible, provided that the crime in question in one that may be punished with a term of imprisonment not exceeding five years). If the minor complies with the plan of conduct, the proceeding will be stopped and as a result the formal judicial proceedings shall be terminated. Amongst other duties, the plan of conduct may consist "in the presentation of apologies to the aggrieved party", "in the effective or symbolic, total or partial, reparation of the damage, including spending money out of his own pocket or provision of an activity in favour of the aggrieved party", "execution of economic provisions or community service" (No. 3 of Article 84 of the Educational Guardianship Law).

It is nonetheless possible to criticise a certain understanding of legal doctrine (which is also dominant in judicial practice) via which recourse to such mediation services depends, in this stage, on the decision of the Public Prosecution Service that will ponder whether such mediation can be tailored to obtaining the goals of the proceeding. This understanding is grounded on a restrictive interpretation of Art. 42, no. 1 of the Educational Guardianship Law, according to which "for organisation of the goals of the proceeding, and with the effects specified in this law, the judicial authority may determine the cooperation of public or private mediation entities". From a different perspective, *Fonseca*[14] considers that the useful content of this norm is solely the provision establishing that the Public Prosecution Service should assist the young person and his nearest relations in accessing mediation services, above all public mediation services, when they have difficulty in obtaining such mediation services using their own resources.

12 The Portuguese model established in the 1999 Educational Guardianship Law has also been described as a "third way", by presupposing an attempt at conciliation, within the finest aspects of the paradigms of protection and justice (see *Agra/Castro* 2007, p. 229 onwards).

13 *Fonseca* 2010, p. 11.

14 *Fonseca* 2010, p. 12.

2.2 Court level

2.2.1 Adult criminal justice

At the judgement stage, restorative measures do not arise in the context of specifically restorative practices (or restorative in the strict sense of the term), although precepts exist that presuppose a judicial decision which will take redress into consideration. For crimes of lesser gravity, punishable with a prison sentence of up to six months or a fine not exceeding 120 day units, there is the possibility that the court can refrain from imposing a penalty (a declaration of guilt without a penalty-based conviction) provided that the damage has been redressed, the degree of culpability is low and the aims of prevention do not speak against taking such a course of action (Article 74 of the Penal Code).

Among the alternative or substitute penalties that can be applied in place of prison sentences not exceeding five years, "suspension of the execution of the prison sentence" should be particularly emphasized. The court can take this course of action "if, in light of the offender's personality, his living circumstances, his conduct before and after the offence, and circumstances of the offence itself, the court comes to the conclusion that the simple censure of the offence and the prospect of being sent to custody suffice to achieve the goals of punishment in a suitable and sufficient manner" (Article 50 of the Penal Code). When the court opts for this course of action, it can impose duties on the offender, for example "paying the indemnity payment owed to the injured party, within a specific deadline, to the full or partial extent that the court considers to be possible, or guaranteeing such a payment by means of a suitable guarantee; give suitable moral satisfaction to the injured party; deliver a monetary contribution or provision of equivalent value to public or private social solidarity institutions or to the State" (article 51, no. 1, paragraphs a, b and c of the Penal Code).

Another substitute penalty that is not guided by the attempt to achieve specific redress of the damages caused to the victim in question, but rather to achieve positive collaboration with overall community objectives (which, in a certain manner, is also restorative in the broader sense of the term), is the provision of community service. Under the terms of Article 58, no. 1 of the Penal Code, "if the [offender] should receive a prison sentence no higher than two years, the court may substitute it with community service whenever it concludes that the objectives of the punishment can be achieved in a suitable and sufficient manner". The legislator clarifies, in no. 5 of the same Article, that community service may only be applied where the offender consents to it.

On the other hand, redress of the consequences of the crime is a factor that determines the specific measure of the penalty (Article 71, no. 2, paragraph and of the Penal Code) and if "there have been demonstrative acts of the offender's sincere repentance, in particular redress of the damages caused, as far as

possible," this constitutes a general mitigating ircumstance (Article 72, no. 2, paragraph c) of the Penal Code), which will result in a reduction in sentence.

Finally, in cases of theft and abuse of trust, criminal liability is extinguished or the penalty is specially attenuated, provided that the stolen or illegitimately appropriated item has been returned or the losses caused have been redressed (Article 206 of the Penal Code).

2.2.2 Juvenile justice

The exhaustive list of educational guardianship measures that can be applied when minors perpetrate facts that may be classified as crimes includes measures with restorative objectives, in particular the "measure to redress the damage caused to the victim" and the "measure of organisation of economic provisions or community service". Although they do not correspond to a totally restorative intervention model, since they involve coercive application, there are factors that attenuate the coercive nature of those measures: according to *Fonseca*,[15] "although these measures formally have a coercive nature, this burdensome imposition […] is to a certain extent compensated by the fact that the Educational Guardianship Law foresees the recourse to mediation (but here, in a wording that is disconnected from the restorative objective and in the framework of the judge's discretionary power), in the context of the preliminary hearing, with the aim of achieving a consensus in relation to the non-institutional educational guardianship measure to be applied".[16] This means that, according to Article 104, no. 3, paragraph b) of the Educational Guardianship Law, the educational measure to be applied in a given case can be determined through mediation, so that the victim also can be heard in the decision of which measure the offender should be subjected to.

Admission of mediation at this stage of the proceedings, and the dependency on the discretion of the judge in particular, have engendered several forms of criticism within Portuguese legal doctrine, that suggests this "localization" within the framework of judicial intervention as a factor that may impede genuine procedural diversion and generates very limited use, is furthermore founded on the idea of an opportunity that to a large extent depends upon recourse to an element of judicial discretion.

---

15 *Fonseca* 2010, p. 12.

16 Under the terms of Article 104, no. 3, paragraph b) of the Educational Guardianship Law, if consensus is not reached (between the judge, public prosecution service and the minor, wherein the parents or minor's legal representative, attorney and, if present, the aggrieved party, should also be heard) in relation to the measure to be applied, the judge may "determine the intervention of mediation services and suspend the hearing for no more than 30 days".

2.3 Restorative Justice elements while serving sentences

2.3.1 Adult criminal justice

The Code on the Execution of Penalties and Measures involving Deprivation of Liberty, approved by Law no. 115/2009 of 12 October, introduced a general possibility of post-sentencing restorative practices. Hence, no. 4 of Article 47 of this Law establishes that "the prisoner may participate, with his consent, in restorative justice programmes, in particular via mediation sessions with the aggrieved party". These programmes should be approved by the Minister of Justice, subject to a proposal from the Director-General of the Prison Services. Nonetheless, it also foresees that "in the conception, execution and evaluation of programmes, the Prison Services may obtain the collaboration of university institutions and other specialised bodies" (Article 48). In the General Regulation of Prison Establishments (approved by Decree-Law no. 51/2011 of 11 April) there are also several norms related to the restorative practices to be developed in a prison context. Article 91, no. 1, paragraph d), establishes that one of the objectives to be pursued is "promotion of empathy with the victim and raising awareness of the damage caused, in particular via involvement of prisoners in mediation and restorative justice programmes". Article 91, on the conditions of the programmes, clarifies that participation "presupposes the prisoner's express willingness to participate" and that "the programmes are based on the signing of a contract, which must specify the rules, conditions, potential benefits and the grounds for possible exclusion from the programme".[17]

In relation to crimes of domestic violence, the fact that they are public crimes excludes them from the framework of application of Law no. 21/2007. As a result, in cases of domestic violence, there cannot be mediation in the inquest stage which, in the event of obtaining an agreement, would trigger the end of the penal intervention. The Portuguese legislator does however foresee the possibility of a "restorative meeting" after conviction, or provisional suspension of the proceeding. Under the terms of Article 39 of Law no. 112/2009 of 16 September (that establishes the legal regime applying to the prevention of domestic violence, protection and assistance for its victims), "during provisional suspension of the proceeding or while serving the sentence, a meeting may be organised, under terms to be regulated, between the offender and the victim, after obtaining their express consent, in order to restore social peace, taking into consideration the victim's legitimate interests, provided that necessary safety conditions are guaranteed, and including the presence of a penal mediator who is accredited for this purpose".

17 In relation to adoption of the model of contractualization of penalties, see *Rodrigues* 2000, p. 143 onwards.

2.3.2 Juvenile justice

The Educational Guardianship Law admits the possibility of "shared execution" of non-institutional guardianship measures. Under the terms of Article 22, "the court will associate the parents or other significant persons for the minor, whether or not family members, to the execution of non-institutional guardianship measures, whenever this is possible and suited to the desired educational goals". No. 2 of Article 130 establishes that "except for cases in which the entity charged with monitoring and guaranteeing execution of the measure is determined by law, the court may entrust its execution to a public service, social solidarity institution, non-governmental organisation, association, sports club and any other public or private entity, on an individual basis, that is deemed to be appropriate". So, it is possible for significant persons for the minor to participate in the execution of the measures.

In addition, the content of the measure and its consequent execution may lead to redress of the damages caused to the aggrieved party or lead to economic provisions or community service. Article 11 specifies the following means whereby the minor may redress the damages caused to the aggrieved party: "a) present apologies to the aggrieved party; b) economically compensate the aggrieved party, in full or in part, for damages to property; c) exercise activity, to the aggrieved party's benefit, connected to the damage, whenever possible and suitable". The aggrieved party's consent is required in relation to any measures related to the hypotheses described in b) and c). In turn, "a measure based on economic provisions or delivering community service involves the delivery by the minor of a specific amount, or of community service to the benefit of a public or private non-profit entity" (Article 12 of the Educational Guardianship Law).

3. Organisational structures, restorative procedures and delivery

Victim-offender mediation is a restorative practice in the strict sense of the term (in which both the procedure and the aspired outcomes are restorative) for which the Portuguese legislator manifests an almost exclusive preference. There are two entities that are primarily responsible for creating the conditions that will enable such mediation to take place, both of which are linked to the Ministry of Justice: the Directorate-General of Social Reinsertion (DGSR), for mediation related to juvenile delinquency and post-sentencing restorative measures; and the Alternative Dispute Resolution Office (GRAL), for mediation that constitutes a form of procedural diversion, in the inquest stage. Here, mediation is understood within the framework of alternative means of resolving litigation.

Mediation is scarcely regulated in the context of juvenile justice. In this framework, the entity that is empowered to implement mediation (after promotion of this option at the initiative of the judicial authority, the minor, attorney, parents or legal representative) is the DGSR of the Ministry of Justice. The Social Reinsertion Services develop a programme orientated towards creation of the conditions that are technically necessary for exercising mediation, known as the Mediation and Redress Programme (PMR). This programme adopts the priority of redressing the damages caused to the victim, supporting the young person to find restorative measures, which will promote his sense of responsibility and his involvement in a commitment to education that is designed to foster values, thus avoiding the perpetration of further crimes in the future. The description provided by DGSR of the programme states that "the programme's central participants are the community, the victims and the offenders". It also distinguishes between interventions available by virtue of this programme, identifying two autonomous moments. In the inquest stage, victim-juvenile offender mediation is indicated; support for drawing up of a plan of conduct and support for execution of the mediation agreement or plan of conduct. In the trial stage, reference is made to support for obtaining a consensus for application of a non-institutional educational guardianship measure and victim-young offender mediation in order to apply guardianship measures that will redress the interests of the aggrieved party.

The DGSR is also the competent entity, in the context of adult criminal justice, for monitoring post-sentencing measures, in particular community service measures with restorative objectives. The social reinsertion services guarantee execution of these penalties, via the action of their teams, distributed across the country.

Penal mediation "for adults" introduced by Law no. 21/2007 of 12 June, occurs in the framework of the Penal Mediation System (SMP), regulation of which is specified in the Annex to Administrative Rule no. 68-C/2008 of 22 January. The Penal Mediation System is essentially operated by penal mediators selected by the GRAL to be included in lists that are subsequently provided to the Public Prosecution Service. With this list in its possession, the Prosecution Service in turn progressively allocates cases to the mediators via a computing service that guarantees sequential designation.

The mediation sessions are conducted by a penal mediator, wherein the formal suspect (*arguido*) and the aggrieved party (*ofendido)* appear in person. It is possible to arrange for these sessions to be monitored by an attorney or intern attorney.

Under legal terms, "the penal mediator cannot suggest or impose the terms of the agreement on the persons involved in the mediation, and should help them to communicate with each other, reflect upon the issues under dispute, and contemplate options that make it possible to reach a just, equitable and long-lasting agreement that incorporates the free exercise of their intent and responsi-

bility". The main duties that condition the mediator's activity are impartiality, independence, confidentiality and diligence. The mediator is prevented from participating, in particular as a witness, in a judicial proceeding that may occur after a mediation process in which no agreement was reached or for which the agreement was not complied with.

Article 12 of Law No. 21/2007 of 12 June defines the necessary requirements to be able to act as a penal mediator: mediators must be over 25 years of age; in full possession of political and civil rights; have a bachelor's degree or suitable professional experience; be qualified with a penal mediation course recognised by the Ministry of Justice; be a suitable person for exercise of the activity of a penal mediator; have full command of the Portuguese language.

The mediation procedure admitted in the inquest stage begins with verification by the Public Prosecution Service of any evidence that the crime has been committed and that the requirements for submitting the proceeding for mediation have been fulfilled (private offences in the broad sense of the term against persons or property, punishable with a prison sentence no higher than five years or a sanction other than a prison sentence, except for crimes against sexual freedom, cases in which the aggrieved party is a minor aged under 16 years or where the form of a special summary proceeding or highly summary proceeding applies), subject to the Public Prosecution Service's initiative or the joint initiative of the aggrieved party (*ofendido*) and the formal suspect (*arguido*). The Public Prosecution Service then designates a penal mediator via the computing system and, if the latter accepts this nomination, essential information will be sent to the mediator in relation to the formal suspect and the aggrieved party, together with a summary description of the case of the proceeding. Simultaneously, the Public Prosecution Service will notify the formal suspect and the aggrieved party that the proceeding has been submitted for mediation. The notification model was approved by Administrative Rule No. 68-A/2008 of 22 January, which specifies, amongst other elements, the following information[18]: "mediation is an informal, flexible and voluntary proceeding, in which a specifically trained mediator helps the parties reach an agreement that will enable them to end the dispute. The mediator does not impose any decision on the parties, he simply helps them to reach an agreement. Mediation will only occur if both parties agree to it". The notification will also state that the mediator will enter into contact with the parties in order to clarify all existing doubts, that the mediation is confidential and that the content of the sessions may not be used as evidence in a judicial proceeding. The notification sent to the formal suspect (*arguido*) and aggrieved party (*ofendido*) will also include information stating that "if it is possible to obtain the agreement of both parties in the wake of the

18 The essential aspects of the notification are reproduced herein, to the extent that, in this manner, a simplified description is established – and that which from the outset is communicated to the parties – of the mediation proceeding.

mediation sessions, the details of the agreement will be drawn up in writing. Signature of the agreement implies withdrawal of the complaint by the aggrieved party and non-opposition by the formal suspect. If no agreement is reached between the parties, the penal proceeding will continue. The content of the agreement may be established freely, provided that it does not include sanctions involving deprivation of liberty, duties that offend the dignity of the formal suspect or duties that extend over 6 months. The agreement may consist, for example, of the payment of an amount, a public declaration of apology, redress of a damaged item, etc".

Remuneration for the provision of the penal mediator's services is determined by a ministerial order issued by the Minister of Justice and the charges resulting from payment of such remuneration are covered by the budget of the Ministry of Justice's Alternative Dispute Resolution Office. Under the terms of Article 13 of the Regulation of the Penal Mediation System (annex to Administrative Rule No. 68-C/2008, of 22 January), "the mediation proceeding is not subject to the payment of legal expenses".

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice

4.1.1 Data in relation to minors

The site of the Directorate-General of Social Reinsertion of the Ministry of Justice contains statistical data concerning requests for reports and other advisory services, received within the framework of the Educational Guardianship Law, wherein information on interventions involving mediation identify 25 cases in 2007, 44 in 2008 and 48 in 2009. In relation to information on interventions involving mediation, the site clarifies that "for organisation of the goals of the proceeding, the judicial authority may determine the cooperation of public or private mediation entities. Mediation will occur at the initiative of the judicial authority, the minor, his parents, legal representative, *de facto* guardian or attorney (Art. 42 Educational Guardianship Law)".[19]

On 31 December 2009, the DGRS accompanied a total of 974 young persons with community service measures in progress, in the framework of educational guardianship. Of these 974 individuals, 859 (88%) were males and 115 (12%) were females. Data are also available in relation to measures being executed on 31 December of each year and, in relation to suspension of the proceeding, distinguishing between cases with and without mediation. Hence, in

19 See *Gomes/Martins/Pechorro* 2010, p. 24.

2007 it specifies 103 provisional suspensions of proceedings, all with mediation; in 2008 it mentions 92 suspensions of proceedings with mediation and 10 without mediation; in 2009 it specifies 93 suspensions of the proceedings with mediation and 11 without mediation.

In relation to measures being executed on 31 December 2009 in the framework of educational guardianship, it states that "with the exception of Organisation of Community Service and Imposition of Obligations, all other categories registered reductions, in particular Educational Monitoring, Frequency of Training Programmes and Imposition of Rules of Conduct". Nonetheless, "the number of young people serving a detention measure in an educational centre increased by 13% from 2008 to 2009". Also according to the same source, "the total number of 974 young persons being monitored as of 31 December 2009 were serving, during the pre-sentencing stage, 104 Proceeding Suspension measures and, in the post-sentencing stage, 341 Educational Monitoring measures, 293 measures involving Imposition of Obligations and 189 measures involving Economic Provisions and Community Service".

According to provisional data retrieved from the DGRS' Statistical System on 31 March 2011, there were 204 young persons detained in an educational centre in December 2009, 226 in December 2010 and 254 in March 2011, 228 males and 26 females. Of these young persons, at the end of March 2011, 70% were detained in a semi-open regime, 19% in a closed regime and 11% in an open regime.

4.1.2 Data in relation to adults

In relation to non-restorative measures in the strict sense of the term, contemplated within Portuguese criminal justice, that are orientated towards redress and diversion, there has been a marked increase in application of such measures above all between 2007 and 2009. Combined analysis of the levels of application of provisional suspension of proceedings, provision of community service, substitution of a fine by work and suspension of execution of the prison sentence, reveals that there has been growth between 6% and 51% in this period. The highest level of growth was recorded in the application of provisional suspension of the proceedings.[20]

The Ministry of Justice's Alternative Dispute Resolution Office supplies data in relation to the public penal mediation service.[21] Firstly, it's important to

20 See *Gomes/Martins/Pechorro* 2010, p. 27.

21 In compliance with the provisions established in the Resolution of the Assembly of the Republic no. 99/2010, of 11 August, the Ministry of Justice's Alternative Dispute Resolution Office discloses statistics on alternative dispute resolution mechanisms on the 12th day of each month or the next following working day. The numbers stated above are those included in the update published on 13 March 2012.

consider the number of mediation requests: 95 in 2008; 224 in 2009; 261 in 2010; and only 90 in 2011 Next, it's important to consider within the number of mediation proceedings concluded in each year, those with and without an agreement: in 2008: 16 with agreement and 14 without agreement; in 2009: 47 with agreement and 40 without agreement; in 2010: 71 with agreement and 87 without agreement; in 2011: 35 with agreement and 50 without agreement. In the first two months of 2012, 10 mediation requests were presented and, in the same time period, 5 mediation proceedings were concluded, 2 with agreement and 3 without agreement.

This data enables two main conclusions to be drawn that offer little optimism in relation to the framework of application of this penal mediation for adults system, as a procedural diversion mechanism. Firstly, given that the public penal mediation system entered into force at the beginning of 2008, we find that in the following two years (2009 and 2010) there was a consistent rise in the number of mediation requests; but there was a marked fall in the number of requests in 2011, which would seem to be a negative sign. On the other hand, there also seems to a consistent increase in the percentage of mediation proceedings without an agreement.

4.2 Findings from implementation research and evaluation

To date, no studies or research have been conducted on recidivism after mediation or on satisfaction or opinion rates among participants. Nor have there been studies that investigate the opinions of practitioners of the justice system. The focus of this chapter is therefore on analyses and studies looking into the problems that mediation faces in Portugal today.

The dominant opinion in studies dedicated to the topic of youth crime is that improvements have resulted from the application of the Educational Guardianship Law of 1999, but that at the same time recourse to restorative measures has been well below its possible and desirable level. In this regard *Fonseca*[22] states that "a rising number of educational guardianship restorative measures have been applied, according to statistics available from the Ministry of Justice. However, this increase is far more evident and constant in the case of measures involving the organisation of economic provisions or community service, especially the latter, than in the case of measures intended to redress the interests of the aggrieved party".

The study coordinated by *Sousa Santos*[23] offers an identical conclusion – focused on the timidity with which mediation has been used in the context of application of the Educational Guardianship Law. The low-level of recourse to

22 *Fonseca* 2010, p. 13.

23 *de Sousa Santos* 2010, pp. 215 ff.

mediation is explained by the tendency to reject mediation outside the judicial system and as a result of excessive judiciarization of such mediation, due to the fact that judicial authorities play an excessive role in the effective promotion of the measure. When mediation is a diversion mechanism that aims to permit suspension of the proceeding, an initiative should be taken by the minor, his parents or representatives, but this depends upon a decision of the Public Prosecution Service. When mediation appears in the preliminary hearing as an instrument for choosing the guardianship measure, it is understood that the judge holds discretionary power in this regard. It is nonetheless recognised that "the possibility of recourse to mediation outside the judicial system is […] controversial. The following fundamental objections are raised: the fact that recourse to mediation without control of the Public Prosecution Service may "conceal" the existence of a multiple set of complaints; protection of the young person's fundamental rights; and the form in which mediation is structured, requiring technical quality".

The study coordinated by *Sousa Santos*[24] also suggests "investment in mediation, not only as a form of resolving the dispute and avoiding the young person being submitted to a hearing, but also as a mechanism or instrument at the service of execution of the applied measure". As such, the study advocates a commitment to mediation after functioning of the judicial control system.

On the other hand, emphasis is also placed on the advantages of predelictual mediation, in contexts in which the existence of further disputes is possible. On the basis of recognition of the cultural heterogeneity detected amongst the agents of juvenile delinquency a commitment to social mediation is defended, "with empowerment of strategic actors at the local level for pacification and solution of disputes and promotion of human rights, wherein special attention should be given to experiences in Portugal of intercultural mediation. The legal professions, by intervening in proceedings intended to promote social mediation, as trainers, provide the community with technical tools for dispute resolution, and also receive sociological knowledge in order to understand the social nature of the disputes."[25]

The Recommendations of this extensive study into the application of the Educational Guardianship Law include the fact that it is indispensable to "stimulate the growth of mediation in the framework of educational guardianship". It also suggests a broad and express commitment to mediation at various stages of the procedure, with several clarifications and extensions of the regime currently applied. The first relevant stage is the educational guardianship inquest stage. In this stage, the young person and those nearest to him are responsible for requesting mediation, but this responsibility is also expressly held by the

24 *de Sousa Santos* 2010, p. 217.

25 *de Sousa Santos* 2010, p. 320.

Public Prosecution Service, that does not require a prior manifestation of intent from the former; this mediation should not be uniquely configured as an instrument for preparing the project that will enable the proceeding to be suspended, but instead there should be broad recognition that if mediation enables an agreement to be reached, which the Public Prosecution Service homologates, this should lead to archiving of the proceeding. Subsequently, it should stimulate recourse to mediation in the preliminary hearing stage, in order to guarantee a settlement of interests that helps inculcate a sense of responsibility and fosters education of the young person via the chosen educational guardianship measure. Finally, it is important to guarantee the recourse to mediation as a mechanism that, during execution of the guardianship measure, facilitates conciliation between the juvenile offender and the community, thus favouring his reintegration.

In relation to adult criminality, specifically restorative practices have also not acquired a desirable scale. Various causes may be identified in function of the stage of the proceeding in which such practises are admitted.

In relation to penal mediation for adults, as specified in Law no. 21/2007, which constitutes a diversion mechanism, one of the barriers to more widespread use of this alternative is excessive dependence upon a decision from the Public Prosecution Service (which has demonstrated several types of resistance to this new procedure), that has the power to send the proceeding for mediation. If the Public Prosecution Service fails to take this option, mediation at the request of the parties requires an expression of joint intent from the formal suspect (*arguido*) and the aggrieved party *(ofendido),* which only rarely occurs, since this is also a time of conflict. On the other hand, the list of crimes in relation for which mediation is admitted seems to be limited, given that it excludes all crimes which are punishable with a prison sentence higher than 5 years, all public crimes and also several crimes that, although they are private crimes and punishable with a penalty no higher than 5 years of prison, have been expressly excluded from the possibility of mediation by the legislator (above all "sexual crimes"). Law no. 21/2007, in addition, frequently indicates an understanding of penal mediation primarily as a mechanism offering celerity and economy rather than a "quasi-right" of the intervening parties involved in the dispute. One example of this understanding is the preference manifested for special (summary and highly summary) proceedings rather than mediation.[26]

In relation to crimes of domestic violence, the option for a "restorative meeting" after conviction or after provisional suspension of the proceeding causes many problems.[27] Firstly, the content of the norm, which is extremely

26 Under the terms of paragraph e) do no. 3 do article 2, independently of the nature of the crime, mediation in a penal proceeding cannot occur when "a summary proceeding or highly summary proceeding is applicable".

27 See *Santos* 2010, pp. 74-76, who, notwithstanding his criticism of the adopted solution, nonetheless emphasises its symbolic value, whereby it is thereby possible to clarify,

vague in relation to practical implementation of that restorative practice, requires regulation. Secondly, it should not include the restoration of social peace as an objective presiding over this meeting. The primary goal of pacification is the interpersonal relationship between the agent and victim. And, in relation to domestic violence, the preponderant interest is that of the specific victim, rather than punishment in order to defend the community. On the other hand, it is unclear why only this (late) moment in time is chosen for acceptance of the restorative meeting, when it is possible to conceive cases in which the victim would like to have achieved a peaceful settlement of the dispute at an earlier moment, and didn't desire the response given by the penal justice system, via provisional suspension of the proceeding or the conviction. This decision by the Portuguese legislator seems to be founded on the concern that diversion might convey an image of political-criminal tolerance in relation to domestic violence. In first place, functioning of criminal justice is required and only subsequently is the possibility of a restorative practice admitted. But this does not consider the possibility that, in function of the specificities of the case, the penal solution may undermine the restorative meeting.

Finally, the lack of a commitment to restorative practices in the prison context, although this possibility is admitted by law, seems to be based above all on the lack of initiative from the Prison Services, that requires a proposal to this effect by the Director-General and subsequent approval by the Minister of Justice.

5. Summary and outlook

Global consideration of measures with restorative objectives prevailing in Portugal should begin with a distinction between those that presuppose the consent of the formal suspect (*arguido*) and the aggrieved party (ofendido) but are also determined by the judicial authorities in light of preventive objectives; and other measures that are restorative in the strict sense of the term because they expect the direct intervening parties involved in the dispute to reach a solution.

In relation to the former category, that has existed in Portugal since the 1980s and in particular includes provisional suspension of the proceeding or suspension of execution of the prison sentence, it is possible to make a positive evaluation – given that their framework of application has successively broadened. This wider application is the result of successive legislative alterations that emphasise the preference of the Portuguese penal and procedural penal legislator for solutions of consensus, celerity and diversion for criminality of little and medium gravity (i. e. criminality punishable with a prison sentence no

within the Portuguese legal framework, the possibility of recourse to restorative practices in the framework of serious crimes and subsequent to the functioning of the formal control proceedings.

higher than 5 years or with a penalty that does not involve deprivation of liberty).

In relation to restorative measures in the strict sense of the term, at the present time, there seem to be fewer grounds for optimism. Penal mediation is not admitted for all crimes nor is it practically effective at all times of the proceeding. Amongst the factors that may contribute to explaining this situation, special emphasis should be placed on either the questionable legislative options or insufficient (or even inexistent) practical implementation of solutions that are already permitted by law.

The legislative options that are considered to be questionable in particular include the limited material framework of application of mediation as a diversion mechanism in the inquest stage. The crimes that, under the terms of Law no. 21/2007 of 12 June, admit the possibility of sending the proceeding for penal mediation are solely some private offences. There is an exclusion of other crimes whose procedure depends upon the existence of a complaint, in particular crimes against sexual liberty, in relation to which there are well-known phenomena of a high level of unreported crimes and secondary victimisation inherent to functioning of a punitive justice system. The prohibition on mediation as a diversion mechanism for all public crimes is also not deemed to be inevitable, in particular for public crimes in which there is a relationship of existential proximity between the agent and the victim. On the other hand, the option for penal mediation seems to be hampered by an eventually excessive role of promotion of the measure attributed to the Public Prosecution Service that is furthermore conditioned by the criterion of utility from the perspective of specifically penal goals. It is considered that, at least in relation to private offences, a possibility should be admitted of mediation by individual request of either the formal suspect (*arguido*) or the aggrieved party (*ofendido*), provided that subsequently both manifest their intention to take part in the restorative practices.

Also in terms of doubtful legislative options, emphasis should be drawn to the lack of determination that is inherent to the regime of the "restorative meeting" specified for crimes of domestic violence. It is possible to question the sole moment when this meeting is admitted – after the provisional suspension of the proceeding or the conviction – and its overriding goals.

The timidity of the recourse to restorative practices in the strict sense of the term is also related, on the other hand, to insufficient use of the hypotheses already admitted by the legislator. It would be convenient, to this extent, to foster a more precise knowledge of their properties and the associated advantages amongst possible promoters of such measures and their addressees.[28] These

28 Expansion of recourse to restorative measures presupposes that it is thereby possible to overcome a certain sense of disorientation that is provoked (in law enforcement officials, in the intervening parties in a dispute and amongst the other members of the

gaps in terms of practice appear to be particularly visible in the framework of post-sentencing penal mediation or mediation in a prison context. Furthermore, these gaps are also notorious in terms of mediation for juvenile delinquency enabled by the Educational Guardianship Law, and also the limited implementation to date of the penal mediation regime for adults established in Law no. 21/2007, of 12 June.

We believe that the future of restorative practices in Portugal should involve understanding of such practices not only as an alternative dispute mechanism orientated towards celerity and economy of resources, but above all as a mode of pacification of the criminal dispute, that may correspond to demands for justice – to the extent that they favour socialization of the agent of the crime, redress of the damages suffered by the victim and pacification of the community. In the words of *Rodrigues*,[29] "either negotiated justice or swift justice, wherein the former often serves the interests of the latter, not only serves logic of 'productivity', but also'logic of justice'."

References:

da Agra, C., Castro, J. (2007): La justice des mineurs au Portugal. Risque, responsabilité et réseau. In: Bailleau, F., Cartuyvels, Y. (Eds.): La Justice Pénale des Mineurs en Europe. Entre modèle welfare et inflexions néo-libérales. Paris: L'Harmattan, pp. 229-246.

Castro, J. (2006): O processo de mediação em matéria penal. Elementos de reflexão a partir do projecto de investigação-acção da Escola de Criminologia da Faculdade de Direito da Universidade do Porto. Revista do Ministério Público, vol. 27, nº. 105, January-March, pp. 145-154.

de Sousa Santos, B. (2010): Entre a Lei e a Prática – Subsídios para uma Reforma da Lei Tutelar Educativa, Coimbra: CES/Permanent Observatory of Portuguese Justice.

Duarte-Fonseca, A. C. (2010): Sobrevivência e erosão do paradigma da protecção em sistemas europeus de justiça juvenil. Ousar Integrar – Revista De Reinserção Social e Prova, nº. 7, pp. 1-16.

Fidalgo, S. (2008): O consenso no processo penal: reflexões sobre a suspensão provisória do processo e o processo sumaríssimo. Revista Portuguesa de Ciência Criminal, vol. 18, April-September 2008, nº. 2 and 3, pp. 277-315.

community) by a model of reaction to the crime that, at various levels, seems to be opposed to the penal paradigm formed by Enlightenment Thinking, focused on the public character of penal justice and its goal of subsidiary protection of legal rights. On this matter, see *Santos* 2007, p. 459 onwards.

29 *Rodrigues* 2006b, p. 305.

Gersão, E. (1997): A reforma da organização tutelar de menores e a Convenção sobre os direitos das crianças. Revista Portuguesa de Ciência Criminal, vol. 7, pp. 577-620.

Gomes, F., Martins, P., Pechorro, P. (2010): Difusão Estatística 2009. Lisbon: Ministério da Justiça, Direcçao-Geral de Reinserção Social.

Leite, A. L. (2008): A Mediação Penal de Adultos, um Novo "Paradigma" de Justiça. Coimbra: Coimbra Editora.

Morais, M. T. (2006): Mediação penal, o "Projecto do Porto" e o Anteprojecto da Proposta de Lei. Revista do Ministério Público, vol. 27, nº. 105, January-March, pp. 134-144.

Reis, S. (2010): A vítima na mediação penal em Portugal. Revista da Ordem dos Advogados, vol. 70, pp. 573-590.

Rodrigues, A. M. (1997): Repensar o direito de menores em Portugal – utopia ou realidade? Revista Portuguesa de Ciência Criminal, vol. 7, pp. 355-386.

Rodrigues, A. M. (2000): Novo Olhar Sobre a Questão Penitenciária. Coimbra: Coimbra Editora.

Rodrigues, A. M. (2006a): A propósito da introdução do regime de mediação no processo penal. Revista do Ministério Público, vol. 27, January-March, nº. 105, pp. 129-133.

Rodrigues, A. M. (2006b): Globalização, democracia e crime. In: de Faria Costa, J., Marques da Silval, M. A. (Eds.): Direito Penal Especial, Processo Penal e Direitos Fundamentais – Visão Luso-Brasileira. São Paulo: Quartier Latin, pp. 277-310.

Santos, C. M. C. (2006): A mediação penal, a justiça restaurativa e o sistema criminal – algumas reflexões suscitadas pelo Anteprojecto que introduz a mediação penal "de adultos" em Portugal. Revista Portuguesa de Ciência Criminal, vol. 16, nº. 1, January-March, pp. 85-113.

Santos, C. M. C. (2007): Um crime, dois conflitos (e a questão, revisitada, do "roubo do conflito" pelo Estado. Revista Portuguesa de Ciência Criminal, vol. 17, nº. 3, July-September, pp. 459-474.

Santos, C. M. C.(2010): Violência doméstica e mediação penal: uma convivência possível? Julgar, vol. 12, September-December, pp. 67-79.

Romania

Andrea Păroşanu

1. Origins, aims and theoretical background of restorative justice

1.1 Overview on forms of restorative justice in the criminal justice system

In recent years, restorative justice approaches have received increased attention in Romania, as in many other eastern and south-eastern European countries. In the course of the judicial reforms in Romania, various restorative justice elements have been implemented by law.[1]

The main form of restorative justice initiatives in the country is victim-offender mediation, first practiced experimentally for juveniles and young adult offenders. Victim-offender mediation is based on the Law on Mediation from 2006, which regulates, among other forms of mediation, the procedure and characteristics of mediation in penal matters. This restorative measure of conflict resolution can be conducted either independently or as part of the criminal proceedings. Mediation is applicable both to adults and juveniles for certain categories of offences as provided by the law. Furthermore, Romanian law provides for financial compensation to victims of crime for material or immaterial damage caused by the offence. Hereby, civil action may be connected with criminal proceedings. The law allows for compensation on the basis of a mediation agreement.

Further elements of restorative justice can be found in the Law to Prevent and Combat Domestic Violence, which has provided for mediation in the field of violent family conflicts since 2003.

1 For an overview on restorative justice and victim-offender mediation in Romania see *Balahur* 2007; 2012; *Rădulescu/Banciu/Dâmboeanu* 2006; *Szabo* 2010.

In recent years, legal reforms have brought further improvement of victims' rights and incorporated principles of restorative justice. Thus, the Law on Measures to Protect Victims of Crime 2004 introduced important rights such as enhanced information rights, psychological and legal counselling as well as state-granted financial compensation for victims of serious offences.

Regarding the treatment of juveniles, the new Criminal Code[2] provides for a wider catalogue of alternative measures (including participation in educational programmes and extended supervision measures by probation services). The legislator has abandoned the category of juvenile sentences and united all measures under the term "educational measures", which are subdivided into custodial and non-custodial measures.[3] The new legislation thus indicates a slight shift away from the retributive approach, although restorative justice is not explicitly mentioned.

1.2 Reform history

Within the transition process in post-communist Romania, the country has experienced changes and essential reforms in the field of justice in order to align with international standards and EU regulations.[4]

In the context of juvenile justice reform, first elements of restorative justice were introduced by establishing two pilot centers for restorative justice in the cities of Craiova and Bucharest in 2002. The centers were organized in cooperation with the Probation Directorate[5] within the Ministry of Justice, the Center for Legal Resources and the foundation "Family and Child Protection". Funding was provided by the UK Department for International Development and the Center for Legal Resources from 2002 to 2003 and by the European Union through a Phare program in 2004. The pilot centers were legally based on several Ministry of Justice Ordinances[6] regarding the establishment, function and continuation of the two restorative justice centers.

The project aimed at promoting restorative justice approaches such as mediation in the field of juvenile justice. Therefore, the first pilot project

2 Law No. 286/2009, published in the Official Gazette No. 510 of 24 July 2009. The law was further amended and modified by Law No. 27/2012, Law No. 63/2012 as well as Law No. 187/2012 and entered into force on February 1st, 2014.

3 However, already in 1977 the Romanian legislator abolished imprisonment for juveniles aged 14 to 18 years and provided for non-custodial and custodial educational measures. In 1992, this regulation was abrogated and prison sentences for minors were introduced again.

4 See further *Balahur* 2007, pp. 64 f.; 2012, pp. 302 f.

5 Then called: Directorate for Social Reintegration and Supervision.

6 Ministry of Justice Ordinances 1075/C/2002, 2415/C/2003, 400/C/2004.

running from 2002 to 2003 was entitled "Restorative Justice – a possible answer to juvenile delinquency".[7] Activities continued in 2004 within the project "Enhancement of the juvenile justice system and victim protection".[8] A further objective of the project was to elaborate legislative proposals in order to enhance the juvenile justice system and protection of victims of crime.

The main activity was to provide victim-offender mediation to juveniles and young adults aged 14 to 21 years, including both victims and offenders. Further activities aimed at: psycho-social evaluation of offenders by request from the public prosecutor or judge; special assistance and counselling for the beneficiaries of the program; organization of rehabilitation programs for offenders; promotional activities within the communities.[9]

Local coordination committees consisting of representatives of county courts, public prosecutor's offices, police and probation services were set up in order to enhance cooperation and better implement the initiatives at both the local and regional levels. Furthermore, interdisciplinary cooperation teams with judges, public prosecutors and police were organized to enhance case referrals to the restorative centers.

Regarding the activity within the centers, multidisciplinary teams including social workers, psychologists and mediators provided for the counselling and mediation services.

Victim-offender mediation was available in cases where criminal action was initiated upon prior complaint of the victim, or reconciliation of the parties removed criminal liability. These encompassed minor offences, mainly offences against the person, such as bodily harm, harassment and insult, furthermore damage to property and theft. The restrictive legal framework was found to be one of the main obstacles which prevented a wider selection of cases.[10] Detailed results of the evaluation of the restorative justice projects will be presented later in this report.

In 2004, funding could not be continued and the centres had to cease their activities. However, the centre in Craiova continued to offer mediation services and covered a wide range of conflicts, such as civil, commercial and family conflicts. The Craiova Mediation Centre was set up parallel to the restorative justice pilot centre as a general mediation pilot centre in 2003, supported by the US Embassy and the bar association Dolj. Today, it provides for general

7 For detailed information see the evaluation study by *Rădulescu/Banciu* 2004.

8 Evaluation study by *Rădulescu/Banciu/Dâmboeanu/Balica* 2004.

9 See *Rădulescu/Banciu/Dâmboeanu* 2006, pp. 200 f.

10 See *Rădulescu/Banciu/Dâmboeanu* 2006, p. 201.

mediation services including victim-offender mediation and training courses throughout the country.[11]

Regarding the implementation of mediation, the commitment of the civil society and academics was of major importance.[12] Local initiatives supported by NGOs and international experts led to the establishment of restorative justice guided projects. Notable examples are the Centre for Mediation and Community Security (since 2001) and the Association for Dialogue and Dispute Resolution (since 2005), which are based in the city of Iaşi and deliver restorative justice guided projects, including victim-offender mediation, special counselling and assistance to victims and offenders. From 2005 to 2006, the Centre for Mediation and Community Security implemented the project "Participatory model of restorative justice in cases of juvenile delinquency", funded by the British Embassy in Bucharest through the Global Opportunities Fund.[13] The project aimed at providing an intervention model based on restorative justice principles, involving victims, offenders, police, prosecutors, judges, probation services and specialized agencies. Further objectives were to increase public and professional awareness in the fields of restorative justice and dispute resolution.

Furthermore, mediation in civil and commercial matters was practiced in several places before its actual legal implementation. The overall positive experience resulting from the mediation projects contributed among others to the elaboration of the legal framework of mediation, covering different fields of application. However, in practice, there are no systematic nationwide victim-offender mediation programmes. Principally, mediation including victim-offender mediation is available throughout the country, provided by private organizations. Yet, it has to be noted that there is currently hardly any specialization on mediation in penal matters, except for a few facilities.

Based on practical experiences, principles of restorative justice were taken into cosideration in the judicial and welfare reform process. First elements were introduced in 2003 in the Law to Prevent and Combat Domestic Violence. Later on, reforms focused on the better implementation of victims' rights, resulting in 2004 in the Law on Measures to Protect Victims of Crime and, with regard to alternative conflict resolution, in the Law on Mediation in 2006, further amended and modified.

---

11 See website of the Craiova Mediation Centre, *http://www.mediere.ro/en/* (accessed 3.6.2014).

12 See *Balahur* 2007, p. 66; 2012, p. 314.

13 See website of the Centre for Mediation and Community Security, *http://www.cmsc.ro/index.php?page=03* (accessed 3.6.2014).

1.3 Contextual factors, aims of the reforms and the influence of international standards

The promotion of restorative justice initiatives and their legal implementation has mainly been due to the will to better align the state of affairs in Romania with European and international standards. The practical experiences by non-governmental organizations, as mentioned above, were also of further importance. In the context of EU accession, one of the priorities has been harmonization with the *acquis communautaire*. Promoting methods of alternative dispute resolution such as mediation was among the strategic aims of the Romanian government in reforming the justice system prior to EU accession.[14] Under the Action Plan to implement the judicial reform strategy, the legislator decided to prioritize the regulation of alternative dispute resolution methods, including (victim-offender) mediation.[15]

Special attention was paid to the reform of the juvenile justice system by introducing restorative justice elements. The objective was to move away from the retributive-oriented sanctioning system towards a system grounded on rehabilitation, reintegration, victim protection and assistance.[16]

Within the transformation process, Romania experienced a significant increase in the use of liberty-depriving penalties, especially among juveniles and young adults. In the period from 1994 to 1998, almost half of all convicted minors were given prison sentences.[17] Reforms in the fields of juvenile justice aimed at reducing the high incarceration rates and promoting the expansion of alternative sanctions and measures. The introduction and promotion of community-based measures that aim to better foster offender reintegration were intended. As a consequence, a comprehensive reform to set up a national probation system was initiated. In the course of the project to implement probation services from 1998 to 2004, funded by the UK Department for International Development, victim-offender mediation was initially meant to complete the framework of alternative institutions such as probation.[18] Accordingly, it was decided that the experimental victim-offender mediation projects be conducted within the country's juvenile justice system, as described earlier.

---

14 See *Balahur* 2007, p. 65; 2012, p. 316.

15 See *Ministry of Justice*, Action Plan for the Implementation of the Strategy of the Reform of the Judiciary 2005-2007, available at *www.just.ro*.

16 See also *Ministry of Justice*, Strategy for the Reform of the Judiciary 2005-2007, p. 13, available at *www.just.ro.*

17 See *Romanian Statistical Yearbook* 1999.

18 See *Balahur* 2007, p. 65.

Moreover, the promotion of alternative practices aimed at reducing the high caseload of the courts.[19] Judges were facing a very high number of actions to be solved. The European Commission stated significant imbalances of workload between the court levels, a lack of human resources within the judicial system and critizised Romania for the inefficiency of judicial proceedings.[20]

Council of Europe, Committee of Ministers, Recommendation No. R (99) 19 concerning mediation in penal matters was of importance with regard to the implementation of mediation in penal matters. This directive is explicitly mentioned in the motivation leading to the Law on Mediation of 2006.[21] With regard to the Mediation Law, several other documents were of importance as well, such as the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law COM (2002) 196, the European Code of Conduct for Mediators, launched by the European Commission in 2004, the Council of Europe Recommendation on mediation in civil matters No. R (2002) 10 and the Council of Europe Recommendation on family mediation No. R (98) 1.

The following instruments were also of relevance: Council of Europe, Committee of Ministers, Recommendation No. R (2000) 22 on improving the implementation of the European rules on community sanctions and measures and United Nations, Economic and Social Council, Resolution No. 2002/12 Basic principles on the use of restorative justice programs in criminal matters.

The UN Convention on the Rights of the Child, ratified by Romania in 1990, must be mentioned as well. It played an important role in the course of the reform of the juvenile justice and welfare system. The standards emphasize reintegrating juvenile offenders into society and resorting, in cases where it is appropriate, to alternative measures instead of formal court proceedings.

The legal framework on the protection of victims of crime took into consideration various principles and standards found in EU documents, such as the European Convention on the Compensation of Victims of Violent Crime (24 November 1983), ratified by Romania in 2006, Council of Europe Recommendation R (85) 11 on the position of the victim in the framework of criminal law, Commission Communication "Crime victims in the European Union – reflections on standards and action" (14 July 1999), EU Framework Decision on the standing of victims in criminal proceedings (15 March 2001) and the Council Directive 2004/80/EC relating to compensation to crime victims.[22]

---

19 See *Ministry of Justice*, Statement of reasons, Law on Mediation, p. 1.

20 *European Commission* 2010, p. 4.

21 For detailed information, see *Ministry of Justice*, Statement of reasons, Law on Mediation, p. 2.

22 See *Ministry of Justice*, Statement of reasons, Law on measures to protect victims of crime, p. 1.

2. Legislative basis for restorative justice at different stages of the criminal procedure

2.1 Victim-offender mediation

Mediation in penal matters is based on the Law on Mediation and the Mediator Profession,[23] which was enacted in 2006 and further amended and modified in the subsequent years.[24] The legal provisions apply both to adults and juveniles, so that no general structural distinction between the two age categories is made in this section. Individual differences are pointed out where applicable. Procedural rights that juveniles are entitled to are safeguarded in the act. The general Law on Mediation aims at enhancing alternative practices of conflict resolution in the country.[25]

The law contains general dispositions on mediation, detailed provisions on the mediator's profession, mediator's rights and duties, the mediation procedure and different fields of application, including victim-offender mediation. Regarding victim-offender mediation, the law stipulates that it is applicable before and after the initiation of criminal proceedings. Restorative justice values are merely included in the law, which is more aligned to values of formal court procedure.[26]

The general provisions provide for a definition of mediation and relevant principles of mediation. Regarding fields of mediation, parties can agree to settle conflicts by mediation in civil, commercial, family and penal matters, as well as in any other matters, under the conditions of the law. The mediation process requires the participation of both the parties and the mediator(s).

The amendment by Law No. 370/2009 introduced the duty of justice officials to inform the parties about the availability of mediation.[27] The provision stipulates that judicial and arbitral bodies and other authorities having jurisdictional powers have to inform the parties about the possibility and advantages of mediation and work towards this way of conflict resolution

23 Law No. 192/2006, published in the Official Gazette No. 441 of 22 May 2006.

24 The Law on Mediation was amended and modified by Law No. 370/2009, Government Ordinance No. 13/2010, Law No. 202/2010, Law No. 76/2012, Law No. 115/2012, GEO (Government Emergency Ordinance) No. 90/2012, GEO No. 4/2013, GEO No. 80/2013 and Law No. 255/2013.

25 See for legislation on mediation *Bălan* 2013, pp. 5 ff.

26 See *Balahur* 2012, p. 306.

27 Law No. 370/2009 modifying and amending Law No. 192/2006, entered into force on 3 March 2010, published in the Official Gazette No. 831 of 3 December 2009.

(Art. 6). Investigative bodies such as public prosecutors and judicial police officers[28] also belong to these judicial bodies.

Regarding victim-offender mediation, the law contains special dispositions on the preconditions, procedure and consequences of a succesful or unsuccesful mediation process.[29] The law stipulates that the dispositions are applicable in criminal cases referring to penal as well as to civil aspects (Art. 67 para. 1).[30] Regarding mediation as part of criminal proceedings, the law provides for the application of mediation in cases where criminal action is initiated upon prior complaint of the victim, or reconciliation of the parties removes criminal liability according to the law (Art. 67 para. 2). The following offences fall under the provisions of the criminal law: hitting or other forms of violence, bodily harm, bodily harm by negligence, breaking and entering, rape, seduction of minors, theft upon prior complaint, breach of trust, mischief, property damage, breach of domestic peace, family abandonment[31] and failure to abide by child custody measures.[32] After the coming-into-force of the new Criminal Code in 2014, a few more offences are eligible for mediation. These include offences such as harassment, sexual asault, invasion of privacy, (qualified) theft, deceit or bancruptcy.[33] Evidently, the legislator opted for a rather restrictive legal framework for mediation in penal matters. However, regarding all offences, civil claims can always be asserted by way of mediation (Art. 23 para. 1 new Code of Criminal Procedure). The law provides that during criminal proceedings, the accused, the civil party and the civilly responsible party can complete a mediation agreement.This kind of mediation can be referred to as *civil mediation within criminal proceedings*.[34]

---

28 In cases stipulated by law.

29 See for more detail *Danileţ* 2014, pp. 30 ff.; *Dragne/Trancă* 2011, pp. 32 ff.

30 Modifications brought by Law No. 255/2013 on the application of the new Code of Criminal Procedure. Penal aspects of mediation refer to mediation as part of criminal proceedings.

31 Family abandonment implies for instance that a person who has custody over a child abandons or endangers the child or otherwise fails to fulfill his/her obligations arising from having custody over the child, or that a person who is obliged to pay child support fails to do so for two concurrent months.

32 Failure to abide by child custody measures means that one parent retains custody of a child without the other parent's consent.

33 Furthermore, certain special laws refer to cases where criminal action is initiated upon prior complaint of the victim, or reconciliation of the parties removes criminal liability, and which thus are eligible for mediation in penal matters, see on eligible cases *Danileţ* 2014, pp. 39 f.

34 See *Danileţ* 2014, pp. 34 ff., 42.

The legislator highlights the principle of voluntariness ("neither the injured person nor the offender shall be constrained to accept the mediation procedure", Art. 67 para. 3) in accordance with the European Recommendation No. R (99) 19 concerning mediation in penal matters. Mediation is always based on the free decision of the parties, regardless of whether it takes place independently at the pre-court level, at the court level or at the post-sentence level.

Furthermore, the law points out that procedural rights are safeguarded (Art. 68). These rights encompass the right to legal assistance for each involved party, the right to a translator if necessary, and the penal procedural rights concerning minors, e. g. mandatory legal assistance, the presence of the parents, tutor or the person in charge of supervision of the minor, and probation services.

Mediation may take place before, during or after criminal proceedings. In principle, victim-offender mediation can also be conducted while serving sentences.

2.1.1 Pre-court level (juveniles and adults)

In case the mediation procedure is conducted before the penal proceedings start and results in a succesful agreement, the offender will not be held criminally liable any more regarding the offence (Art. 69 para. 1).

If the mediation procedure started within the period provided by law for submitting the prior claim, the legal deadline will be suspended throughout the mediation process. If the parties do not reconcile during the mediation procedure, the injured party is entitled to file the charge within the legally provided period, starting on the date of the formulated minutes on the closing of the mediation procedure, and taking the time that had past prior to suspension of the proceedings into consideration (Art. 69 para. 2).

If mediation is conducted after the beginning of preliminary proceedings, these proceedings may be suspended until termination of the mediation procedure for a period of maximum three months, starting from the suspension order (Art. 70 para. 2).[35] The penal proceedings will be resumed *ex officio* after receiving the minutes stating that the parties reached no reconciliation, or after the expiry of the period of three months (Art. 70 para. 4). The mediator has the duty to send the mediation agreement and the minutes on the closing of the mediation procedure to the competent judicial body (Art. 70 para. 5).

35 Art. 70 was modified by Law No. 255/2013 and provided that after the beginning of mediation the criminal proceeedings may be suspended, leaving it to the discretion of the judicial authorities. The prior legal provision stipulated that after initiation of the mediation procedure, pre-trial and trial proceedings had to be suspended.

The new Code of Criminal Procedure further emphasized mediation-related aspects.[36] The Code provides that criminal proceedings (including pre-court and court level) have to be suspended if the parties have reached a reconciliation agreement through mediation (Art. 16 para. 1.g new Code of Criminal Procedure). The mediation agreement may also refer to civil claims arising from any type of offence and may therefore not be restricted to an agreement in cases concerning prior complaint or reconciliation.[37]

Furthermore, the new Code of Criminal Procedure provides that, for offences which are punishable by a fine or imprisonment for up to seven years, the public prosecutor may dispense with prosecution if there is no public interest in prosecution and the offender has fulfilled the obligation(s) stemming from the mediation agreement. Concerning public interest in prosecution, the efforts by the offender to remove the results of the offence or to repair the harm are also taken into consideration. In this case, the prosecutor may specify a maximum period of nine months in order to fulfill the obligations (Art. 318 new Code of Criminal Procedure).

2.1.2 Court level (juveniles and adults)

At the court level, once mediation has been initiated, trial proceedings may be suspended for the period of the mediation procedure. Suspension will last until the mediation procedure is closed, however no longer than three months after the suspension was ordered. The same provisions as regards mediation at the pre-court level (Art. 70) apply, see explanations above.

Furthermore, the new Code of Criminal Procedure stipulates that court proceedings have to be suspended if the parties have reached a mediation agreement (Art. 16 para. 1.g new Code of Criminal Procedure, see above).

Positive aspects of the legal implementation of mediation can be seen in the promotion of alternatives ways of conflict resolution compared to formal judicial proceedings. It provides a decision-making process that is based on the voluntary participation and the responsibility of the parties. The law provides for further visibility of mediation among the public and may strengthen the trust in this alternative procedure. Obliging justice officials by law to inform offenders and victims of the availability of mediation in appropriate cases is also (theoretically) one step towards a broader application of alternative dispute resolution measures. This presupposes, however, that judicial bodies themselves have basic knowledge about the mediation procedures.

---

36 Law No. 135/2010, further amended and modified, published in the Official Gazette No. 486 of 15 July 2010, entered into force on 1 February 2014.

37 *Danileț* 2014, pp. 58 ff.

Moreover, an obstacle for the further application of mediation can be seen in the fact that the parties have to arrange privately for mediation and must bear the costs themselves. This can be seen as a major difficulty in the implementation of victim-offender mediation, especially with regard to juveniles.

Regarding the efficiency of the judicial system, the "Small Law Reform", which entered into force in 2010, aimed at accelerating legal proceedings both in criminal and civil matters.[38] The law introduced mediation-related aspects into the Code of Criminal Procedure, thus strengthening the importance of mediation in penal matters. Furthermore, the new Code of Criminal Procedure introduced several provisions referring to mediation. It emphasizes, *inter alia*, the right for the parties to call for a mediator in cases provided by law.

2.2 Other measures with Restorative Justice elements

2.2.1 Mediation in domestic violence conflicts

Regarding family violence, the Law to prevent and combat domestic violence, which came into force in 2003 and was modified significantly in 2012, provides for mediation in family conflicts upon request from the concerned family members.[39] It is in accordance with the principle of voluntariness, based on the free will of the parties to opt for mediation. The law was elaborated after reforms in the child welfare system, when domestic violence on children and women became a major issue.[40]

Since 2012, Art. 19 para. 1 of the law provides that assistance centres for offenders *"ensure their rehabilitation and social reintegration, educational measures, counselling and family mediation services."*[41] Assistance centres for

38 Law No. 202/2010 on measures to accelerate judicial proceedings, published in the Official Gazette No. 714 of 26 October 2010.

39 Law No. 217/2003 (modified and amended by Government Ordinance No. 95/2003 and Law No. 25/2012), published in the Official Gazette No. 367 of 29 Mai 2003, re-published in the Official Gazette No. 365 of 30 May 2012 and recently re-published in the Official Gazette No. 205 of 24 March 2014. Article 3 para. 1 of the law defines domestic violence as "*any physical or verbal action or inaction intentionally committed by a family member against another member of the same family, except for self-defence or defence, which causes or may cause physical illness, mental, sexual, emotional or psychological injury or suffering, including threat of such acts, coercion or arbitrary deprivation of liberty.*" Domestic violence furthermore means *preventing women to exercise their fundamental rights and freedoms* (Art. 3 para. 2).

40 See *Balahur* 2012, p. 304.

41 Prior to the legal modification, the law had stipulated that either authorized mediators or the Family Council were entitled to prevent family conflicts or to conduct the mediation

offenders are one category of units to prevent and combat domestic violence and work as day centres. In terms of victims' assistance, emergency reception centres as well as special rehabilitation centres for victims of domestic violence have been established (Art. 15 para. 1.a) and b)). The units offer free social services for victims of violence (Art. 15 para. 2). They may be public, private or based on public-private partnership. Only social service providers are allowed to establish the centres (Art. 16 para. 1 and 2). The law does not provide, however, further details on family mediation services.

2.2.2 Measures to protect victims of crime

The Law on Measures to Protect Crime Victims[42] came into force on 1 January 2005 and provides for certain measures to enhance victims' rights and ensure appropriate compensation in the aftermath of a crime. It was phrased in accordance with the dispositions of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, aiming at guaranteeing adequate compensation of crime victims throughout the EU.[43] The law provides for information rights, psychological and legal counselling and financial compensation.[44] The measures are applicable both to adults and juveniles, after notifying the law enforcement officials or the court.

Regarding information rights, the Law on the Protection of Crime Victims provides that justice officials such as judges, prosecutors or police officers have to provide victims of any offence with information in order to implement their rights. The information relates to aspects such as organizations offering psychological counselling or other forms of victim support, the right to legal advice and the relevant institution in which they can exercise their right, the conditions and procedures to receive free legal counselling and state-funded financial compensation, as well as procedural rights as an injured person or civil party (Art. 4 para. 1). The law further provides for free psychological counselling, delivered by probation services attached to the courts.

---

among the affected family members. The legislator now has abandoned the notion of the Family Council.

42 Law No. 211/2004, published in the Official Gazette No. 505 of 4 June 2004, modified by Government Emergency Ordinance No. 113/2007 and Law No. 255/2013.

43 After Romania's ratification of the European Convention on the compensation of victims of violent crimes on 1 June 2006 and the modification of the law by Government Emergency Ordinance No. 113/2007, compensation is available in national and cross-border situations, regardless of the victim's country of residence or the EU Member State in which the crime was committed, and thus compliant with the provisions of the Council Directive. The law ensures appropriate compensation to crime victims in accordance with the Council Directive.

44 See further *Szabo* 2010, pp. 140 f.

Counselling is provided for victims of certain categories of offences such as bodily harm related offences, attempted manslaughter and first-degree murder, sexual offences, as well as human trafficking (Art. 8 para. 1).

Psychological counselling is limited to a maximum period of three months. In cases in which the victim is underage, the period will be extended to six months (Art. 9). Counselling may also be provided by non-governmental organizations, arranged either independently or in cooperation with public agencies. For this purpose, organizations may receive grants from the state budget (Art. 12).

Finally, the Law on Measures to Protect Crime Victims provides for the possibility to grant financial compensation to victims of crimes.[45] The provision refers to victims of certain categories of offences, including serious violent offences, serious sexual offences, human trafficking, and terrorism offences. Besides direct victims of offences, family members as indirect victims have the right to state granted financial compensation in cases of manslaughter, first-degree murder and further offences that result in death.

2.2.3 Restitution, compensation

Furthermore, juvenile and adult victims of a crime can claim compensation when appearing as a civil party, as provided by the Code of Criminal Procedure. Civil action can be joined with criminal action within criminal proceedings. Reparation of material or immaterial damage is made according to civil law (Art. 19 new Code of Criminal Procedure). The Law provides that damage compensation within criminal proceedings may be achieved through a mediation agreement (Art. 23 para. 1 new Code of Criminal Procedure).

The court can consider efforts by the offender to remove the results of the offence or to repair the harm as a mitigating circumstance in sentencing (Art. 75 para. 2.a) new Criminal Code). The new Criminal Code further introduced the provision that full material damage compensation until the beginning of the court session – except for several categories of offences – constitutes a mandatory mitigating circumstance (Art. 75 para. 1.d) new Criminal Code).

Moreover, the court may dispense from applying a penalty in case the offender has made efforts to remove the results of the offence or to repair the harm (Art. 80 para. 1.b new Criminal Code).

---

45 Compensation to the victim covers the costs of hospitalization and other medical expenses, material damage resulting from destruction, degradation or rendering useless of the victim's property, or from deprivation of its property. It further includes the equivalent of the salary that the victim can no longer earn because of the offence (loss of income).

2.2.4 Conditional sentence under supervision

Regarding adults, the new Criminal Code has introduced the possibility of suspending the application of the penalty (Art. 83 et seq. new Criminal Code) if the penalty established is a fine or imprisonment not exceeding two years, the accused has not been previously sentenced to imprisonment, has agreed to conduct community service and the immediate application of the penalty is considered not to be necessary. Hereby, the efforts of the offender to remove the results of the offence or to repair the harm are taken into consideration. According to the new Criminal Code (Art. 91 new Criminal Code), the conditional sentence under supervision can be applied if the penalty is imprisonment not exceeding three years and it is deemed that, taking into account the convicted person, his/her behaviour prior the commission of the act, his/her efforts to remove the results of the offence or to repair the harm, that even without the execution of the penalty, the person will no longer commit offences. One of the obligations the court orders is to carry out a social reintegration activity or to conduct a school or vocational training course.

During the probationary period, the offender has to serve community work between 60 and 120 days. The new Criminal Code has widened the application of social reintegration programs.

Regarding juveniles, the new law has abolished penalties including imprisonment for underage persons and instead opted for non-custodial and custodial educational measures (Art. 115 new Criminal Code).[46] Conditional sentence under supervision is only of importance to juveniles, when it was applied under the previous Criminal Code.[47]

46 Non-liberty depriving measures include civic traineeship, supervision, confinement at the end of the week and assistance on a daily basis. Custodial measures are divided into referral to an educational centre or to a detention centre.

47 Prior, the court could impose a conditional sentence under supervision or control (probation, Art. 110^1 previous Criminal Code), which could be combined with community service. Furthermore, the educational measure of supervised liberty could be ordered (Art. 103 previous Criminal Code). This measure could be joined with community service comprising 50 to 200 hours in an institution of public interest, such as public agencies or non-governmental organizations. In the case that the court imposed conditional suspension to juveniles on the basis of the previous Criminal Code, this measure has to be maintained after the coming into effect of the new Criminal Code (Art. 22 Law No. 187/2012).

3. Organisational structures, procedures and delivery of victim-offender mediation[48]

Article 1 of the Law on Mediation defines mediation as *"an amicable way of conflict resolution with the support of a third party specialized as mediator, in conditions of neutrality, impartiality, confidentiality and based on the free consent of the parties.* (Art. 1 para. 1). *Mediation is based on the trust of the parties in the mediator, as a person able to facilitate negotiations between them and support them to resolve the conflict by achieving a mutually agreed, efficient and sustainable solution* (Art. 1 para. 2)*."*

This definition makes reference to several important principles of mediation and restorative processes, such as the principle of voluntariness of the parties, neutrality and impartiality of the mediator, and the confidential setting. By pointing out the character, objective and conditions of mediation, the law illustrates core elements of this relatively new form of conflict resolution.

Regarding participants to the medition procedure, the law states that legal or natural entities can resort to mediation (Art. 2 para. 3). Natural persons need to have the full capacity to act. In cases where persons have limited or no capacity to act, like in cases of juveniles, legal actions related to the mediation process are only valid with the prior consent of the parents, guardians or legal representatives.

The law further specifies that mediation can take place between two or more parties and can be conducted by one or more mediators (Art. 5). Co-mediation may be necessary in cases where many participants are involved in the dispute. The parties can freely choose their mediator, based on the mutual consent of the parties The law states that during the mediation process, the parties can be represented by other persons, having disposal authority according to the law (Art. 52 para. 2). Besides the directly affected parties of the conflict, like injured persons and offenders in criminal cases, further persons such as family members, parents of juveniles, legal representatives, probation or social workers, lawyers, and further community members can be involved.

By stipulating in Art. 3 that mediation shall be conducted equally for any persons, regardless of race, color, ethnic origin, nationality, language, sex, opinion, political affiliation, property or social origin, the law includes an anti-discrimination clause in accordance with the Romanian constitution.[49] This provision is closely associated with the principles of neutrality and impartiality

48 In this section, it will just be referred to victim-offender mediation which represents a restorative justice measure in the narrow sense. Moreover, organisational and procedural aspects of the other measures with restorative elements are already mentioned above.

49 See further *Păncescu* 2010, p. 36.

of the mediator. Any violation of the anti-discriminatory clause gives the parties the right to terminate the mediation procedure.

The mediation law further provides for rights and obligations of mediators (Chapter IV, Art. 25 et seq.). Regarding rights, it sets out that mediators have the rights to inform the public about their activity, and to negotiate a fee with the parties, which should be reasonable and consider the nature and subject of the conflict. Furthermore, each mediator has the right to apply his/her own model to organize the mediaton procedure, in accordance with the legal provisions. Also, mediators have to respect several obligations, and to observe deontology norms (Code of Ethics), such as the obligation to inform the parties about the mediation process, so that the parties can clearly understand the objective, limitations and effects of mediation.

The principle of impartiality also comes into play where the law states that mediators should conduct the mediation procedure impartially and ensure a constant balance among the parties. In case the mediator is aware of any circumstance which might prevent him/her from being impartial and neutral, he/she has the obligation to refuse to accept the case. Mediators have the duty to maintain confidentiality over the information obtained throughout the mediation process, as well as over the prepared documents or the documents submitted by the parties during the mediation procedure, even after the mediator ceases his/her activity.

In general, a mediator can not be heard as a witness regarding the issues he/she is aware of from the mediation procedure. In criminal cases, the mediator can only be heard as a witness if he/she obtained an expressed, written and prior consent of the parties, and, if appropriate, other interested persons (Art. 37 para. 1). If the mediator fails to observe his/her duties of impartiality, neutrality and confidentialiy, he/she will receive disciplinary sanctions as decided on by the Mediation Council.

The actual mediation procedure is described in the act. It is divided into the pre-mediation session followed by the signing of the mediation contract, the mediation process itself and the closing of the mediation procedure.

In the pre-mediation session (Art. 43) the conflicting parties present themselves to the mediator, either on their own initiative or upon recommendation of other persons from judicial bodies, social workers, etc. In case only one party presents itself to the mediator, the mediator shall write to the other party in order to inform about the mediation procedure and invite the party to participate, indicating a 15-day period for responding. In case it is impossible for the party to get in touch with the mediator, the mediator can decide on a new deadline. If mediation is accepted, the parties shall sign a contract with the mediator. If one of the parties refuses explicitly to take part in the mediation, or twice fails to present him/herself to the mediator at the specified deadlines, mediation shall be considered as having not been accepted.

Regarding the signing of the mediation contract (Art. 45 et seq.), in order to be valid, a mediation contract shall include the following provisions: identity of

the parties, or of their representatives; description of the type or subject of the conflict; statement of the parties showing that they have been informed by the mediator about the mediation procedure, its effects and applicable rules; obligation of the mediator to keep confidentiality and decision of the parties to keep confidentiality; duty of the parties to pay the due fee to the mediators and further expenses he/she made during mediation in the interests of the parties; obligation of the parties to sign the minutes prepared by the mediator, regardless of the outcome of the mediation procedure, etc.[50] The mediation contract shall be concluded in written form and signed by the parties and the mediator. Mediation sessions can take place only after the mediation contract has been signed.

The main mediation session is regulated in Art. 50 et seq. Mediation usually takes place at the mediator's office. Upon agreement between the mediator and the parties, mediation sessions can be conducted at other locations. The parties have the right to be assisted by a lawyer or other persons, under mutually agreed conditions. During the mediation sessions, the mediator uses communication and negotiation techniques and methods, which shall serve the legitimate interests and aims of the parties. The mediator shall not impose a solution related to the conflict. The discussions and submissions of the parties and the mediator have a confidential character to third parties and shall not be used as evidence for judicial or arbitral procedures, except if the parties agree otherwise. If during the mediation process a situation occurs which is likely to affect the objective of mediation, neutrality or impartiality, the mediator shall inform the parties about it. The parties decide whether to continue the procedure or to cancel the mediation contract.

Regarding the closure of the mediation procedure (Art. 56 et seq.): The mediation procedure will be closed, if 1) the parties reach an agreement, 2) the mediator assesses that the mediation procedure has failed, or 3) one of the parties cancels the mediation contract. In each case, when closing the procedure, the mediator shall draw up minutes which are to be signed by the parties or their representatives, and by the mediator. When the parties reach an agreement, a written document shall be formulated including all the clauses the parties agreed on. What the agreement entails is open to the parties, but it will likely contain elements of restitution, work, apologies and obligations to participate in certain activities or to refrain from others. Usually, the mediator formulates this document. The agreement, which has the validity of a written document under private signature, may be subject to public notary authentication. At every stage of the mediation procedure, the parties are entitled to cancel the mediation contract, by written notice to the mediator or to the other party.

The specific provisions regarding mediation in penal matters were mentioned in *Section 2*. In conclusion, the detailed legal provisions are useful in order to

50 For more detail on the characteristics and nature of the mediation contract, see *Păncescu* 2010, pp. 153 ff.

get a comprehensive picture about the whole procedure of mediation and to strengthen the trust in this conflict resolution method, which is still not very well-known among the public. However, the institutionalization bears the risk that further changes can not be incorporated easily.

Regarding the organization of mediation and the mediators' activity, the central responsible institution is the Mediation Council. The council is an autonomous body of public interest, based in Bucharest and established in 2007. It comprises nine full members and three substitute members, each elected for a a mandate of four years.[51] The main activities of the Mediation Council as set out in Art. 20 include:

- Promotion of mediation activities and representation of the interests of the authorized mediators to ensure the quality of the mediation services in accordance with the law,
- Elaboration of training standards, based on the best international practices,
- Authorization of basic and ongoing professional training programs, including those for the specialization of mediators,
- Authorization of mediators in compliance with the legal provisions,
- Supervision and observance of mediation training standards,
- Adoption of Codes of Ethics,
- Submission of legislative proposals regarding the promotion of the mediation activity.

Accordingly, the Code of Ethics was adopted by the Mediation Council in 2007, which is mandatory for all mediators. The Code contains general principles regarding the mediation activity, the role and responsibility of the mediator, and their professional comportment.

In order to further ensure the quality of mediation, training standards have been elaborated (2007).[52] These standards provide for basic training courses of of minimum of 80 hours and advanced training courses in order to enhance the mediator's qualifications. Training courses are ensured by authorized training providers or by accredited universities. Currently, there are 22 training providers authorized by the Mediation Council.[53] Trainers shall be authorized mediators,

51 Law No. 115/2012 modified the provision that membership will last four years (Art. 17 para. 4). Before, members were mandated for two years.

52 The training standards are approved by the Decision of the Mediation Council No. 12/2007, further amended and modified by Decisions of the Mediation Council No. 963/2008, 2826/2011 and 1044/2012.

53 See List of authorized mediation training providers, updated 2.6.2014, Website of the *Mediation Council*, *www.cmediere.ro* (accessed 5.6.2014).

with at least three years practical experience as a mediator and 25 mediation cases minimum, as training in adult education.

As regards the mediators's activity, the following legal requirements have to be met cumulatively by a person to be allowed to exercise the profession (Art. 7):

- Full capacity to act,
- University degree,
- at least three years work experience,
- medically able to perform the task,
- enjoys a good reputation and has not been finally convicted for an offence likely to affect the prestige of the mediator's profession,
- completed mediation training courses, as provided by the law, or a relevant masters level postgraduate program, accredited in accordance to the law and approved by the Mediation Council,
- has been authorized as a mediator, under the conditions of the mediation law.

Persons who fully meet the requirements shall be authorized by the Mediation Council, after payment of an authorization fee (Art. 8 para. 1). Furthermore, mediators have the duty to subscribe to a professional mediators' association according to Art. 12 para. 2.g).[54]

In recent years, the number of authorized mediators has been on the rise. As of today, about 9,000 mediators have been authorized by the Mediation Council in Romania.[55] Since 2008, all authorized mediators are recorded on the Mediator's list, published by the Mediation Council. In practice, mediators have different professional background, including lawyers, teachers, social workers, psychologists, engineers, notaries, physicians, teachers, economists, judges, police, etc.

Mediation, including victim-offender mediation, can be provided by different types of facilities. As set out by the Law on Mediation in Art. 22, these comprise professional civil entities, offices of authorized mediators or non-governmental organizations.

The vast majority of mediation facilities delivers mediation services in various fields of conflicts, because the number of specialized mediators is rather low. Case numbers vary among the facilities, depending on the experience and number of mediators. The parties have to bear the costs for the mediation procedures.

---

54 For further information on the Code of Ethics, training standards and the profession of the mediator, see *Bălan* 2013, pp. 34 ff.

55 See List of authorized mediators, Website of the *Mediation Council*, *www.cmediere.ro* (accessed 5.6.2014). In comparison, in 2012 there were just approximately 3,000 mediators listed as authorized by the Mediation Council. It has to be noted, however, that not all of the authorized mediators are practicing the mediator profession.

Inter-agency cooperation is ensured by collaboration protocols at local, national and international level. These comprise especially mediation facilities and associations, courts, administrative bodies, the Mediation Council, the National Union of Mediation Centers, the National Union of Mediators and international organizations.

Throughout the country, in recent years there have been numerous information campaigns, round-tables, seminars and conferences on mediation, organized by the professional associations, the Mediation Council, NGOs and further stakeholders in order to promote the implementation of mediation. However, public awareness on this kind of conflict resolution is rather low, being rather sporadic and targetting justice professionals in particular.[56]

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative practices

In Romania, there are yet no nationwide statistical data available on the number of victim-offender mediation cases. According to a Decision of the Mediation Council in 2012, all professional associations and organizations in the field of mediation are asked to submit relevant statistics on mediation case numbers on a quarterly basis to the Mediation Council.[57] Up to date, no statistics have been published by the Mediation Council. Moreover, no unified information on specialized facilities delivering mediation in penal matters is obtainable.

4.2 Findings from implementation research and evaluation

There are almost no qualitative and quantitative evaluation studies on victim-offender mediation available.[58] Several studies have focussed on the development and legal context of restorative justice and on mediation in penal matters.[59] *Rădulescu* and *Dâmboeanu* found that the legal framework on mediation only partially included restorative justice elements, ignoring the experiences gathered during the implementation of the restorative justice pilot

56 See *Dragne/Trancă* 2011, pp. 154 f.

57 See *Bălan* 2013, p. 43, referring to the Decision of the *Mediation Council* No. 349/2012.

58 To be mentioned are the evaluation studies of the first restorative justice pilot centres by *Rădulescu/Banciu* 2004 and *Rădulescu et al.* 2004, see *Section 4.2.1* below.

59 See for instance *Balahur* 2007; 2012; *Danileț/Szabo/Dedu/Răduț* 2014; *Rădulescu/Banciu/Dâmboeanu* 2006; *Rădulescu/Dâmboeanu* 2008; *Szabo* 2010.

projects as well as international experiences in the field of restorative justice. The following were mentioned among the main deficiencies: a lack of community involvement in the mediation process, a lack of differentiated treatment between juveniles and adults and an exclusion of important restorative justice issues such as compensation or reparation from the mediation procedure.[60]

4.2.1 Evaluation study on restorative justice pilot centres

Regarding the assessment of the restorative justices pilot centres, an extensive qualitative and quantitative evaluation of the programs focusing on victim-offender mediation was conducted, showing overall positive results. The restorative justice experimental projects were evaluated in 2003 and 2004 by researchers of the Institute of Sociology at the Romanian Academy.[61] The general aim was to analyze the overall performance of the restorative justice centres and to identify potentials and obstacles in order to submit proposals for optimizations.

As mentioned above, the beneficiaries of the program were 14- to 21- year-olds. Bodily harm and theft accounted for the majority of referred offences. Victim-offender mediation was the main service delivered by the centres. The personnel was responsible for identifying and selecting the beneficiaries for the program, collecting data on the participants and their psycho-social evaluation, conducting the pre-mediation and mediation sessions. Mediation sessions were conducted in a direct (face-to-face encounter) or indirect (communication through mediators) manner.

Further, post-mediation services including counselling and assistance were offered (psychological counselling, social assistance to foster reintegration, group counselling programs) to the beneficiaries of victim-offender mediation and further beneficiaries who have not been included in the mediation procedure.

The accompanying research revealed relatively high levels of satisfaction among participants with the offered mediation services, especially with regard to the mediation procedure and the mode of conflict resolution. The majority of beneficiaries stated that they appreciated the active involvement in the mediation procedure, the fact that they were listened to during the sessions and that they were treated with respect. High levels of satisfaction were found with regard to the agreements made. The first evaluation study showed that more than 90% of the participants were satisfied with the results of the mediation procedure and found them appropriate. Beneficiaries, victims (100%) to a higher degree than offenders (75%), reported to have been actively involved in the decision-making

60 *Rădulescu/Dâmboeanu* 2008, p. 159.

61 *Rădulescu/Banciu* 2004; *Rădulescu et al.* 2004.

process. Most beneficiaries stated that the agreements taken met their needs. Approximately 75% of the participants, including victims, accused, parents and supporters, found that mediation contributed to solving the problems they were facing. About 85% of victims and offenders stated that in a similar situation they would select mediation again for the resolution of conflicts.

Furthermore, the study showed high levels of satisfaction with the following aspects: voluntary participation in the mediation session, impartiality and correctness of the mediators, fast conflict resolution, usefulness of the restorative justice programme (participants would recommend it to other persons). The evaluation studies also showed that a large part of mediated cases resulted in successful mediation agreements.

Among the reasons to participate in the mediation process, most victims invoked the desire to avoid lengthy and often expensive procedures and the possibility to openly express their point of view and to explain how they dealt with the consequences of the offence. For the victims another important reason to participate was the receipt of financial compensation for the suffering experienced.

Offenders reported that they were especially motivated by the possibility to avoid a formal court procedure and conviction through providing compensation to the victim. Other important issues mentioned by the accused were the possibility to tell their perspective of what has happened, and implicitly to deliver an apology.

Aspects victims were most often dissatisfied with were related to the low amount of the financial compensation they received and that payment was made rather belatedly. A further reason for dissatisfaction was the very mild character of the agreement. In contrast, offenders negatively perceived the very high amount of compensation, as in some situations, according to the offenders, the victim caused the conflict. Nervertheless, the vast majority of victims and offenders found the decisions were correct.

The second evaluation study showed similar results and confirmed the above mentioned high levels of satisfaction among the participants of the programs.

Despite the overall positive assessment, a number of obstacles and difficulties became clear in the findings. Due to the restrictive legal framework of eligible offences, case selection and referral were very limited. During the first phase of the project from 2002 to 2003, only cases in which criminal action was initiated upon prior complaint of the victim or in which reconciliation of the parties removed criminal liability were considered. In 2004, the catalogue of offences was extended to include cases of theft and aggravated theft. The restrictive framework resulted in low case numbers. In the first project phase, only 15 mediation procedures were conducted, in 2004 sligthly more – 18 victim-offender mediations – took place.

Cooperation with judicial bodies, especially with public prosecutors and police, was not predominantly positive. The restorative justice centers were not

fully accepted as official institutions entitled to handle penal disputes and often denied state legitimacy. The representatives of police and public prosecutor's offices were not fully aware of the aim, content and impact of the projects. Although judges were less sceptical than the other institutional actors, the majority did not inform the parties about the availability of mediation and did not refer cases to the pilot centers.

Another aspect negatively perceived was the bureaucratic character of the completion of the mediation process. In the aftermath of the mediation, the participants had to appear again before the court to inform about the result, even if it was positive and even though mediators had already delivered a final document to the judicial institutional actors.

However, the overall evaluation of the restorative justice centers was positive and encouraging, and provided for the further development of criminal strategies.

4.2.2 National survey on mediation in penal matters

In 2010, a national survey on public prosecutors and judges was conducted in order to analyze the acceptance of victim-offender mediation by these judicial bodies.[62] The research focused on the level of information on mediation in penal matters and the acceptance of this form of dispute resolution by judicial bodies, bearing in mind that the information duty for judges and prosecutors to inform parties about mediation entered into force in 2010.[63] A further objective was to reveal the level of awareness about types of organizations delivering victim-offender mediation. Judicial representatives were asked about their individual experience with mediation in penal matters and about types of offences they found appropriate to be incorporated into the Law on Mediation.

The survey included 1,521 public prosecutors out of 2,250 (67.5%) and 361 judges out of 3,820 (9.4%) judges in total. As there are no statistical data available on the number of judges specialized in penal matters and in practice judges usually deal with both criminal and civil cases (due to a lack of specialized panels), it was not possible to obtain data on the number of criminal judges. Designed as a full survey, standardized questionnaires were sent to all criminal divisions of courts and all levels of prosecutor's offices, except the High Court of Cassation and Justice.

---

62 *Păroşanu/Balica* 2013, pp. 62 ff. The project was realized under the cooperation agreement of the Institute of Sociology at the Romanian Academy, Bucharest and the Department of Criminology at the University of Greifswald. It was partly funded by the German Research Foundation (DFG) within the program "Initiation and enhancement of bilateral cooperation".

63 Amendment of the Law on Mediation (192/2006) by Law No. 370/2009, introducing the duty to inform parties of the availability of mediation.

Regarding the opinion towards mediation in penal matters, the study revealed high levels of acceptance by public prosecutors and judges. The vast majority of public prosecutors (73%) and of judges (about 71%) expressed that they found victim-offender mediation to be a "useful" or even "very useful" procedure in conflict resolution in penal matters.

Asked about the level of information on the national legislation linked to mediation in penal matters, slightly more than half of prosecutors stated they were well or a little informed about the issue. The survey shows a very high level of (good or little) knowledge among judges in this regard (96%).

In terms of information on the procedure of mediation in penal matters in the country, the study showed rather low levels of information. Only 13% of public prosecutors and 30% of judges reported they were well informed about the procedure of mediation, whereas about one third of public prosecutors and slightly more than half of the surveyed judges stated they were little informed. A remaining 15% of the prosecutors and 14% of judges admitted they had absolutely no knowledge of the mediation procedure.

As to the level of information regarding facilities providing victim-offender mediation, only about one-fifth of prosecutors reported they were well or a little informed about mediation organizations, whereas approximately two thirds of judges declared they had knowledge about mediation facilities (however, most of them indicated they were poorly informed).

About half of the public prosecutors and approximately 90% of judges were informed about eligible types of offences for mediation in penal matters. Approximately one third of prosecutors and even half of judges stated they had no knowledge about implementing practice of mediation at local or national level.

As to the individual experience, before passing the amendment of the mediation law stipulating the duty to inform the parties about the availability and advantages of mediation and to work towards reconciliation, only 7% of prosecutors and 8% of judges advised the parties to resort to mediation. Since the law has been changed, the proportion has increased, with almost one-fifth of prosecutors and one third of judges reporting that they provide information about mediation.

Those who sent parties to mediation facilities most often referred cases to mediator's offices. Regarding the reasons invoked by the parties when refusing to participate in mediation, the following aspects were mentioned: lack of trust in mediation and mediators (lack of trust in a newly established institution, lack of trust resulting from formal court system), lack of financial resources, injured party preferred to hold the offender accountable through criminal proceedings, lack of information about mediation, etc.

Regarding the training of mediators, the overwhelming majority of prosecutors and judges found that mediation in penal matters should be conducted by mediators who are specialized in that particular field.

Although the survey showed high levels of acceptance of mediation in penal matters, results indicated a further need to inform judges and public prosecutors on the procedure of mediation, facilities delivering mediation in penal matters, the legal framework, experience with mediation and types of eligible offences.

After it became mandatory to inform the parties, the share of prosecutors (more than doubled) and judges (four times higher) increased significantly compared to the previous period. This shows a positive impact of the legal provision regarding the promotion of mediation.

5. Summary and outlook

In Romania, restorative justice elements were partly introduced in the legislative framework regarding victims' rights and mediation, including mediation in penal matters. Although the laws are in compliance with EU standards and show a shift away from retributive approaches, the legislator was rather reluctant to emphasize core restorative justice principles. Further forms of restorative justice, such as initiatives based on a strong community involvement, and educational programs for juveniles, were not included.[64]

The enactment of the Law on Mediation was a positive signal by the legislator to further enhance mediation as an alternative to court proceedings. However, due to the restricted framework concerning mediation in penal matters in terms of eligible offences, the potential of restorative justice has been far from exhausted in Romania. Yet, recent criminal law reforms provided for a shift regarding the wider application of mediation. Moreover, the new Criminal Code and Code of Criminal Procedure embrace efforts by the offender to repair the harm in the course of criminal proceedings.

It was shown that judges and public prosecutors widely accept victim-offender mediation as a viable form of conflict resolution. This is an important issue in order to enhance the application of mediation in penal matters in practice.

As the Law on Mediation provides that judicial bodies have to inform the parties on mediation, further knowledge among judges and public prosecutors should be ensured. This comprises information relating to mediation procedures, organizations providing mediation and experiences in the field of victim-offender mediation at the national and international level.

Various stakeholders in the field of mediation, such as mediation organizations, professional associations and the Mediation Council are conducting activities in order to enhance the public's awareness of mediation. Promotional activities aiming at involving further criminal justice practitioners would be of advantage. Especially those who come into contact with victims and offenders at an early stage, such as police, lawyers and social workers should be more

64 The new Criminal Code provides for a wider catalogue of educational measures for juveniles, including enhanced supervision measures and educational programs.

included in inter-disciplinary activities. Enhanced inter-institutional cooperation would be greatly advantageous in providing for more sustainability in the area of alternative conflict resolution and promotion of victims's rights.

The implementation of victim-offender mediation is mainly based on the continous work of non-governmental organizations and various stakeholders in the field of mediation. As of today, few organizations can provide for specialized victim-offender mediation services. State-funding to non-governmental organizations should be provided in order to ensure that the parties must not bear the costs themselves. Free access to victim-offender mediation services is essential in promoting the use of mediation in penal matters. This is also important since Romania has increasingly faced significant economic challenges throughout recent years.

It has been emphasized that there is a need of specializing mediators in penal matters, as a sensitive approach is necessary when involving victims and offenders. Specialized training sessions contribute to enhancing the quality of the mediation services and strengthening the trust in mediation.

References:

Balahur, D. (2007): Justiţia restaurativă: O analiză evaluative. In: Balahur, D., Littlechild, B., Smith, R. (Eds.): Restorative Justice Developments in Romania and Great Britain. Sociological-juridical enquires and applied studies of social work. Iaşi: A.I. Cuza University Press, pp. 21-75.

Balahur, D. (2012): Restorative justice and victim-offender mediation in Romania. In: Miers, D., Aertsen, I. (Eds.): Regulating Restorative Justice. A comparative study of legislative provision in European countries. Frankfurt am Main: Verlag für Polizeiwissenschaft, pp. 299-320.

Bălan, A. (2013): Legislation on mediation in Romania. In: Păroşanu, A., Balica, E., Bălan, A.: Mediation in Penal Matters in Romania. Evaluation Study and Perspectives. Bucureşti: C. H. Beck, pp. 5-60 (English version).*Danileţ, C.* (2014): Capitolul II. Aspecte de procedură privind medierea penală. In: Danileţ, C. (Eds.): Ghid de mediere penală. Conform noilor coduri. Bucureşti: C. H. Beck, pp. 28-93.

Danileţ, C. (Eds.) (2014): Ghid de mediere penală. Conform noilor coduri. Bucureşti: C. H. Beck.

Dragne, L., Trancă, A. (2011): Medierea în materie penală. Bucureşti: Universul Juridic.

European Commission (2010): Report from the Commission to the European parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism. COM (2010) 401 final.

Ministry of Justice: Action Plan for the Implementation of the Strategy of the Reform of the Judiciary 2005-2007. Available: www.just.ro.

Ministry of Justice: Statement of reasons, Law on measures to protect victims of crime. Available: *http://www.cdep.ro/proiecte/2004/200/40/6/eml_pl246_04.pdf* (accessed 14.1.12).

Ministry of Justice: Statement of reasons, Law on mediation and the mediator profession. Available: *http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=7211* (accessed 13.1.2012).

Ministry of Justice: Strategy for the Reform of the Judiciary 2005-2007, p. 13. Available: www.just.ro.

Păncescu, F. G. (2010): Legea medierii. Comentarii şi explicaţii. Bucureşti: C. H. Beck.

Păroşanu, A., Balica, E. (2013): Evaluation study on mediation in penal matters in Romania. In: Păroşanu, A., Balica, E., Bălan, A.: Mediation in Penal Matters in Romania. Evaluation Study and Perspectives. Bucureşti: C. H. Beck, pp. 61-152 (English version).

Rădulescu, S. M., Banciu, D. (2004): Studiu evaluativ asupra programului experimental de justiţie restaurativă din România. In: Rădulescu, S., Banciu, D.: Evaluarea sistemului de justiţie restaurativă din România. Bucureşti: Editura Oscar Print, pp. 9-87.

Rădulescu, S. M., Banciu, D., Dâmboeanu, C. (2006): Justiţia restaurativă. Tendinţe şi perspective în lumea contemporană. Bucureşti: Lumina Lex.

Rădulescu, S. M., Banciu, D., Dâmboeanu, C., Balica, E. (2004): Evaluarea proiectului de justiţie restaurativă derulat în Bucureşti şi Craiova.

Rădulescu, S. M., Dâmboeanu, C. (2008): Victim-Offender Mediation Programmes in Romania – A Useful Experience, Unexploited in the Legislation. Romanian Journal of Sociology, No. 1-2, Bucureşti, pp. 145-161.

Romanian Statistical Yearbook (1999): National Institute of Statistics, Bucureşti: Editura Institutului Naţional de Statistică.

Szabo, A. (2010): From Restorative Justice to Restorative Practices: Applicability in the Field of Social Work. Revista de Asistenţă Socială, 9, Bucureşti, pp. 125-147.

Russia

Natal'ya Chlonova, Natal'ya Nikitina,
Nikolay Shchedrin, Victor Yurkov

1. Origins, aims and theoretical background of Restorative Justice

1.1 Overview on forms of Restorative Justice in the criminal justice system

An analysis of Russian sources on restorative justice in Russia reveals two basic forms, each of which, in turn, has a few modifications. First of all there is the possibility of reconciliation with the victim, either through face-to-face mediation, shuttle mediation, group conferences or community circles.[1] All these forms could be relevant at all stages of criminal proceedings in the context of Articles 61, 64, 75 and 76 of the Criminal Code of the Russian Federation, as described in the course of this article.

These forms of reconciliation can be reflected in the conclusion and implementation of a conciliation agreement, both at the court and pre-trial stages.[2] However, all of these forms of restorative justice are rarely implemented in practice and only in the most "advanced" regions, i. e. where the respective pilot projects are being carried out.

The Russian Legislation provides also a possibility of the compensation of damages on the initiative of a court or a victim (Paragraph "c") Part 2 of Art. 90 and Art. 104.3 of the Criminal Code, Art. 44, 299, 393 of the Criminal

1 *Karnozova* 2010, p. 271; *Maksudov* 2012b.

2 For experiences of the Centre for Judicial and Legal Reform with including procedures for reconciliation in criminal justice, see the reports and publications section of the Centre's website at *www.sprc.ru*.

Procedure Code of the Russian Federation), but this is difficult to subsume under "Restorative Justice" in the narrow sense.

1.2 Reform history

The term "restorative justice" was used extensively in Russia in the late 90s of the 20th century.[3] In 1998, the Public Centre for Judicial and Legal Reform (founded in 1996[4]) was one of the first to develop a concept of restorative justice. The main field of application of the restorative justice approach was juvenile justice. Subsequently, programmes on restorative justice have been introduced primarily in the context of juvenile proceedings. In fact, juvenile justice reform has indeed been the motor for the development of restorative justice in Russia.

In our opinion, attempts to reform the judicial system of the Russian Federation were one of the prerequisites for the implementation of restorative justice in Russia. *"The focus on the interests of the State and the inhumanity of justice"* were noted in the 1991 Strategy for Judicial Reform in the Russian Federation,[5] among other things, as one of the central problems of justice in Russia. However, restorative justice was not mentioned as one of the directions of the reform.

Thus, the initiative for introducing restorative practices came not from the State but from public institutions, most notably from the Public Centre for Judicial and Legal Reform. The Centre's activity was originally associated with the implementation of international experience in the restorative approach[6]. Based on this experience, in 1998 the Centre conducted Russia's first model experiment in the field of the Restorative Justice in juvenile matters. Today, the Centre is a member of the European Forum for Restorative Justice and Mediation.

On the initiative of the Centre for Judicial and Legal Reform, so-called community groups were formed in various regions of Russia[7]. Some comunity groups cooperate with the representatives of the municipal institutions of social care and education. These community groups implement restorative practices in criminal cases and conflicts involving juveniles, doing so in cooperation with

3 *Karnozova* 2010, p. 271.

4 Centre for Judicial and Legal Reform: *http://www.sprc.ru* (accessed: 26 April 2012).

5 Resolution of the RSFSR Supreme Soviet of 24 October 1991, No. 1801-1 "On the Concept of Judicial Reform in the RSFSR". "Bulletin of the Congress of Soviets and the RSFSR Supreme Soviet", 31 October 1991, No. 44, Art. 1435.

6 *Karnozova* 2010, p. 418.

7 Moscow, Perm Territory, Tyumen, Volgograd Region, Krasnoyarsk, Urai, Kazan, Dzerzhinsk, Novosibirsk, Petrozavodsk, Samara Region, Cheboksary, Lipetsk, Kirov, Yakutsk, Rostov Region, Stavropol, Cherepovets, Makhachkala, Barnaul, Arkhangelsk.

the local courts and the Commissions on Juvenile Affairs and Protection of the Rights of Juveniles. Additionally, they promote the establishment of school conciliation services in educational institutions.[8]

In 2009, the All-Russian Association for Restorative Mediation was established. In 2009-2010, with the support of the Centre for Judicial and Legal Reform, regional associations of mediators working in the social and educational spheres were founded in Moscow, Tyumen, Volgograd, Novosibirsk, Perm, Kirov and Cheboksary. The All-Russian Association for Restorative Mediation developed restorative mediation standards as guidance for the institutions of civil society and for the government agencies in organizing the process for applying the restorative justice model.[9]

Thus, today, the introduction of restorative justice in Russia has been concentrated in certain regional centres established only in some regions of the country. The decisive role in the creation of such centres, the training the staff who work there, and in the implementation of RJ in practice has been played by institutions of civil society, with the support from certain municipal units and federal subjects, bodies and agencies.

1.3 Contextual factors and aims of the reforms

Article 76 of the Criminal Code of the Russian Federation of 1996 first introduced the possibility to exempt an offender, both juvenile and adult, from criminal liability in connection with victim-offender reconciliation and reparation. Such exemption was possible in cases with public and private-public charges, and was at first limited to minor offences.[10] For juveniles, the scope of applicability of such exemptions from criminal liability was drawn more widely to cover not only minor offences, but also offences of medium gravity. Furthermore, in cases of juveniles such exemption is associated with the assignment of measures of educational influence, one of which is the obligation to make amends for the harm caused.[11]

8 *Maksudov* 2012b.

9 *All-Russian Association of Restorative Mediation* 2009.

10 At the time of the adoption of the Criminal Code in 1996, the crimes of minor gravity included intentional and negligent acts for the commission of which the maximum penalty provided for by this Code did not exceed two years in prison (§ 3 of Art. 15 of the Criminal Code). Since 2011, the crimes of minor gravity are intentional and negligent acts for the commission of which the maximum penalty provided for by this Code shall not exceed three years' imprisonment (Part 2 of Art. 15 of the Criminal Code, amended on 7 December 2011).

11 Part 1, Paragraph "c", Part 2 of Art. 90 of the Criminal Code of the Russian Federation.

In 2003 the scope for the exemption from liability in connection with reconciliation with the victim was extended so as to include crimes of medium gravity. Respective changes first appeared in the Article 9 of the Criminal Procedure Code of the RSFSR, and later in the Article 25 of the Criminal Procedure Code of the RSFSR.

In 2011, Article 76.1 of the Criminal Code of the Russian Federation and Article 28.1 of the Criminal Procedure Code of the Russian Federation were introduced. These articles state that persons who have committed certain economic crimes, and who are first-time-offenders, can be exempt from criminal responsibility if they have compensated the arising damages in full and have paid a specified amount to the federal budget.

The main political motivations that had facilitated this "opening of the door" to restorative justice as a means of closing criminal cases had been the desire of lawmakers to reduce criminal repression, in particular the use of custodial sentences,[12] and the problem of ensuring that victims can receive reparation or compensation for the damages they have suffered.[13]

The main objectives of introducing the restorative justice measures is to transfer the legal conflict resolution from the public sphere into the sphere of civil society, when the resolution of this conflict is carried out not by the state within the criminal justice, but by the public organizations within the conciliation procedure. With restorative justice the following is possible: a comprehensive solution to the problems of crime victims[14]; reducing the number of persons exposed to criminal penalties of imprisonment; comprehension by a person who committed a crime of the real consequences of his actions (correction).

The application of restorative justice can restore socially important functions of custody and guardianship of the community over offenders; citizenship of people as members of socially important processes; partnership of the state and society; individual and personal resource of society collapsing in conflicts and criminal cases; social-psychological mutual support of people.[15]

1.4 Influence of international standards

Current legislation of the Russian Federation does not allow implementing many of the provisions and principles of the Recommendation of the Council of Europe No. R 99 (20). Russian law does not require the competent authorities to take actions that could contribute to the reconciliation of the parties in the

12 *Karnozova* 2010, p. 421.

13 *Commissioner for Human Rights in the Russian Federation* 2003.

14 *Karnozova/Maksudov* 2006.

15 *Maksudov* 2001, p. 10.

criminal procedure.[16] Separate provisions of the Recommendation are included in the Standards of Restorative Mediation.[17] The implementation of other rules of the international law relating to restorative justice is also not noticeable at the legislative level. Most of them represent so called "soft law" and therefore are not binding for Russian officials. We have the impression that the reception of international standards into Russian legislation and practice has to a certain degree been hindered by the fact that Restorative Justice as a strategy is as of yet relatively unknown to the current criminal justice system, and could come to be regarded as an additional workload burden for that system. Furthermore, there is a need for more elaborate measures for implementing the relevant international standards on behalf of politicians and legislators.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

In this chapter, we discuss which elements of the restorative justice strategy have their footing in legislation at the various stages of the criminal procedure and in the context of sentence enforcement, looking first at the pre-court level and then the court level.

2.1 Pre-court level

2.1.1 Adult criminal justice

The criminal prosecution in Russia, including the charge at the trial, have to be carried out in public, private-public or private procedure. The form of the procedure depends on the character and on the gravity of the alleged offence.[18] Criminal cases involving crimes that are subject to "private prosecution"[19] are to be terminated in case of successful reconciliation of a victim with an offender in accordance with Part 2 of Article 20 of the Criminal Procedure Code of the Russian Federation.

For "private-public prosecution" and "public prosecution" cases the Russian legislator links the possibility of discontinuing criminal prosecution upon reconciliation with the victim to special conditions. These conditions are

16 *Golovko* 2003, p. 68.

17 These standards are adopted by the public organization, and are advisory in nature. For details, see *Section 1.2* of this Report.

18 Article 20 of the Criminal Procedure Code of the Russian Federation.

19 The "private prosecution cases" are some milder cases of the Intentional Infliction of Light Injury, Assault/Battary and Slander.

regulated in Article 76 of the Criminal Code and Article 25 of the Criminal Procedure Code of the Russian Federation.

Generally, the reconciliation with the victim may be carried out with or without the participation of a mediator. Hence, in the reconciliation process various forms of restorative justice can be used.

In accordance with Article 76 of the Criminal Code of the Russian Federation, a person who has committed a crime of minor or medium gravity and who is a first-time-offender may be exempted from criminal liability if he reconciles with the victim and makes amends for the harm the victim has suffered because of the offence. This substantive rule of the Criminal Code is accompanied by a procedural rule in Article 25 of the Criminal Procedure Code of the Russian Federation. According to this Article 25, a court has the right to discontinue the criminal proceedings against a person suspected or accused of having committed a crime of minor or medium gravity in cases provided for by Article 76 of the Criminal Code, if the person suspected or accused reconciles with the victim and makes amends for the harm suffered, and the victim or his/her legal representative have made an application to the court to make such a decision. Furthermore, such decisions can also be made by an investigator (with the consent of the head of the investigating authority) or an inquiry officer (with the consent of a prosecutor), thus making Article 76 of the Criminal Code and Article 25 of the Criminal Procedure Code applicable at the pre-court stage.

The first legal condition for exemption from criminal liability under Article 76 of the Criminal Code is that the offender in question is a "first-time-offender". Factual and legal criteria shape the basis for determining whether an offence is a "first-time offence", or rather, whether an offender "has committed an offence for the first time". In the doctrinal interpretation, a crime committed for the first time is an act:

- that a person commits for the first time,
- or an act committed repeatedly, but if the person is considered as untried for the previous offence.

The same is applicable if the statute of limitations for criminal responsibility has expired (Articles 78, 94 of the Criminal Code of the Russian Federation), or a criminal record for a previous conviction is canceled or quashed (Articles 84, 85, 86, 95 of the Criminal Code of the Russian Federation).[20]

The second legal condition for exemption from criminal liability in connection with reconciliation with the victim is the fact that a crime is classified as being of "minor or medium gravity". Minor offences are recognized in accordance with Part 2 of Article 15 of the Criminal Code of the Russian Federation as intentional and negligent acts, for the commission of which the maximum punishment under the Criminal Code shall not exceed three years in prison. Crimes of medium gravity are intentional acts, for the commission of

20 *Ashin/Rarog* 2009, Art. 75, 80.1; *Naumov* 1999, p. 206.

which the maximum punishment under the Criminal Code does not exceed five years in prison, and negligent acts, for the commission of which the maximum penalty provided for by the Code is more than three years in prison (Part 3 Article 15 of the Criminal Code of the Russian Federation).

Along with the two conditions stated above, the grammatical interpretation of the wording of Article 76 of the Criminal Code implies that, for an exemption from criminal responsibility under this article to be applicable, two legal facts must be asserted together – reconciliation with the victim, *and* reparation of the harm caused to the victim.

A law enforcement official has the right to terminate prosecution if the victim or his/her legal representative delivers to him a written reconciliation statement (Article 25 of the Criminal Prosecution Code of the Russian Federation). At the same time, law enforcement officials have to ensure that reconciliation is not fictitious and has not occurred under the influence of threats, bribery or any other form of coercion. The paragraph 16 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 dated December 9, 2008[21] states: "When making a decision to dismiss a criminal case in connection with reconciliation of the offender with the victim, the court should thoroughly investigate the [...] other circumstances of the case ([...] whether pressure was exerted on the victim for the purpose of reconciliation [...])". It is highly disputable, whether such resolutions of the Supreme Court of the Russian Federation are binding for the courts or not. However, they play an outstanding role in the interpretation inter alia of Criminal Law and Criminal Procedure Law and could be used at the pre-court level as well.

The second legal fact, with the presence of which the exemption from criminal liability of the offender is allowed, is the reparation of damage caused to the victim.[22] The wording of Article 76 of the Criminal Code, "[...] and made amends for the harm to the victim [...]" is not entirely appropriate, because it implies the need to take some actions for reparation, and that these actions must be performed before the decision on exemption from criminal liability. In this case this requirement is unconditional, which narrows discretion and makes the decision-making process inflexible. However, we consider that the question of the form and amount of reparation in the reconciliation of the parties should be decided by the victim (before the parties reach a mutual agreement), because he/she has the right to opt out of any acts of reparation in his/her favor.[23]

---

21 *Plenum of the Supreme Court of the Russian Federation* 2009.

22 The question of what is understood by reparation of the damage caused and its possible forms in the science of criminal law is considered in Russian literature in sufficient detail, see: *Atzhanov* 1998, pp. 67-74; *Ostanina* 2004, Chapter 2, § 2.

23 See *Golovko* 1998a, p. 45; 1998b, pp. 15-16; *Goricheva* 2004, pp. 12-13; *Gasparyan* 2009, p. 9.

In practice, serious problems arise in the interpretation of the rule of Article 76 of the Criminal Code which states that an offender "*may be* exempted from criminal responsibility", and Article 25 of the Criminal Procedure Code which states that a law enforcement official "*has the right* to terminate a criminal case". The Supreme Court of the Russian Federation has repeatedly stressed that the termination of criminal proceedings in accordance with Article 76 of the Criminal Code and Article 25 of the Criminal Procedure Code is the right of the court, and not an obligation. Indeed, the etymological meaning of the italicized words implies a choice of decisions.[24] As rightly observed by *G. B. Wittenberg*, the interpretation of the word "may" refers only to the "fundamental admissibility of the exemption", "competence of the judicial and procuratorial institutions in committing such acts." [25] The discretion of law enforcement agencies applies to the establishment and interpretation of the circumstances forming the basis and conditions for exemption from criminal liability, but not an opportunity to consider these circumstances or ignore them.[26]

However, the limits of discretion in deciding to exempt an offender from criminal responsibility under Article 76 of the Criminal Code and Article 25 of the Criminal Procedure Code remain unclear. In the Decision of the Judicial Board on Criminal Cases of the Supreme Court of the Russian Federation of 14 October 2008[27], it is stated: "Article 25 of the Criminal Procedure Code of the Russian Federation states that the court has the right, but is not obliged to discontinue the criminal proceedings. However, this does not provide any opportunity to the court to resolve the issue based solely on their discretion. Considering the application of the victim to discontinue the criminal proceedings in connection with the reconciliation of the parties, the authority or an official engaged in criminal proceedings not only state the presence or absence of a legitimate ground for this, but also make an appropriate decision taking into account all the circumstances of the case, including the degree of public danger of the offence, the identity of the offender, the circumstances mitigating or aggravating responsibility". The Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 dated 9 December 2008 indicates that, when deciding on the exemption from criminal liability in connection with reconci-

24 More about this: *Filimonov* 2004, p. 252.

25 *Wittenberg* 1969, p. 64, cited in *Lyango* 2000, p. 103.

26 *Lyango* 2000, pp. 103-104.

27 *Judicial Board for Criminal Cases of the Supreme Court of the Russian Federation* 2008. This decision is virtually identical to the position of the Constitutional Court of the Russian Federation in its Decision dated June 4, 2007 No. 519-O-O "On refusal to accept for consideration the request of the Lenin district court of the city of Makhachkala on inspection of the constitutionality of Art. 25 of the Criminal Procedure Code of the Russian Federation". See also: *Presidium of the Supreme Court of the Russian Federation* 2005.

liation with the victim, the court must assess whether it corresponds with the aims and objectives of protecting the rights and lawful interests of individuals, society and the State. The interpretation made by the Supreme Court mentioned above could be also useful in the law enforcement practice of law enforcement bodies at the pre-court level. Thus we discuss such Resolutions already in this section.

Of course, a certain scope for the implementation of the discretionary powers of law enforcement agencies is needed, but in order to protect citizens from abuse or arbitrariness, mechanisms to appeal the decision made by these bodies are also required. We believe that, where the requirements of Article 76 of the Criminal Code and Article 25 of the Criminal Procedure Code have been fulfilled, the respective decision-making body must give good reasons for refusing to exempt the offender from criminal liability.

Article 76.1 of the Criminal Code regulates specific grounds for exemption from criminal responsibility for crimes in the sphere of economic activity. Among the conditions for exemption from criminal responsibility in this context, reparation of the damages caused to the budget system of the Russian Federation as a result of the crime is also stated (either in full, or up to five times the amount of damages, depending on the alleged acts). This rule is normally accompanied by the Article 28.1 of the Criminal Procedure Code of the Russian Federation, according to which the court has the right to terminate a criminal case on this ground, as well as an investigator with the consent of the head of the investigative body, or the inquiry officer with the consent of the prosecutor.

Elements of restorative justice are also recognizable in Article 75 of the Criminal Code of the Russian Federation. According to this article, a person who has committed a crime of minor or medium gravity and who is a first-time offender can be exempted from criminal liability if he/she, after having committed the crime, voluntarily surrendered to the police, facilitated detection and investigation, has compensated or in some other way made amends for the harm he/she has caused and as a result of his/her "active repentance" ceased to be socially dangerous. The procedural aspects of the termination of a criminal case on this ground are settled in Article 28 of the Criminal Procedure Code of the Russian Federation.

2.1.2 Juvenile justice

In Russia, juvenile criminal law and juvenile justice are not regulated in a separate branch of legislation due to the principle of codification (Article 1 of the Criminal Code, Article 1 of the Criminal Procedure Code). Instead, peculiarities of criminal liability and punishment of juveniles are governed primarily in Chapter 14 of the Criminal Code, and features of the criminal proceedings involving minors are stated in Chapter 50 of the Criminal Procedure Code. Additionally, the Federal Law of 24 June 1999 No. 120-FZ "On the Basis

of the System of Preventing Child Neglect and Juvenile Delinquency" provides a package of special-preventive measures for juvenile offenders. Also, the Federal Law of 24 July 1998 No. 124-FZ "On Basic Guarantees of Children's Rights in the Russian Federation" introduced a number of rules that are potentially of great importance in the context of minors who have offended and who are subject to criminal prosecution.

The provisions of Article 76 of the Criminal Code and Articles 20 and 25 of the Criminal Procedure Code also apply to minors who have committed criminal acts. Russian legislation currently gives no special consideration to reconciliation as a ground for exemption from criminal responsibility in juvenile criminal proceedings, and contains no provisions that seek a different application of these Articles for juveniles.

The Criminal Code does not rule out the possibility that the parents of a minor (or other persons) pay the reparation arising from reconciliation with the victim. However, in order to achieve the desired educational effect, it would be necessary and appropriate for a minor to assume an active role in the delivery of reparation. In connection with this, suggestions made by Russian authors should be supported. They believe that the recognition of reparation as a ground for exemption from criminal responsibility requires active measures of material and non-material reparation, indicating his/her the desire to help the victim.[28]

2.2 Court level

2.2.1 Adult criminal justice

Articles 75, 76 and 76.1 of the Criminal Code, and Articles 25, 26 and 28.1 of the Criminal Procedure Code are equally applicable in court proceedings in criminal cases. Decision-making authority in this context is transferred to the court once the pre-trial phase of the proceedings has been completed.

Additionally, the fact of reconciliation with the victim can also be considered as a mitigating circumstance independently (Part 2 of Art. 61 of the Criminal Code). This legal norm is applicable to all offences. Furthermore, under Paragraph "k" Part 1 of Article 61 of the Criminal Code, an offender's sentence can be mitigated if he/she provided medical assistance or other forms of assistance to the victim immediately after commission of the offence, voluntarily made reparation for material or moral damages arising from the crime, or has undertaken other actions aimed at mitigating the harm caused to the victim.

Article 64 of the Criminal Code, which is also applicable to all offences, allows the imposition of a penalty that is below the lower limit provided for by

28 See *Atzhanov* 1998, p. 73; *Yakovleva* 2003.

the relevant article of the Criminal Code if, after having committed the crime, the circumstances that reduce the degree of social danger of acts occurred (repentance, reconciliation, reparation of damage, and other remedial actions).

2.2.2 Juvenile justice

Articles 75 and 76 of the Criminal Code and Articles 25 and 28 of the Criminal Procedure Code are also applicable after a case has gone to court. Furthermore, Articles 61 and 64 of the Criminal Code as described above under *Section 2.2.1* equally apply to juvenile offenders.

In order to expand the practice of reconciliation of juvenile offenders with their victims in criminal law, Paragraph 2 Part 16 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 1 of 1 February 2011 is of great importance. It recommends that courts should consider the possibility of using Articles on exemption from criminal liability[29] (including reconciliation with the victim in crimes of minor and medium gravity) in all cases in which a minor is alleged to have committed an offence that falls within the scope of these Articles, and where all other preconditions for the applicability of these articles have been met. In the Russian literature there are calls for the drafting of special rules that are dedicated to the reconciliation of juveniles and their victims, that also take the special-preventive potential[30] of restorative justice procedures into account.

The Criminal Code in Chapter 14 provides for the application of compulsory educational measures to the minors who committed a crime of minor or medium gravity (Articles 87, 90 and 91 of the Criminal Code). One of these measures is imposing on a minor a duty to make amends for harm. The legal effect of this measure may be an exemption of a minor from criminal responsibility or punishment, if the court finds that the correction of a minor can be achieved through the application of compulsory educational measures (Articles 90, 92 of the Criminal Code).

2.3 Restorative Justice elements while serving sentences

Russian legislation does not explicitly recognize reconciliation with a victim and reparation of damage as a circumstance indicating a possibility of correction of the convicted person without his real serving punishment in connection with:

---

29 Articles 75-78 of the Criminal Code of the Russian Federation to a minor and Articles 24-28 of the Criminal Procedure Code.

30 See for example: *Tkachev* 2001, pp. 108-110; *Zolotykh* 2008, pp. 470-505; *Yurkov* 2012, pp. 10-13, 156-173.

- conditional punishment/suspended sentence (Article 73 of the Criminal Code),
- conditional early release from punishment (Article 79 of the Criminal Code),
- conventional pre-schedule relief from serving punishment (Article 93 of the Criminal Code.

We believe, however, that the implementation of certain forms of restorative justice in this case may indicate a correction of a person.[31] Than in accordance with the Article 73 Part 2 of the Criminal Code the court, imposing a conditional sentence, shall take account of the nature and the degree of the social danger of the crime committed, of the personality of the guilty person, and of mitigating and aggravating circumstances. And the fact of reconciliation with the victim and reparation of damage is a mitigating circumstance (see *Section 2.2.1* above).

In imposing a suspended sentence the court may place some duties on the conditionally convicted person. In addition to the fixed catalogue of such duties, the court may impose other duties which are conducive to the reformation of the conditionally convicted person. One possibility is a duty to make amends for harm caused during an offence in accordance with Part 5 Article 73 of the Criminal Code and contains in this respect elements of restorative justice.

Also, when applying parole (granting conditional early release), the court may impose duties provided for by Part 5 Article 73 of the Criminal Code on the convicted person (i. e., including the obligation to make amends for the harm caused during a crime).

There are no statistical data concerning the frequency of the use of these measures in Russia. The experiences of some pilot projects are mentioned in *Section 3.3*.

3. Organizational structures, restorative procedures and delivery

Russian law does not state how exactly the parties come to reconciliation; such terms as “mediation”, “restorative programme” do not exist in the Russian Criminal Law, and, therefore, the legislative order of transferring the cases from the structures of the criminal procedure to the service of reconciliation does not exist either. Nowadays, in some areas of the Russian Federation activists in restorative justice establish cooperation with the courts, so it becomes possible to carry out reconciliation programmes in criminal cases. The particularities of reconciliation and Victim-Offender Mediation apply to all the different opportunities for reconciliation that are described in *Section 2* above.

31 See more details about the purpose of correction of the convicted person in criminal law see *Komissarov* 2010, pp. 337-339.

Today in Russia there is a strong social movement for the creation of a juvenile justice system, which includes the official justice authorities, so that it becomes possible to experimentally conduct restorative programmes. These programmes are conducted by independent agencies that are established either on the basis of social organizations working with minors or state or municipal authority agencies that work with children and families. Reconciliation services can be created both on a departmental basis: in education, youth policy, social security, judicial, law enforcement, etc., and an interdepartmental (services at municipalities, commissions on juvenile affairs and protection of their rights) or territorial basis.

Thus, at this stage, a significant part of reconciliation services function in a test mode and is financed mainly at the expense of the international and Russian grants, state and municipal target programmes and budgets of respective agencies. The control and coordination of prosecuting agencies and reconciliation services is carried out by the courts or commissions on juvenile affairs, wherefore its own individual order of interaction of these bodies is developed in each subject of the Russian Federation.

In Russia there are no statutory requirements for professional competence and forms of mediators training. However, the existing professional community of mediators developed and approved the "Standards for Restorative Mediation", according to which a mediator is not required to have special (psychological, educational, legal) education, but must be trained as a mediator, which includes:

- theoretical mediation training, including the specifics of restorative mediation, knowledge of performance standards;
- taking a training course on mastering the basic skills of mediation;
- independent conducting of a series of mediations and subsequent supervision with more experienced mediators, as well as writing reports on conducted mediations.

The mediator should also know the specifics of working with offenders and victims in a field he works in. Most frequently the training of conducting programmes of restorative justice is carried out by specialists recognized (the best) in the professional community. Training of mediators as a part of the advanced training courses or training of students is also carried out at the higher education institutions.

3.1 Mediation between the offender and the victim

As already noted, various models of experimental sites to introduce elements of juvenile justice (restorative programmes) simultaneously work in Russia. The specifics of each model is defined by demographic indices, the level and dynamics of infringing behaviour of juveniles, grant support, economic, infra-

structure and personnel capability of the territory, its national, cultural and geographical features.

In this section, the authors tried to analyze and describe the logic and consistency of the implementation of restorative programmes based on the experience of the existing experiments.

Information on the criminal law conflict to be considered with the use of a restorative programme (hereinafter the case) can be transferred to the reconciliation service (mediators):

- From the commission on juvenile affairs and protection of their rights (that received information from the criminal police, an investigator or the court that the criminal case was initiated against a minor);
- Directly from an investigator or a judge (assistant judge) if there is an official or unofficial cooperation agreement with an appropriate service of reconciliation;
- Information on criminal conflict can also come to the reconciliation service from the educational institution where a minor studies;
- A juvenile himself, his legal representative, a lawyer, a victim (representatives of the victim) can also turn for assistance in resolving the criminal conflict with the help of restorative programmes.

The "customer" transfers the available material on this case (last name, first name, address and contact numbers of the "offender" and the "victim") to the mediator of the service, and the mediator voluntarily accepts the case to work on. After that the mediator calls (or meet with) the parties of the conflict explaining to them the nature of the mediation process, its legal implications, social effects, rights of participants, and also informs and invites the legal representatives of minors to participate in the programmes. The first party that the mediator invites to participate in restorative programmes is the "offender" party (in order to prevent re-injury of the victim by refusal of the "offender" to participate in the programme of reparation in case of an obtained consent of the "victim"). If the parties agree to participate in the programme, the mediator conducts preparatory (individual meetings) with each party.

Within individual meetings, the mediator hearing out each party creates the conditions for a discussion during the general meeting on questions about the expectations of the parties, the dates and mechanisms of reparation, which is followed by the individual meetings. In some situations (psychological trauma, resentment, fear, anger) the work of the mediator (in the case of voluntary consent of a party) may involve a psychologist or another specialist.

During the meeting, both parties discuss the need for remedying the damage caused, the form, and with the assistance of the mediator mechanisms and procedures for reparation are developed. In the case of an agreement between the parties a conciliatory agreement is concluded according to the results of mediation. This agreement is to be sent to the body that initiated the restorative

programme. During the hearing, the parties request to attach the agreement to the case materials.

It should be noted that restorative programmes have educational value, which is why reconciliation services often conduct reduced programmes that may not include the victim – in such cases the juvenile may be asked to write a letter to the victim. The time-frame for the reconciliation programmes normally are not limited, but they have to be limited by the "procedural terms" – i. e., by the period of investigation (before the transfer of the case to the court), or the dates fixed by the court for reconciliation of the parties.

The basis for restorative mediation is a dialogue between the parties promoting the change in the relations: from confrontation, prejudice, revenge to positive relationships.

The most important result of restorative mediation is restorative actions: apology, forgiveness, desire to sincerely make amends for harm – actions that help to correct the effects of conflict and criminal situation.

3.2 Conducting group conferences

To solve the criminal conflict mediators often use the group programmes of reconciliation between the offender and the victim. More often such group programmes as "Circles of care", "Family conferences" that acquired popularity in recent years are used by the experts in the social field to resolve social conflicts in classes, groups of minors with a bigger amount of participants, and also are used as social rehabilitation, restorative and preventive measures in dealing with offenders.

3.3 Restorative measures in places of imprisonment

In the Russian penal estate there are only individual cases in which reconciliation programmes are used by some specialists in individual institutions. Therefore we cannot speak about restorative programmes in places of imprisonment as sustainable practices. As an example we will illustrate the data of the experimental project on training restorative methods of conflict resolution (mediation) for the employees and the convicted to imprisonment in the women's penal colony in the Shakhovo village of the Orel Region. The project was implemented by the Regional Public Organization "Centre for Prison Reform" in cooperation with the Federal Service for Execution of Punishment in the Orel Region.

Currently 47 convicted people and staff of the colony have been awarded with mediator's certificates; five of them have been certified as trainers. From 2004 to 2011, training sessions of various levels were taken by about 200

prisoners and prison officials. The reconciliation service created as a result of the project considers the following types of conflicts:[32]

- Conflicts among inmates (often with crowd involved);
- Conflicts between the inmates and the administration (staff) of the penitentiary institutions. The assistance in settlement of these types of conflicts contributes to the emergence of an alternative to the standard penal and administrative system of the response to crimes, conflict situations, reducing the number of penalties imposed on convicted persons, which increases the chances for convicted persons to get the parole and improves psychological climate in the community.
- Conflicts with the victims in criminal cases (offenses for which the convicted serve sentences of imprisonment). Resolution of this type of conflict has, unfortunately, few cases. This is largely due to the objective reasons: the criminals are denied the right of free movement to meet with the victim, and for the victim it is seen as unpleasant and impossible to visit a secure setting. However, in such cases, the following programmes are also used: "Letter to the victim", "Shuttle mediation" or reconciliation conducted with the surrogate victim (i. e., a person "playing the role" of the victim). In such cases, it is possible to talk about the psychotherapeutic and preventive sense of restorative programmes rather than legal.

3.4 Reconciliation with the victim as a cultural practice of conflict resolution of the Peoples of Russia

3.4.1 The Chechen Republic

Throughout its historical development the Chechen society highly valued every human life, regardless of gender, age and social status. In the fight for a life a human deserves the traditions of talion have been formed and established. Morals of the Chechen society not only approved, but also strictly regulated talion, including the blood revenge custom. The custom of blood revenge is prevalent in Chechnya to the present day. In 2010, there were about 500 families involved in blood feuds in the territory of the Republic. In autumn 2010, the Conciliation Commission headed by the President of the Chechen Republic Ramzan Kadyrov was established. It lasted a year and was abolished due to the solution of its main task – reconciliation of existing conflicts on the ground of the blood revenge. During the work of the Commission more than 200 conflicting families have come to a settlement, despite the fact that in some

32 *Al'pern* 2011, p. 7.

cases the blood feud lasted 80 or even more years.[33] At the moment the Muftiat resolves family, domestic and other conflicts.

3.4.2 The Ingush Republic

On 15 September 1995, the government approved the "Regulation on the Reconciliation Commissions to resolve cases of blood feud" that keep records of all blood feud cases and with the help of society deal with these complex issues. However, the major work in this area accounts for the Spiritual Administration of Muslims of the Republic that keeps records of reconciliation cases and all statistics for blood feud participants that is unofficial and not public. In the official list of blood feud participants as of 1 January 2009, there were 180 people and none reconciliation. In 2010, about 104 blood feud participants came to reconciliation in the country.[34] It should be noted that this work is being done on a voluntary basis and is not paid. The Commission consists of representatives of all the settlements of the Republic – about seven people from each settlement. These are clan elders, religious leaders and respected people, regardless of their age. The members of the Conciliation Commission carry out their hard and diligent work for years, until they achieve positive results. Every family has the right to choose the people whom it trusts to deal with the reconciliation issues of families. In every community there are people who deal with these issues all their lives.

3.4.3 Kabarda, the Republic of Adygea

At present, the local judicial and administrative authorities not only allow the highlanders to choose the legal system to which they want to resort in resolving conflicts themselves, but, moreover, in some cases, encourage the traditional mediation. Now the majority of criminal offenses are not transferred to the Russian courts for consideration. Mediation courts secretly got a chance, as before, to consider all cases related to causing property and physical damage.[35]

Currently mediators consider such criminal offenses in Russian courts as injury or murder as infliction of physical harm that requires satisfaction, rather than punishment. The rule of discovery of the murder intent is not applied in the Highlanders' judicial process. The fact that the Adyghes have a kind of an appeal institution is quite interesting. If the chosen mediators failed to reconcile the parties, the offender and his family may choose new mediators who after a

33 *Bersanova* 2011, p. 53.

34 *Albogachieva* 2011, p. 46.

35 *Babich* 2011, p. 31.

while go to the relatives of the victim for the second time. However, it is not accepted to go to the victim for the third time.

In cases of bodily injury the mediators, as before, are guided by the Adyghe adat and apply the following rules: "the system of conciliatory treats"; presents to the injured party; the payment of compensation; eviction of the abuser's family for temporary or permanent residence into another place. The same rules are applied for other peoples of the Caucasus, for example, the Abkhazians.

3.4.4 Dispute resolution of the Gypsies

According to the population census held in 2010, there are 220,000 Gypsies in Russia. Considering the resolution of conflicts among the Gypsies, we should speak of the extrajudicial and judicial regulation. In both cases the case is examined without any participation of Gadjo (non-Gipsies). Minor conflicts, conflicts within families and clans, conflicts the shame of which outweigh their severity are regulated by the extrajudicial order. In the extrajudicial conflict resolution the initiative is taken by the clan elders who directly show their commitment to a particular position or offer a compromise solution. Such cases as property-related cases, cases of defence of honour and dignity, cases of crimes against morality, sexual immunity, health and life can be resolved in the judicial order. The competence of the kris (court) includes cases the unsettlement of which may cause fear in society. The Kris is a gathering, a meeting of participants in the conflict, people authoritative for both parties, witnesses and simply caring members of society. The initiator of the gathering is usually a party whose rights allegedly were impaired. The main purpose of the Kris is conciliation of the parties and finding a compromise settlement, which is why all the actions related to the bloodshed or restraint of liberty are not applied by the Kris. The Kris does not turn into violent punishment even when the absolute proof of guilt is achieved. Besides, the Kris does not make decisions the effects of which will be irreversible in the case of cancellation of the decision for whatever reason. In cases involving property the punishment may be the payment or working off the debt. In cases of crimes against morality, sexual immunity or murder the Kris may recognize the accused as "non-received in a decent home" (magardo – Gypsy – Foul). According to the Gypsies, to become a magardo is worse than death. It is extremely rare that the Kris considers cases against different ethnic groups. In any case, a person who was under the trial always has a chance to prove to others his correction and restore the broken relationship.

The Kris can take the form of a feast. The testimony and views of all participants are heard regardless of gender, occupation, age and material well-being. The role of the "court clerk" is taken by a person who finds it possible to call to order and clarify organizational issues. No records are kept, but especially

important speeches made during the Kris are passed from mouth to mouth and from generation to generation. The main objectives of the Kris are:

- To examine the case and deliver a fair judgment that does not allow escalation of a conflict;
- To draw up a solution to be accepted and understood by both parties of the conflict and other members;
- To create the conditions under which the subsequent peaceful coexistence of the parties is possible;
- To maintain its authority and establish a precedent.[36]

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

The data of the official Russian statistics on crime and justice contain few details on the use of practices of restorative justice. The statistics of the Judicial Department at the Supreme Court of Russia contains, among other things, the indication of the number of persons whose cases were reviewed by the courts and terminated on the grounds of Art. 75, 76 of the Criminal Code of the Russian Federation (active repentance and reconciliation with the victim), as well as in connection with the application of compulsory educational measures for juveniles. A purely restorative nature is attributed to reconciliation with the victim under Art. 76 of the Criminal Code of the Russian Federation; the other mentioned grounds for termination of the criminal prosecution can sometimes contain elements of restorative justice.

According to the Russian general federal statistics, the proportion of persons exempted from criminal responsibility due to reconciliation between the parties, is at average one-fifth of the total number of persons of cases consummated by courts. In the five-year time frame a trend toward a decrease of this proportion from 20.5% in 2007 to 18% in 2011 is traceable. However, this trend does not apply to the proportion of minors exempted from the criminal liability due to reconciliation with the victim. In 2002, the proportion of juveniles, whose criminal cases were dismissed by the court due to reconciliation with the victim, was only 3.7% of all juveniles whose cases were considered by the courts, while in 2011 it was already 31.5%.[37]

36 *Afanas'yev* 2012, pp. 65-70.

37 According to the *Judicial Department at the Supreme Court of the Russian Federation* provided on request.

Table 1: The number of individuals, which cases were examined by the Court and the outcomes of the examination (the general Jurisdiction Courts of the Russian Federation, since 2010 with the data presented by Military Courts)[38]

Year	Convicted	Acquitted	Termination of the Criminal Prosecution			
			Reconciliation with the victim (Art. 76 CC)	Active Repentance (Art. 75 CC)	Compulsory educational measures (for juveniles)	Other grounds
2007	931,057	10,216	275,628	20,089	5,787	48,611
2008	941,936	10,027	233,496	16,404	5,693	56,915
2009	906,664	9,179	217,045	14,687	4,411	40,470
2010	870,082	9,152	210,667	13,824	3,994	42,557
2011	806,728	8,855	197,731	12,696	3,794	43,368

Table 2: Termination of the Criminal Prosecution on the grounds of reconciliation with the victim and Active Repentance, 2011, all Russia[39]

Crimes Against	Termination of the Criminal Prosecution			
	Reconciliation with the victim (Art. 76 CC)		Active Repentance (Art. 75 CC)	
	N	%	N	%
Human life and health	82,854	42.08	511	4.06
Freedom, honour, and dignity of a person	7,148	3.63	36	0.29
Sexual inviolability and sexual freedom of a person	454	0.23	32	0.25

38 *Judicial Department at the Supreme Court of the Russian Federation* 2012.

39 *Judicial Department at the Supreme Court of the Russian Federation* 2012.

Crimes Against	Termination of the Criminal Prosecution			
	Reconciliation with the victim (Art. 76 CC)		Active Repentance (Art. 75 CC)	
	N	%	N	%
Constitutional rights and freedoms of man and citizen	3,852	1.96	171	1.36
Minors	2,974	1.51	184	1.46
Property	88,637	45.02	4,171	33.12
Crimes in the sphere of economic activity	145	0.07	441	3.50
Interests of service in profit-making and other organizations	47	0.02	46	0.37
Public security	660	0.34	693	5.50
Human health and public morality	29	0.01	686	5.45
Environmental crimes	334	0.17	2,503	19.88
Traffic safety and the operation of transport vehicles	6,531	3.32	55	0.44
Crimes in the sphere of computer information	127	0.06	50	0.40
Fundamentals of the constitutional system and state security	0	0.00	6	0.05
Abuse of official powers	43	0.02	287	2.28
Administration of justice	122	0.06	598	4.75
Administration procedure	2,897	1.47	2,101	16.69
Military service	22	0.01	21	0.17
Total	*196,876*	*100*	*12,592*	*100*

The ratio of *corpora delicti* to which some practices of restorative justice were applied by the courts is presented in *Table 2* (by the example of 2011).
From the data in *Table 2* it is shown that the offenses for which the proceedings were terminated in connection with reconciliation with the victims mainly relate to crimes against property (45%) and against life and health (42%). Mainly, the criminal proceedings on such crimes as crimes against property (33.1%), environmental crimes (19.9%) and crimes against administrative order (16.7%) were terminated in connection with active repentance.

From the official statistics it is not clear what specific official decisions were taken on those cases in which the elements of restorative justice were used. We can only see the total amount of terminated cases in which there are elements of restorative justice. The available data of monitoring of the restorative justice programs in 2009 in certain cities and regions show that the criminal proceedings were terminated as a result of participation in the program quite rarely, despite the mediation.[40]

In Novosibirsk, for example, out of 18 successful conciliation meetings seven cases were terminated according to Art. 25 of the Criminal Procedural Code, 76 of the Criminal Code of the Russian Federation, in five cases the real imprisonment was changed to probation, in four cases a public apology was given, and in two cases a damage was compensated. In Kazan, according to the results of six cases of successful mediation the criminal cases were not terminated, but, mainly, probation or infliction of penalty were ruled. Only in Urai city in all six cases of successful conciliation meeting the criminal cases were terminated due to reconciliation between the parties. These data are not representative, but they suggest that the Russian courts are not always willing to release minors from criminal responsibility or significantly reduce the negative effects of punitive sanctions, despite the success of the mediation.

4.2 Findings from implementation research and evaluation

At this point, it should be stated that there have been no large-scale studies or evaluations in Russia that seek to investigate levels of participant satisfaction or rates of recidivism following participation in reconciliation or mediation. This is not least due to the localized provision of reconciliation services. Some descriptive inventory research is however available, to which we shall now turn our attention.

Monitoring of the restorative justice programs was launched in Russia in 2009 by the experts of the All-Russian Association of Restorative Mediation. One of the main difficulties is the lack of a single technique for collecting information in regions. For example, in the Perm Territory the reconciliation

40 *Konovalov* 2010, pp. 102 f.

services use not only mediation meetings but also a wider range of procedures and methods.[41]

Currently we have data on the number of territorial services of reconciliation, the sources of cases for restorative procedures, the number and type of programs, the number of participants of the started and completed programs.

The number of conciliation services continues to grow: in 2009 there were 44 conciliation services in Russia, in 2011 that figure rose to 61. An operating service for the monitoring is the service considering at least four cases per year.

41 *Khananashvili* 2012, p. 110.

Table 3: Monitoring of the Restorative Justice Programs, 2011*

Nr.	Territory	Number of services	Number of cases/Sources of cases					
			Number of cases (total)	From column 4:				
				Court	CJAPR*1	PdoMA*2	EI*3	Others
1	**2**	**3**	**4**	**5**	6	**7**	**8**	**9**
1.	Kirov Region (Kirov city)	1	4	0/0	2/1	2/1	0/0	0
2.	Moscow	5	108	12/1	33/7	0/0	55/27	8
3.	Novosibirsk Region	2	188	10/2	118/2	6/2	32/2	22
4.	Perm Territory	45	922	347/50	402/-	70/-	0/-	103
5.	The Republic of Karelia (Petrozavodsk)	1	18	16/1	1/1	0/0	1/1	0
6.	The Republic of Tatarstan (Kazan)	1	40	40/2	0/0	0/0	0/0	0
7.	Tyumen Region (Tyumen)	4	23	17/4	2/1	0/0	4/2	0
8.	The Republic of Chuvashia	2	11	0/0	1/1	0/0	5/1	5
	Total	*61*	*1,314*	*442/60*	*559/13*	*78/3*	*97/33*	*138*

* *Khananashvili* 2012, p. 117
*1 Commission on juvenile affairs and protection of their rights.
*2 Police department for minor affairs.
*3 Educational institution.

According to *Table 3*, the majority of cases were submitted for reconciliation by the Commission on juvenile affairs and protection of their rights – 559 cases, and by the courts – 442 cases. In 2009, the territorial reconciliation services were given 788 cases, while in 2011 that number rose to 1,314 cases. In 2009, over 542 cases were closed following the reconciliatory meeting. In 2011, the rate of completed rehabilitation programs increased to 859. The main type of a conciliatory practice is mediation – it was used in 619 cases. The mediation is followed by such type as a "letter to a victim" and a shuttle mediation – 203 cases. Community circles and family conferences were used much less frequently – only in 31 and 5 cases, respectively.

Thus, it is believed that restorative justice in Russia has a positive vector of development, at least with regard to juvenile delinquents. The proportion of minors exempted from criminal responsibility in connection with reconciliation with the victim has a tendency toward an increase. Also the practices of conciliation procedures in the criminal justice field with specialist-intermediaries are developing.

The factors contributing to this development include the enthusiasm and the active position of representatives of civil society organizations and officials who understand the importance of communication and the values of civil society.[42] The support of a number of lawyers – both practitioners and theorists – is also important for the development of Restorative Justice in Russia.[43] Retraining of intermediaries, exchange of experience between experts in the field of reconciliation practices at conferences and seminars annually held by the Center "Judicial and legal reform" and the RAS Institute of State and Law play an important role in this process. In Russia the traditions of reconciliation that are based on centuries-old traditions of reconciliation of different peoples still exist.[44] Currently the study and introduction to the Russian practice of restorative justice is being carried out. However, the following key factors negatively impact the proper development of restorative programs:

- Vertical organization of social institutions which complicates the effective management and objective evaluation of services conducting reconciliation;
- Excessive reporting, inspection, many regulatory bodies, poorly paid social workers;
- The culture of "repression" of a part of population and representatives of law enforcement agencies and courts.[45]

42 *Maksudov* 2012a, p. 5.

43 *Karnozova* 2012b, p. 12.

44 *Karnozova* 2012a, pp. 30-33; *Maksudov* 2012a, p. 6.

45 *Maksudov* 2012a, p. 6.

5. Summary and outlook

Summing up, we should state that restorative justice in Russia is at the first stage of formation that may be called the preparatory stage. In the midst of dissatisfaction with traditional ways of the punitive criminal resolution of conflicts, a favourable attitude to the measures that are alternative to criminal penalties, including restorative measures and mediation begins to form in the Russian society and in the professional environment. This is facilitated primarily by the dissemination of the experience of countries that are more "advanced" in this regard. Along with translations of foreign sources into Russian language, the justification of the restorative model and its individual elements, as well as the comparative legal aspects has already become the subject of a number of dissertations on Criminal Law, Criminology and the Criminal Process.

Thanks to the efforts of enthusiasts and, above all, the Non-Governmental Centre for Judicial and Legal Reform (*L. Karnozova*, *R. Maksudov*, *M. Flyamer*), the All-Russian Association for Restorative Mediation (*R. Maksudov*) the restorative practices and training of mediation techniques based on the initiative pilot projects begin to form in Moscow and other regions.

The field of the most active introduction of the restorative approach is the preventive measures of juvenile delinquency and juvenile criminal justice. The adoption of the Law "On the mediation" in 2010, which regulates the use of mediation to resolve civil disputes, boosted the development of mediated technologies. In order to provide appropriate services in the regions on the basis of educational institutions, chambers of commerce and other institutions the mediation centres were established, training and certification of mediators was organized. It favourably affected the distribution of mediation in criminal justice.

Current Criminal and Criminal Procedural Law do not "reject" the application of the restorative approach. Two major forms of restorative justice – reparation and reconciliation are used primarily as: a) a legal fact to deal with exemption from criminal liability or punishment; b) a circumstance mitigating punishment. More sophisticated restorative technologies, such as reconciliation with the help of mediator, are used infrequently. The limits, grounds, procedure and legal consequences of their use are regulated fragmentarily and mostly are not specific enough in the legislation.

Unfortunately, the restorative approach as a means that have a separate special-preventive effect and a strengthening penal execution influence is not stated in the official Russian Criminal Law doctrine. Until recently, Russian Criminal Law was positioned as "punitive". Only in 2006 in the Criminal Code of the Russian Federation appeared Section 6 "Other measures under Criminal Law", but, nevertheless, this section does not clearly specify the restorative measures as an independent "track".

The number of adherents of the restorative approach in Russia is slowly increasing, but the vast majority of practitioners continue to consider restorative technologies as "exotic". The infrastructure of restorative justice in Russia is only beginning to develop.

For the destruction of punitive stereotypes and the successful promotion of the ideas of restorative justice, as well as the implementation of the relevant rules in the Russian legislation and introduction of successful practices it is required to make efforts in the following areas:

- dissemination of international standards, international experience and successful practices;
- adoption of the concept of restorative justice that was universally accepted and agreed, or allocation of the restorative approach in the "multi-track" concept of the criminal policy of the new generation;
- promotion of scientific research and experimental-innovative projects through the allocation of restorative justice into a number of priorities for the national and regional grant programs;
- formation of the national and regional order for training and professional development of lawyers, teachers, psychologists, social workers, specialists for work in the field of restorative justice;
- preparation of legislative initiatives to amend the existing Criminal Law, criminal procedure legislation, penal execution and preventive law (tactical objective); design of new criminal legislation that includes four types of sanctions: measures, punishment, security measures, rehabilitation measures and incentives (strategic objective).[46]

However, in our opinion, while there is no generally accepted and consistent concept of the criminal policy of the new generation in Russia, we should not expect from the state to widely implement restorative justice in the coming years. The main work will be carried out by the creative teams in the scientific and educational community that, along with "swaying" the public opinion, will unite to share experiences, develop techniques, train specialists, and introduce the elements of restorative justice into the system of prevention of minor offenses and Juvenile Criminal Law.

46 *Shchedrin* 2012.

References:

Afanas'yev, E. (2012): Traditsii uregulirovaniya konfliktov v tsyganskom prave (Tradition of conflict resolution in the Gypsy law). Vestnik vosstanovitel'noj justitsii (Restorative Justice Herald), Nr. 9, pp. 65-70.

Albogachieva, M. (2011): Primiritel′nyye komissii v Ingushetii: istoriya i sovremennost′ (Reconciliation Commission in Ingushetia: Past and Present). Vestnik vosstanovitel'noj justitsii (Restorative Justice Herald), Nr. 8, pp. 40-49.

All-Russian Association of Restorative Mediation (2009): Standarty vosstanovitel′noy mediatsii (Standards for Restorative mediation). Moscow. Available: http://mediator2009.narod.ru/standarti.html (accessed: 6 June 2012).

Al'pern, L. I. (Ed.) (2011): Sluzhba primireniya. Opyt vnedreniya vosstanovitel′nykh programm (mediatsii) v penitentsiarnyye uchrezhdeniya Rossii (Mediation service. Experience of implementation of rehabilitation programs (mediation) to prisons in Russia). St. Petersburg: Aletheia.

Ashin, A. A., Rarog, A. I. (2009): Commentary of the Art. 75, 80.1 CC. In: Chuchaev, A. I. (Ed.): Commentary to the Criminal Code of the Russian Federation. Moscow: Infra-M.

Atzhanov, T. Z. H. (1998): Osobennosti osvobozhdeniya nesovershennoletnikh ot ugo-lovnoy otvetstvennosti (po zakonodatel′stvu Respubliki Kazakhstan i Rossiyskoy Federatsii) (Special features of the release of minors from criminal responsibility (under the laws of the Republic of Kazakhstan and the Russian Federation). Chelyabinsk.

Babich, I. (2011): Vozrozhdeniye instituta mediatorstva v gorskikh soobshchestvakh Severnogo Kavkaza v sovetskiye i postsovetskiye gody (Revival of the institute of the mediatorship in mountain communities of the North Caucasus in Soviet and post-Soviet years). Vestnik vosstanovitel'noj justitsii (Restorative Justice Herald), Nr. 8, pp. 28-39.

Bersanova, Z. (2011): Obychay krovnoy mesti i praktika primireniya v sovremennoy Chechne (Custom of blood revenge and reconciliation practices in today's Chechnya). Vestnik vosstanovitel'noj justitsii (Restorative Justice Herald), Nr. 8, pp. 50-53.

Commissioner for Human Rights in the Russian Federation (2003): Spetsial′nyy doklad Upolnomochennogo po pravam cheloveka v Rossiyskoy Federatsii «Zashchita prav zhertv terroristicheskikh aktov i inykh prestupleniy» (Special Report of the Commissioner for Human Rights in the Russian Federation "Protecting the rights of victims of terrorist acts and other crimes"). March 20, 2003. Available: http://ombudman.gov.ru/doc/spdoc (accessed: 6 June 2012).

Constitutional Court of the Russian Federation (2007): Decision dated June 4, 2007, No. 519-O-O on refusal to accept for consideration the request of the Lenin district court of the city of Makhachkala on inspection of the constitutionality of Art. 25 of the Criminal Procedure Code of the Russian Federation. Available: http://ksportal.garant.ru:8081/SESSION/S__ngUgZCXD/PILOT/main.html (accessed: 4 June 2012).

Filimonov, V. D. (2004): The rule of criminal law. St. Petersburg: Yuridicheskiy tsentr Press.

Gasparyan, G. (2009): Blazhenny mirotvortsy (Blessed are the peacemakers). Novaya advokatskaya gazeta (New lawyer newspaper). Nr. 1, p. 9.

Golovko, L. (1998a): Nekotoryye grazhdansko-pravovyye problemy, voznikayushchiye v svyazi s pri-meneniyem stat′i 76 novogo Ugolovnogo kodeksa RF (Some civil legal problems arising in connection with the application of Article 76 of the new Criminal Code of the Russian Federation). Khozyaystvo i pravo (Economy and Law). Nr. 2, pp. 43-51.

Golovko, L. (1998b): Proshcheniye dolga – odno iz osnovaniy prekrashcheniya ugolovnogo dela (Forgiveness of debt as one of the reasons for which a criminal case). Rossiyskaya yustitsiya (Russian justice). Nr. 4, pp. 15-16.

Golovko, L. V. (2003): Al′teranivy ugolovnomu presledovaniyu: yevropeyskaya praktika i rossiyskiy ugolovno-protsessual′nyy kontekst (Alternatives to prosecution: European practice and the Russian criminal procedure context). Vosstanovitel′noye pravosudiye (Restorative Justice), pp. 59-68.

Goricheva, V. L. (2004): Osvobozhdeniye ot ugolovnoy otvetstvennosti v svyazi s primireniyem s poterpevshim kak institut ugolovnogo prava (Exemption from criminal liability due to reconciliation with the victim as the institute of criminal law). Ryazan′.

Judicial Board for Criminal Cases of the Supreme Court of the Russian Federation (2008): Decision of the Judicial Board for Criminal Cases of the Supreme Court of the Russian Federation of October 14, 2008 No. 48-O08-77. Bulletin of the Supreme Court of the Russian Federation, 2009. Number 2. Available: http://www.vsrf.ru/vscourt_detale.php?id=5688 (accessed: 26 April 2012).

Judicial Department at the Supreme Court of the Russian Federation (2012): Statistic data. Available: http://www.cdep.ru/index.php?id=79 (accessed: 2 May 2012).

Karnozova, L. (2012): O vserossiyskom nauchno-teoreticheskom seminare «Traditsionnyye praktiki primireniya i sovremennost′» (On the All-Russian scientific and theoretical seminar “Traditional practices of reconciliation and modernity”). Vestnik vosstanovitel'noj justitsii (Restorative Justice Herald), Nr. 9, pp. 30-33.

Karnozova, L. (2012): Vosstanovitel′noye pravosudiye v rossiyskoy pravovoy sisteme (Restorative justice in the Russian legal system). In: Putintseva, N. V. (Ed.): Vosstanovitel′noye pravosudiye v Rossii (Restorative justice in Russia). Moscow: Tsentr Sudebno-pravovaya reforma, pp. 12-21.

Karnozova, L. M. (2010): Ugolovnaya yustitsiya i grazhdanskoye obshchestvo. Opyt pagadigmal′nogo analiza (Criminal justice and civil society. Experience of the paradigm analysis). Moscow: P. Valent.

Karnozova, L. M., Maksudov, R. R. (2006): Organizatsiya i provedeniye programm vosstanovitel′nogo pravosudiya: Metodicheskoye posobiye (Organization and carrying out programmes of restorative justice: Guide). In: Karnozova, L. M., Maksudov, R. R. (Eds.): Moscow: Center for Judicial and Legal Reform.

Khananashvili, N. (2012): Analiz monitoringa deyatel′nosti sluzhb primireniya v 2011 godu (Analysis of monitoring the activities of reconciliation services in 2011). Vestnik vosstanovitel'noj justitsii (Restorative Justice Herald), Nr. 9, pp. 108-119.

Komissarov, V. S. (2010): Tseli nakazaniya (Aims of punishment). In: Inogamova-Khegai, L. V., Komissarov, V. S., Rarog, A. I.: Rossiyskoye ugolovnoye pravo. Obshchaya chast′ (Russian criminal law. General part). Moscow: Prospekt.

Konovalov, A. (2010): K razrabotke form otsenki i monitoringa deyatel′nosti mediatorov i sluzhb primireniya. Vestnik vosstanovitel'noj justitsii (Restorative Justice Herald), Nr. 7, pp. 85-103.

Lyango, L. N. (2000): Problemy prekrashcheniya ugolovnogo dela v svyazi s primireniyem s poterpevshim (Problems of termination of criminal proceedings in connection with reconciliation with the victim). Volgograd.

Maksudov, R. (2001): Dvizheniye za vosstanovitel′noye pravosudiye v Rossii: predmet institualizatsii (Movement for Restorative Justice in Russia: the subject of institutionalization). Vestnik vosstanovitel′noy yustitsii (Restorative Justice Herald), Nr. 2, pp. 4-13.

Maksudov, R. (2012): Strategicheskiye oriyentiry Tsentra «Sudebno-pravovaya reforma» v oblasti vosstanovitel′nogo pravosudiya v Rossii (Strategic guidelines of the "Judicial and legal reform" Centre in the field of restorative justice in Russia). In: Putintseva, N. V. (Ed.): Vosstanovitel′noye pravosudiye v Rossii (Restorative justice in Russia). Moscow: Tsentr Sudebno-pravovaya reforma, pp. 5-11.

Maksudov, R. (2012): Strategicheskiye oriyentiry Vserossiyskoy assotsiatsii vosstanovitel′noy mediatsii (Strategic guidelines of the All-Russian Association of Restorative Mediation). Available: www.sprc.ru.

Naumov, A. V. (Ed.) (1999): Commentary to the Criminal Code of the Russian Federation. Moscow: Norma.

Ostanina, V. V. (2004): Osvobozhdeniye ot ugolovnoy otvetstvennosti v svyazi s primireniyem s poterpevshim (Exemption from criminal liability due to reconciliation with the victim). Kemerovo: Kuzbassvuzizdat.

Plenum of the Supreme Court of the Russian Federation (2009): Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 dated December 9, 2008 on judicial practice on crimes related to violation of traffic rules and operation of vehicles, as well as their unlawful occupancy without theft". Bulletin of the Supreme Court, 2009. Nr. 2.

Presidium of the Supreme Court of the Russian Federation (2005): Overview of the judicial practice of dismissing by the military courts of criminal cases in connection with reconciliation with the victims and active repentance. Approved by the Resolution of the Presidium of the Supreme Court on June 1, 2005. Available: http://www.supcourt.ru/courts_detale.php?id=2990 (accessed: 4 June 2012).

Razumov, S. A. (2005): Glava 11. Osvobozhdeniye ot ugolovnoy otvetstvennosti (Exemption from criminal liability). In: Lebedev, V. M. (Ed.): Nauchno-prakticheskoye posobiye po primeneniyu UK RF (Scientific and practical guide for the application of the Criminal Code of the Russian Federation). Moscow: Norma.

Shchedrin, N. V. (2012): "Mnogokoleynaya" model′ rossiyskogo ugolovnogo prava: opyt zakonodatel′nogo konstruirovaniya ("Multi-track" model of Russian criminal law: the experience of legislative modelling). Available: http://www.crimpravo.ru/blog/u_zakon/1644.html (accessed: 3 May 2012).

Tkachev, V. N. (2001): Osvobozhdeniye nesovershennoletnikh ot ugolovnoy otvet-stvennosti po Ugolovnomu kodeksu Rossiyskoy Federatsii (Release of minors from criminal responsibility under the Criminal Code of the Russian Federation). Rostov na Donu: RYUI MVD Rossii.

Wittenberg, *G. B.* (1969): Criminal responsibility and public accountability. In: Proceedings of the Irkutsk State University. T. LVII. No. 9. Part 4. Irkutsk, p. 64.

Yakovleva, N. G. (2003): Osvobozhdeniye ot ugolovnoy otvetstvennosti neso-vershennoletnikh v svyazi s primireniyem s poterpevshim kak mera ispravleniya podrostka [Elektronnyy resurs]. Vestnik vosstanovitel′noy yustitsii (Restorative Justice Herald). Nr. 5. Available: http://www.sprc.ru/vestnik.html (accessed: 5 June 2012).

Yurkov, V. V. (2012): Primireniye nesovershennoletnego s poterpevshim v ugolovnom zakonodatel′stve Rossii i Germanii (Reconciliation with the victim of a minor in the criminal law of Russia and Germany). Krasnoyarsk.

Zolotykh, V. V. (2008): Problemy i perspektivy sovershenstvovaniya pravosudiya v otnoshenii nesovershennoletnikh (Problems and prospects for improving juvenile justice). Rostov na Donu: Rostizdat.

Scotland

Jenny Johnstone, Michelle Burman

1. Origins, Aims and theoretical background of restorative justice

There is a broad consensus in Scotland that 'restorative justice' (RJ) refers to processes that seek to address or repair harm. However, there are differing views as to what types of approaches are included in the definition of RJ. In Scotland the development of RJ has brought with it a paramount requirement that every restorative justice process aims to provide a 'safe place where all those involved in an incident that has caused harm can speak openly and honestly about three topics', namely the facts, consequences and the future:[1]

There are a range of restorative justice processes recognised in Scotland. The purpose of each is essentially designed to meet the needs of participants. The Scottish Restorative Justice training service provides a very good overview of the types of restorative approaches and practices available within Scotland.[2] However, it is probably pertinent to point out at this stage that there are some conflicting views in Scotland about terminology and the perceived differences between restorative practice and restorative justice needs to be addressed before any further analysis. This difference in terminology, understanding and the nature of restorative justice also differs slightly from that in England and Wales.

There are two main views which have been put forward which are useful to consider before addressing the different models. The first view is that restorative justice is a process that looks to address or repair harm that has been caused. However, this view further suggests that these processes are only part of a wider range of processes with a collective name of restorative approaches (or practices) being used. The purpose behind restorative approaches is to seek to: 1) promote

1 *The Scottish Restorative Justice Training Service* 2007; *Scottish Government* 2008e.

2 *The Scottish Restorative Justice Training Service* 2007.

positive relationships within a community-setting (such as a school) and, 2) be responsive and repairing when conflict or harm arises. The first view would include mediation and peer mediation, checking in circles, mentoring, conflict-resolution techniques, constructive communication, restorative conferences, restorative meetings, restorative conversations and restorative circles. The second view similarly holds that restorative justice refers to processes that seek to redress or repair harm and further argues that the term restorative practice should also encompass these types of processes so that restorative justice and restorative practice should be used synonymously. However, differentially processes that have other purposes, for example to resolve conflict, should not be included within in this term and that mediation, for example, should be seen as a term and process in its own right and not come under the 'umbrella' of restorative justice.

Scotland is not alone in this thinking. There has been a growing recognition of the important differences between "mediation" and "restorative justice" – and, therefore, of the need to be more careful about how these terms are used or applied. To state simply, there is an argument to suggest that mediation is designed to resolve a conflict or dispute; whereas restorative justice is designed to address the harm caused by an offence or wrongdoing. As *Howard Zehr* writes:

> *"The term 'mediation' is not a fitting description of what could happen [in a restorative encounter]. In a mediated conflict or dispute, parties are assumed to be on a level moral playing field, often with responsibilities that may need to be shared on all sides. While this sense of shared blame may be true in some criminal cases, in many cases it is not. Victims of rapes or even burglaries do not want to be known as 'disputants.' In fact, they may well be struggling to overcome a tendency to blame themselves. At any rate, to participate in most restorative justice encounters, a wrongdoer must admit to some level of responsibility for the offence, and an important component of such programs is to name and acknowledge the wrongdoing. The neutral language of mediation may be misleading and even offensive in many cases. Although the term 'mediation' was adopted early on in the restorative justice field, it is increasingly being replaced by terms such as 'conferencing' or 'dialogue' for the reasons outlined above."*[3]

Von Hirsch, Ashworth and *Shearing* share this view and seek to clarify the difference further:

> *"[Some advocates of Restorative Justice suggest that] restorative processes are supposed ... to resolve the 'conflict' between offender and victim (Christie 1977); but crimes are different from disputes in that the offender seldom claims to be entitled to what he takes – so what*

3 *Zehr* 2002, p. 9.

'dispute' is being resolved? The idea of 'conflict', moreover, also carries no necessary implication that either part has wronged the other."[4] *"Whilst this distinction has been articulated and accepted there is recognition that there are several overlaps between mediation and restorative justice. Harm may be caused as a result of an escalating conflict, in which case there may be a dispute that needs to be addressed alongside the restorative justice process in order to achieve a sense of genuine resolution. Conflict may occur within a restorative justice process, and so mediation skills may be needed to resolve the matter, for example, where participants argue about what happened".*[5]

Guidance has been developed and the accepted view by the majority of stakeholders in Scotland is that when reference is made specifically and exclusively to restorative processes that focus on addressing or repairing harm, then, in this context, the term restorative justice should be used.

The various models will be considered but along with this is to what extent these restorative justice processes are compatible with criminal justice, youth justice and the Children's Hearings System. Just over a ¼ of participants believe that RJ is completely compatible with the criminal justice system just over half have some doubt agreeing that it is 'mostly compatible' and just under a ¼ believe that it is mostly incompatible. The research highlighted the need for further exploration of where this incompatibility lies and how RJ can complement and/or act as an alternative to the formal criminal justice, youth justice and Children's Hearings system in Scotland.[6]

1.1 Forms of restorative justice in the criminal justice system

There are providers of restortaive justice services which are used, predominantly within youth justice in Scotland, for example the Police Restorative Warnings and potential referrals to restorative services through the Children's Hearings System.

There are also are various forms of disposals within the criminal justice system some of which can be said to have a reparative or restorative element.

4 *von Hirsch/Ashworth/Shearing* 2003, pp. 22, 23, n. 3.

5 See the Scottish Community Mediation Network or the Scottish Mediation Network for more information on the use of mediation in Scotland. Note: For an extended discussion on the differences between mediation and restorative justice, please download the following paper by *Brookes/McDonough* at http://www.restorativejusticescotland.org.ukMedvsRJ-P.pdf.

6 To note: the survey was focused on criminal justice agencies and RJ within the criminal justice sphere but respondents pointed towards the number of Restorative approaches being used in different settings (i. e. education).

These can be used to deal with various offences. Community Service Orders, Supervised Attendance Orders, Compensation Orders and Community Reparation Orders are available to use. The CSO dealt with the higher tariff offences, the SAO with those who defaulted on fines, and CO's providing compensation to the victim. However prior to the 2004 Act it was felt that there was nothing specific to respond to lower level offending caught by the ASB legislation. The Community Reparation Orders[7] were introduced by Antisocial Behaviour etc., (Scotland) Act 2004 to meet the gap. Even though some of these offences may be relatively minor it was recognised that they can have a significant impact on victims and communities. This was possibly in response to the *Scottish Strategy for Victims* (2000) which suggested that restorative justice incorporated within disposals would give the victim an increased participatory role within the criminal justice system. However as the report by *Curran et al.*[8] note the reparative element of any disposal can only by demonstrated where the person responsible has not been coerced into the restorative element. The evaluation on the implementation of the CRO's noted concerns regarding their seemingly quick implementation which gave rise to a number of procedural issues and suggested that was required was potentially integrating the CROs within a 'policy framework which includes community reparative and restorative provision may allow greater coherence in philosophy, clarity of purpose, and more flexible use of unpaid work in the community for both serious and minor offences' (*Curran et al.* 2007, p. 108). CRO's should be much more than merely unpaid work. The Compensation Orders can be used as a disposal by the summary courts and be set at no more than £5000. The Victims and Witnesses Draft Bill included a provision for the Court to always consider Compensation in all cases where it would be competent for the Court to do so.[9] We can see that only since the 2007 Criminal Proceedings (Reform) (Scotland) Act have prosecutors been given powers to issue Fiscal Fines and also Compensation Offers[10] or a combination of both. Prior to this the only way a court could deal with restitution or compensation was to defer sentence on an accused to enable repayment to be made or other restitution to be effected.[11] The new Victims and Witnesses Act requires the Court to consider compensation.

Work Orders can also be used by the Procurator Fiscal for low level offences and involves the offender carrying out 50 hours of unpaid work.[12]

---

7 *Curran/MacQueen/Whyte* 2007.

8 *Curran/MacQueen/Whyte* 2007.

9 See Victims and Witnesses (Scotland) Bill.

10 See *Scottish Government* 2010.

11 Criminal Justice (Scotland) Act 1980.

12 These are currently being piloted, see *Richards et al.* 2012.

Whilst the Scottish Strategy for Victims Document published in 2000 discussed the potential for restorative justice to provide more of a participatory role within the criminal justice system the new Act would have provided an opportune moment to review the sentencing options rather than focusing on the financial compensatory elements of the sentence, which are welcome but may not address the full needs of the victim. This is not to say that there has not been any moves to address victims' views within a restorative approach in Scotland – there has and this will be addressed in the next section.

1.2 Reform history

The introduction of restorative justice in Scotland has been through a mixture of policy, research based through pilot projects, and the development of local initiatives rather than any formal piece of legislation that requires restorative justice to be at the heart of the criminal justice system. The consultation leading up to the Victims and Witnesses (Scotland) Act 2014[13] criticised the Bill for not fully recognising the potential for restorative approaches. The 2012 EU Directive[14] clearly highlights restorative justice and points to considerations that Member States should have regarding victims and witnesses. It was not until the very last stage that reference was made to restorative justice in the new piece of legislation.[15]

The development of restorative justice in Scotland has very much been within youth justice. It is important at this point to highlight that the youth justice system in Scotland is very different to that of its UK counterparts with a Children's Hearing System being at the centre of dealing with young people who offend and with care and protection issues. Set up in the 1960's following the *Kilbrandon Report* the approach of Scotland was determined to be a welfare approach. This approach recognises that for some of those children who offend they themselves are often victims of neglect, lack of care or of crimes themselves. The focus is on meeting their individual needs and establishing the causes of their offending behaviour or 'at risk' behaviour.

The Youth Crime Action Plan published in 2002 wanted to expand the provision of community based youth justice. It was reported in January 2004 that as part of that expansion 3,000 restorative justice places were available for young people. The focus on restorative justice approaches was clear with additional resources being provided to attempt to double that figure, utilising

13 Victims and Witnesses Act 2014 and Victims and Witnesses Bill 2013.

14 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:005 7:0073:EN:PDF (accessed: December 2012).

15 See Section 2C.

restorative projects to allow offenders to face up to their offending. Local authorities were provided with some finance to do this but the focus was very much on youth rather than adult offenders. In 2008 the Scottish Government reaffirmed its commitment to restorative approaches being available for young people in its report on *Preventing Offending by Young People (2008)*.[16] In relation to Restorative Justice it recognises that, "w*here young people are involved in crime or antisocial behaviour it is important that they are aware of the impact they have on others and make reparation and restoration where appropriate. Restorative justice can play an important role in addressing the harm caused by the behaviour of children and young people, whether on its own or as part of a range of services.*"[17]

One of the key issues has been around consistency and guidance in the practice and delivery of restorative justice services. Guidance, similar to that in England and Wales, has been published several times throughout the last decade.[18] For crimes that are committed by adults the schemes available are few and far between and being reported as being available in approximately 5 of Scotland's 32 local authorities. It is also safe to say that the tendency is to use these practices for cases involving minor crimes rather than serious crimes and to be more of an attempt at diversion from mainstream criminal justice.

In 2006 and 2008 the Scottish Restorative Justice Consultancy Service monitored the development and extent of restorative justice practice by undertaking two censuses.[19] In 2008 services were described as being in place in 31 out of 32 Scottish local authorities. The provision of those services are by a number of different organisations including: 17 by SaCRO, 12 by local authorities and three by other organisations named as Barnardos', CAB and TCA & Web Project.[20]

16 Work to tackle offending by young people is described in 'Preventing Offending by Young People' as contributing to all five of these strategic objectives, and many of the 15 national outcomes and other indicators that comprise Single Outcome Agreements. In particular four of the 15 national outcomes are important: our children have the best start in life and are ready to succeed; our young people are successful learners, confident individuals, effective contributors and responsible citizens; we have improved life chances for children, young people and families at risk; we live our lives safe from crime, disorder and danger.

17 *Scottish Government* 2008d.

18 The standards of practice expected by those delivering a Restorative Justice Service were set out in separate guidance "Best Practice Guidance for Restorative Justice Practitioners and their Case Supervisors and Line Managers" (Scotland), also published in June 2008 (http://www.scotland.gov.uk/Publications/2008/06/10144026/7).

19 *Census* 2006.

20 *Census* 2008.

Guidance has been produced to implement standards in the delivery of restorative justice services. In 2008 Guidance was produced relating specifically to youth justice but did not encompass everything relating to the "practical application of restorative justice".[21] Further Guidance was set out in a document entitled Best Practice Guidance for Restorative Justice Practitioners and their Case Supervisors and Line Managers (Scotland)[22] which detailed expectations of those providing restorative justice services. The Government describes these two documents as providing "*a resource for agencies that wish to make use of Restorative Justice Services, and to ensure that Restorative Justice Services are delivered with the necessary consistency and quality.*"[23]

Several pilot programmes have been developed to consider different restorative approaches. For example, in the 1980's various projects were developed to consider reparative and mediation work.[24] Very rarely have restorative approaches been used in serious cases either post or pre-sentence. An interesting piece of work was undertaken by *Kearney and Kirkwood* in 2006 which looked at an approach called Talking after Severe Crime or TASC, which will be discussed later.[25]

In November 2007, the Government published the Concordat to focus the effort of the public sector on the delivery of the Strategic Objectives. Under the terms of the new arrangements, the Scottish Government sets the direction of policy and overarching outcomes and frees up local authorities and their partners to plan and deliver services by reducing ring-fencing and bureaucratic burdens. Through Single Outcome Agreements, each local authority sets its own priorities for achieving locally the strategic objectives of government. Local authorities and their partners are required to determine how best to target resources.

Over the years, Restorative Justice Services have worked with children and young people referred to the Children's Reporter and the Children's Hearing because of offending and the Government provided guidelines to support this process. However, there were no national guidelines regarding the use of Restorative Justice Services by other agencies, including schools, the police, anti-social behaviour teams, residential childcare settings and social workers. However, the GIRFEC Guidance (Getting it Right for Every Child)[26] is a very important document which sets out responsibilities towards young people that

21 *Scottish Government* 2008b.

22 Best Practice Guidance for Restorative Justice Practitioners and their Case Supervisors and Line Managers (Scotland) 2008.

23 *Scottish Government* 2008b.

24 See *MacKay* 1988; *Warner* 1992.

25 *Kearney* 2005; *Kearney/Kirkwood/MacFarlane* 2006.

26 *Scottish Government* 2012a.

all organisations, including public bodies, should have regard to within their work. This would include any practices involving restorative justice.

1.3 Contextual factors and aims of the reforms

The driver for change within Scotland has been focused within the youth justice sector with the Scottish Executive statement in 2006 clearly setting out its commitment to provide all young people harmed by youth crime to be given the opportunity to participate in a restorative type process.[27] Funding provided to Local Authorities to develop services and strategies for youth justice was to cover the provision of restorative justice services.[28] The main providers are the Local Authorities themselves and SaCRO (Safeguarding Communities Reducing Offending), the latter being the largest provider of these services.

Whilst the driver for introducing restorative justice has come from within the youth justice sector there has been support for the use of restorative justice with adults (insert example). However, there has been no clear steer in terms of an overall evaluation of how restorative justice maybe incorporated within Scotland. The Scottish Government invested in a scoping study to explore the potential for conducting an evaluation within Scotland but although the report was completed no eventual evaluation took place.

The commitment of Government can be seen through the development of their legislation. Up until very recenetly the consultation surrounding the new Victims and Witness (Scotland) Act 2014 has not included, in any direct form, the use of restorative justice even though a statement by *Kenny MacAskill*, the Scottish Justice Minister stated that future commissioning of research on restorative justice would be kept under review.[29] The Scottish Government funded a Restorative Justice Joint Action Project, which included SaCRO and Victim Support Scotland, researched and developed a possible model for the use of restorative practices in the adult criminal justice system along with a model for evaluation. The report was submitted in December 2009 but as yet there is no evidence to suggest that this has been taken forward. However, a provision was added late to the Bill, which stated that the Government would provide guidance on the provision of restorative services. Kenny McAskill, Justice Minister also stated words to the effect that consideration should be given to the benefits of restorative justice to victims of crime.

---

27 *Youth Justice Scotland* 2006.

28 In 2005/2006 £15 million was allocated to Local Authorities for the development of strategies, and the provision of services, for dealing with Youth Justice, see *Youth Justice Scotland* 2006.

29 Thursday 11 August 2011, Scottish Executive at: http://www.scottish.parliament.uk/S4_ChamberDesk/WA20110811.pdf.

Separately, a restorative justice programme for survivors of in-care historical abuse has been piloted requiring a closer look at the nature of restorative justice and potential benefits it may or may not have in this very sensitive area.[30]

However, when considering restorative justice services funding is problematic especially for voluntary sector organisations as highlighted in Ministers questions:

> *Kezia Dugdale (Lothian) (Scottish Labour): To ask the Scottish Executive what grants it provides to voluntary organisations that provide restorative justice schemes. (S4W-1859).*
>
> *Kenny MacAskill: The Scottish Government does not provide grants direct to voluntary organisations solely for the provision of restorative justice schemes. Funding is provided indirectly through two routes. First, the Scottish Government funds mediation and reparation schemes as part of diversion from prosecution programmes in five local authority areas (Aberdeen City, City of Edinburgh, Midlothian, North Lanarkshire and South Lanarkshire) as part of the ring-fenced funding arrangements for delivery of criminal justice social work.*[31]

The Community Justice Authorities (CJA's) were set up in 2006 under the Management of Offenders (Scotland) Act 2005 essentially to 'work with local authorities, the SPS and other partners to prepare local joint area plans focused on tackling re-offending'. The aim was for the CJA's to be a multi-agency approach with distribution of funds, sharing information and monitoring of service provision being key elements. It was envisaged that these Authorities would become actively involved in the development of different initiatives including Restorative Justice, and indeed the Government did fund three of them in 2011-2012 *"to commission mediation and reparation programmes" (Lanarkshire, Lothian and Borders and Northern).*[32]

30 "Survivor Scotland", at http://www.survivorscotland.org.uk/confidential-forum/time-to-be-heard/restorative-justice-toolkit/.

31 Thursday 11 August 2011, Scottish Executive at: http://www.scottish.parliament.uk/S4_ChamberDesk/WA20110811.pdf.

32 Thursday 11 August 2011, Scottish Executive at: http://www.scottish.parliament.uk/S4_ChamberDesk/WA20110811.pdf.

1.4 Influence of international standards

There are international standards that apply or influence the use of restorative justice in Scotland which include the framework decisions of 2001[33] and 2006[34] of the Council of the European Union on the standing of victims in criminal proceedings. These instruments require each Member State to promote mediation in appropriate criminal cases and that agreements arising from mediation are to be taken into account in the justice process.[35] Articles 10 and 17 of 2001 European Union's Framework Decision put an obligation on Member States to adapt their legislation in order to promote victim-offender mediation by March 2006, which is also of relevance. However, as mentioned before, the interpretation of mediation within Scotland has led to careful consideration as to how this is implemented in practice. In addition the UN Economic and Social Council states important basic principles on the use of restorative justice programmes[36] in criminal matters. The United Nations has also produced a very useful handbook on restorative justice programmes which summarises its policy.[37] The new EU directive also calls for recognition of restorative practices within jurisdictions and ensuring that they are available for victims and offenders with clear regulation of restorative practices. However, as stated above it is a moot point as to the extent to which the new Victims and Witnesses Bill[38] actually gives effect to it.

2. Legislative basis for restorative justice at different stages of the criminal procedure

There is very little legislation in Scotland for restorative justice practices and as mentioned above the services available are focused mainly within Youth Justice. Indeed a recent Bill[39] focused on delivering services to victims and witnesses in criminal proceedings was criticised for not going far enough in including any specific reference or direct provision for the use of restorative justice for victims

33 Council of the European Union (2001), Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Brussels.

34 Council of Europe (2006) Recommendation 8 of the Committee of Ministers to member states on the assistance to crime victims (Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies).

35 *Council of Europe* 2001.

36 *United Nations* 2002.

37 *United Nations* 2006.

38 See Victims and Witnesses (Scotland) Bill.

39 *Scottish Government* 2012b.

of crime. In terms of young people the Scottish Government has requested that local youth justice strategic teams consider a range of preventative and diversionary measures aimed at working with young people to address their offending behaviour. The Action Programme to Reduce Youth Crime published in 2002 specifically requests that they look at how these programmes can act in the best interests of the children and young people involved to address, sensitively, their offending behaviour.

The provision of RJ for adult offenders is limited in comparison. Therefore, in the following, no structural distinction is made between young offenders and adult offenders. Any differences or particularities for adults shall be highlighted as they arise.

2.1 Pre-court level

In 2004, Police Restorative Warnings were introduced[40] that were aimed at replacing the original Senior Police Officer Warnings by 2006. The aim of Police Restorative Warnings was that they act as an initial intervention in dealing with anti-social behaviour. Police were entitled to use this approach in dealing 'quickly' with relatively minor offences committed by first time offenders. The age of criminal responsibility in Scotland at the time of their introduction was 8 and so could be used for children and young people between the ages of 8-15 and for those aged 16-17 who were under a Supervision Order through the Children's Hearings System. The Children's Reporter is still involved in this process if a restorative warning is issued but the victim would not necessarily always be involved. A trained officer facilitates the process and it does involve a warning to the child or young person and to some extent addresses the impact on the victim and the community.

The Procurator Fiscals also have discretion in relation to the decision to proceed and diversionary options. Upon receiving a report from the police the Procurator Fiscal has a decision to make which includes the following: taking no action, giving of a warning by the PF, use of Prosecution Diversion, use of a Fiscal Fine or of a Fiscal Work Order or Prosecution of the case in court. In respect of the Fiscal Fine the 2007 Criminal Proceedings (Reform) (Scotland) Act provides prosecutors with Direct Measures to issue Fiscal Fines and also Compensation Offers[41] or a combination of both. Prior to this the only way a court could deal with restitution or compensation was to defer sentence on an accused to enable repayment to be made or other restitution to be effected.[42] The Prosecution Diversion is an interesting option as it requires close working

40 *Scottish Executive* 2004a.

41 See *Scottish Government* 2010.

42 Criminal Justice (Scotland) Act 1980.

and referral to Criminal Justice Social Work (CJSW) to determine what could be achieved with that offender. A Social Worker is assigned and they will prepare a report considering the history of the individual offender including any long-standing problems that may have contributed to their arrest; their present circumstances; what steps they could take, or may have already taken, to reduce the risk of the offence happening again and who, or what services, may be around to support them. The Report is prepared and passed back to the PF who will then make a decision to take no further action, prosecute the case in court or agree to Prosecution Diversion for a period of time, usually no longer than 3 months. The offender works with the Social Worker during this period of time. The aim is to consider what may have led the person to offend and provide an opportunity of finding the best option for that individual if the offence is deemed not serious and not warranting of a prosecution.

2.2 Court-level

Restorative Justice in the context of the Children's Hearing System[43]

A national protocol exists for referrals to restorative justice services within the Children's Hearings system (CHS).[44] At this point it is appropriate to explain briefly what the Children's Hearings System is and then explain how restorative justice can be integrated.

The CHS is the care and justice system for children and young people in Scotland.[45] The philosophy behind the CHS is based heavily on the work of the Kilbrandon Committee set up to review the way in which Scotland dealt with its children and young people who were in trouble or at risk. Lord Kilbrandon and his Committee reported in 1968 that there were common needs for those young people who had committed offences and those that were in need of care and protection. This led, in 1971, to the replacement of the juvenile court with a Children's Hearings System which has taken over responsibility of dealing with children and young people under the age of 16 (and between 16-18 if they are already within the system) who commit offences or who are in need of care and protection. Currently s67 Children's Hearings (Scotland) Act 2011[46] sets out the grounds or legal reasons for referring a child to the CHS.[47] The prosecution will

43 *Sacro* 2005.

44 *Scottish Executive* 2005a.

45 See "Scottish Children's Reporters Adminsitration".

46 S67 Children's Hearings (Scotland) Act 2011. Prior to this new Act the grounds were set out in s52(2) of the Children (Scotland) Act 1995 and applicable prior to July 2013.

47 This includes reasons such as the child being beyond the control of parents or carers, is at risk of moral danger, is or has been the victim of an offence, including physical injury

only consider children under the age of 16 to be referred to court where the case involves murder or manslaughter or an assault which endangers life. Even then the court may refer the child back to the Hearings system to decide on what should be done with that young person. The Hearing must decide whether a child should be subject to compulsory measures of supervision and place the child on such an order. At all times the Hearing should be guided by the overarching principle of what is in the best interests of the child. A child is referred to a Hearing by the Reporter, employed by the Scottish Reports Administration Office (SCRA). They have to initially investigate the referral to them and decide if there is enough evidence to support the grounds for referral and if compulsory measures are needed. This is a discretionary element. If yes, then the child is referred to a Hearing which consists of three Panel Members, a Chair and two side members who hear the case before them.[48] The meeting is held in a room and usually around a table with the children and relevant people present as well as the Reporter and three Panel members. The Hearings' focus is on the child and they should be given the opportunity to talk to the Panel. Indeed the relevant people can be asked to leave if the child/young person wants to speak to the Panel on their own. Papers will have been sent to the Panel prior to the Hearing with details of the Grounds, Social Work reports, School reports as necessary.[49] The Panel hears from all the relevant people and makes a decision which can be appealed. If compulsory measures are required this will be annually reviewed although there is a mechanism for the case to be brought back earlier if circumstances change. Reasons must be given for the decision. Changes to the Hearings System are due to be introduced in June 2013 given new legislation taking effect.[50]

The influence of GIRFEC[51] (Getting it Right for Every Child) is clear in that any service offered by all organisations including SCRA and SaCRO, or indeed any public body, to a child who has offended is a service for the child. This puts the child at the centre of the restorative justice process and any referrals that are made by the Hearings system must adopt this approach.

---

or sexual abuse, is likely to suffer serious harm to health or development through lack of care, has committed an offence, is not attending school regularly without a reasonable excuse, is subject to an antisocial behaviour order and the Sheriff requires the case to be referred to a children's hearing.

48 One of the authors of this report, *Jenny Johnstone*, is currently a Chair within the Children's Hearings System. Panel members are volunteers appointed by the Scottish Government after undergoing a training process.

49 For more details see the Scottish Government Website http://www.childrens-hearings.co.uk/background.asp; *Kearney* 2000; *Lockyer/Stone* 1998; *Norrie* 1997; *Scottish Government* 2006.

50 Children's Hearings (Scotland) Act 2011.

51 *Scottish Government* 2008f.

SaCRO are the main providers of restorative justice in Scotland so the Reporter would refer suitable cases to them. In the case of consideration of restorative justice the referral mechanism that takes place with the Reporter requires them to establish whether there is sufficient evidence to show that the child/young person has committed an offence. The second stage requires the Reporter establishing whether the offence meets the criteria for a referral to SaCRO. SaCRO become involved at this stage as they have to ensure that the child or young person is suitable to participate in such a process. If SaCRO decide that the child is suitable then details of the victim will be requested from the Reporter – the Reporter must seek permission from the victim in order to pass the details to SaCRO. A specific agreement has been put in place as to the referral mechanism and how the decision is made. This may be down to the type of offence, willingness of the parties to be involved or acceptance of responsibility by the offender.[52] The victim can refuse.

The Reporter then assesses whether the offence is such or based on the Reports made available to the Reporter that compulsory measures are required for the child or young person. If they feel that this is not required then the Reporter can just record a decision to refer the child/young person to SaCRO and a restorative justice process. If the Reporter feels that compulsory measures are required and a restorative justice intervention is also taking place then a report on how that is proceeding will be made available to the Hearing based on the request for that report made by the Reporter. In the few cases where the restorative service has been offered but has not started the panel members in the Hearing may assess the appropriateness based on the reports made available to them in the Hearing.[53]

Where the Hearing decide that a referral to SaCRO is appropriate, in the situation of a child with accepted or established offence grounds then the Hearing can continue to another date awaiting a report from SaCRO on the Child's suitability for participating. This should take 10 working days and if SaCRO determine that the child/young person is suitable for the service then the same process as above applies. The Reporter will contact the victim to see if they will consent to their details being passed to SaCRO. The Hearing may continue to another date and request a report from SaCRO on the child's suitability for participating in a restorative justice service in relation to the offence/s. The time scale shall be 10 working days. The form of the restorative justice service or intervention to be offered shall be agreed between the child, his/her parents and the victim in accordance with the Statement of Principles set out by the Scottish

52 Agreement between SaCRO and the Crown Office and Procurator Fiscal Service about arrangements for the diversion from prosecution to SACRO restorative justice services of young people between 16 and 18 at http://www.scotland.gov.uk/Resource/Doc/925/0121430.pdf.

53 See *Sacro* 2005.

Government in 2008.[54] As voluntary participation of the child with a restorative justice service is one of the principles for the use of these processes, it would be contrary to those principles to make a condition regarding the child's participation with SaCRO. At a subsequent review hearing the social work report should include information as to the outcome of the child's involvement with SaCRO. So, the results of any outcome agreement of a restorative justice intervention would be fed back to the Reporter and if necessary referred to a Hearings Panel who may deem that to be sufficient. Where an outcome agreement is not reached and the intervention is deemed unsuccessful then this should be referred back to referring Children's Reporter or a Hearing without delay.[55]

2.3 Restorative Justice elements in prisons and post-sentence

Restorative Justice can be used by prison staff as an alternative, non-punitive way of dealing with the harm caused by misconduct, bullying or a breach of prison rules and violence. Restorative Justice is most likely to be effective if implemented as a 'whole prison' approach, rather than as an 'add on' scheme. Restorative Justice processes can be facilitated by prison officers or senior management. They must be voluntary for all participants. HMP Polmont YOI and HMP & YOI. Cornton Vale (female establishment) have received training in restorative justice, and are in the early stages of implementation.

RJ can also gain entry to closed penal setting through so-called "reparative tasks." This approach involves imprisoned people providing goods or services that help to meet the needs of disadvantaged people in the local community and in the developing world. These projects enable those in prison (a) to learn about the needs of others and their ability to help them; (b) to feel that they have 'given something back' to the community, which can improve their self-esteem and sense of accountability; and (c) to learn new skills which can increase their own employment prospects. The projects are designed and developed by prison staff, imprisoned persons, together with charities and voluntary and community organisations in accordance with restorative justice principles. (This approach is not currently funded in Scotland).

---

54 *Scottish Government* 2008b: Scottish Government which states these principles have been adapted from "Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters", a resolution prepared by a UN Expert Group and adopted on July 24, 2002 by the UN Economic and Social Council to encourage countries to use in developing and implementing restorative justice in their countries. Other documents that were taken into account in the development of these principles are: the Restorative Justice Consortium Statement of Principles for Restorative Justice, and Recommendation No. R (9) Concerning Mediation in Penal Matters, 1999, Council of Europe' at, p. 11 and in *Scottish Government* 2005, p. 1.

55 See *Scottish Executive* 2005b, p. 1.

Regarding the use of RJ "post-sentence" there are two approaches under this category. The first approach addresses crimes of severe violence, including murder and serious assault. Most cases take six months or more preparation before those involved meet or enter into some form of dialogue. This is a private process and does not have any bearing on the judicial or institutional status of the person responsible for the offence, and may occur before or after a sentence has been completed. This service is currently offered by SaCRO on a limited pro rata basis, using specially trained facilitators; and is called TASC (Talk After Severe Crime).[56]

The second approach, Crime Impact Awareness Groups,[57] seeks to address less serious crimes that have nevertheless had a significant impact on an identifiable person, such as burglary and assault. Those involved are given the opportunity to meet or communicate, normally whilst the person responsible has yet to complete their sentence. The outcome of this process would not have a bearing on the length or nature of the sentence. This approach is designed for persons harmed by an offence who do not want any contact with the person responsible, or are unable to contact them due to unwillingness, death, or non-conviction. Likewise, it is suitable for persons responsible who may not yet want to or cannot contact those who were injured or harmed by their offence. This approach involves a series of safe and structured small-group meetings – typically held over a number of weeks – between those who have been harmed by crimes and those who have committed offences of a similar nature. These meetings give an opportunity to those who have been harmed to express their feelings about the offence and those who had harmed them in a powerful and appropriate context. Their 'voice' has the potential to challenge attitudes and thought-patterns that may give rise to repeat-offending. Their stories may also inspire or evoke in those responsible feelings of genuine remorse and efforts to be accountable for their actions. The meetings can also help those who have offended to understand the impact of their crimes; it can give them an opportunity to express remorse and explore the possibility of reparative or accountability tasks.

56 *Kearney* 2005.

57 These are not funded centrally.

3. Organisational structures, restorative procedures and delivery

3.1 Introduction

RJ-based services in the criminal justice system are primarily operated by SaCRO[58] and also exist as an option for the Crown Office and Procurator Fiscal Service (COPFS).[59] Only on very rare occasions have they been used pre-sentencing or post-sentencing. The SaCRO evaluation shows a rise in the use of restorative justice services between 1999 and 2008.[60] This suggests that there is some element of support and engagement with these services.

In 2010-11, the police issued 1,677 restorative justice warnings to juveniles. In addition, where the alleged offender is a juvenile, a referral can be made to the Reporter to the Children's Panel. One outcome of that process is for the police or the reporter to issue a warning letter to the offender; 2,105 such warnings letters were issued in 2010-11. A total of 11,500 includes a number of young people from the CHS[61] and includes formal adult warnings, restorative justice warnings, warning letters and other police warnings.[62]

The Scottish Government guidance sets out the different types of restorative justice interventions with the main provider of these services in Scotland being SaCRO.[63] Restorative justice processes fall into three broad categories, dependent on the kind of communication, if any, that takes place between the person harmed and the person responsible: that is direct communication, indirect communication and cases where communication is either not possible or not appropriate.

Direct communication includes: restorative justice conferences, which are normally led by two facilitators and attended by the Person(s) Harmed, the person(s) responsible, their respective support persons, other affected persons where appropriate, and observers where agreed; Face-to-face meetings, which can be led by either one or two facilitators and are attended only by the Person(s) Harmed, the person(s) responsible, and observers, where agreed.

Indirect communication includes Shuttle Dialogue, which involves a facilitator acting as a go-between to enable the Person(s) Harmed and the Person(s) Responsible to communicate without meeting; Restorative Family Group Confe-

58 *Sacro* 2008.

59 Crown Office and Procurator Fiscal Service.

60 *Viewpoint* 2009.

61 Children's Hearing System.

62 *Scottish Government* 2011.

63 Sacro – Safeguarding communities and reducing offending.

rences, which are normally led by one or two facilitators and are attended by the Person Responsible, his or her family members and support persons, and professionals who are working with or have some involvement with the Person Responsible. The views and requests of any Person Harmed are obtained by the facilitator and conveyed to those present at the conference.

Cases where communication is either not possible or not appropriate include: Victim Awareness, whereby only the Person Responsible is involved in a in one-to-one session or group work session with a facilitator, and this may include reparative tasks. There may be circumstances in which persons harmed and/or persons responsible for causing harm may not wish to communicate in a restorative justice process. If so, then the Restorative Justice Service should offer an appropriate support process to the Person Harmed (in partnership with relevant victim services) or a victim awareness process to the Person Responsible.

The types of process include Restorative Justice Conferences, Restorative Family Group Conferences, Face-to-Face Meetings, Shuttle Dialogue, Victim Awareness, Support for Persons Harmed, Restorative Conversations, TASC (talking after severe crime), Restorative Justice Circles and Restorative Warnings.[64] Each will be considered in turn.

3.2 Restorative Justice Conferences

Restorative Justice Conferences involve two facilitators with one fully preparing all those attending to ensure that they are aware of what the process involves and what each participant's role is. The person harmed and person responsible will attend and they are encouraged to bring support persons with them as well as those who have been affected by the behaviour/offence. Support persons can include family members, friends and/or professionals (e. g. social worker, school staff, youth worker, victim support volunteer, and so on). The facilitators will not be present at the conference. An outcome of the conference may be an Action Plan. The Action Plan sets out any reparatory tasks or steps they will take to address their behaviour. The Action Plan is agreed by all those attending. *"Conferences are ordinarily used only where the incident has caused significant harm to an identifiable person(s) and when the involvement of family members or other support persons is seen as critical to a positive outcome."*[65]

64 Ibid. Terminology – In the description of these and other aspects of the Restorative Justice process throughout this report, the following terms will be used: Persons Harmed will be used to describe the victims of the crimes (this could mean individuals, institutions and organisations or communities) and Persons Responsible will be used to describe the offenders or the perpetrators of the crimes.

65 Ibid.

3.3 Restorative Family Group Conferences

Restorative Family Group Conferences differ from the Restorative Justice Conference as the two facilitators attend with the person responsible and their support persons. It may also involve any professionals who are working with the survivors or who could have some input into a plan flowing from the conference. A discussion takes place about what happened and the impact of the conduct by the person responsible. After this discussion a process which has been broken down into three phases takes place. The first phase is information sharing when the professionals state what they believe to be the underlying causes of the offending and what resources they have to support the person responsible and their family. Secondly the family are given some private family time to establish a plan to help the person responsible to desist from repeat behaviour. Finally an Action Plan is agreed and signed by the people involved.

3.4 Face-to-face meetings

These meetings occur when the person harmed and person responsible believe that the incident can be resolved without extra support at the meeting. The meeting will be led by one or more facilitators. Again an Action Plan may be the outcome and will detail any reparatory tasks or steps to address offending behaviour. *"Face-to-Face Meetings are often used in cases where people have harmed each other as a result of conflict (e. g. a fight). In such cases, the process can be used both to resolve the underlying conflict, as well as address the harm done."*[66]

3.5 Reparation, restitution orders

The 2007 Criminal Proceedings (Reform) (Scotland) Act introduced Direct Measures to prosecutors giving them powers to issue Fiscal Fines and also Compensation Offers[67] or a combination of both. Prior to this only way a court could deal with restitution or compensation was to defer sentence on an accused to enable repayment to be made or other restitution to be effected.[68] If this were done then the sentence would be adjusted accordingly. After enactment of the Criminal Justice (Scotland) Act 1980 Procurators Fiscal were encouraged to put before the court relevant details of the amount of loss or damage caused to the victim. The sentencing court would then see these details before making their

66 *Ibid*.

67 See *Scottish Government* 2010.

68 Criminal Justice (Scotland) Act 1980.

decision. But the Prosecutor had no power to order compensation apart from the discretion to allow informal reparation to take place – possibly instead of commencing proceedings. This was changed post the Scottish Executive report, Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps (2005).[69] Section 50 of The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 introduced new provisions into the 1995 Criminal Proceedings Act. The section provided for the introduction of Fiscal Fines and Compensation Orders for which the Prosecutor had discretion to decide to issue. In effect the Prosecutor was becoming prosecutor, judge and sentencer. At the time of implementation the Fiscal Fine limit was set at £5000 and to be awarded where quantifiable loss had been established but also where the victim had been subjected to frightening, distressing or annoying behaviour or behaviour which could cause nuisance or anxiety. The difficulty observed was in deciding or quantifying the distress element in relation to individual victims.

3.6 Restorative measures in prison

Restorative approaches within prison have been used to assist in prisoner to prisoner problems, arguments and bullying. Cornton Vale[70] is one such prison that has used restorative approaches in this way as presented in their Inspection report in 2006:[71] *"Restorative Practices are a way to help resolve problems, arguments, bullying and fights without immediate recourse to a disciplinary sanction. Referrals can be made through the Orderly Room if it is deemed appropriate. It looks at the facts of what has happened, the consequences in terms of harm and how to stop it happening again in the future. The process is about more than saying sorry: outcomes are required including an action plan. The establishment is working with a number of agencies and is developing networks to take this work forward."*[72]

Susan Brookes (2006) in her report[73] highlighted the use of restorative practices to encourage female prisoners to build positive relationships and to deal with issues of bullying within the prison. She presented a restorative approach as one aspect of responding to the problems that female prisoners have to deal with and which can impact on their ability to develop, build and maintain relationships with others. She recognises that female prisoners may have had a history of abuse and bullying ultimately being a victim of it themselves so the

69 *Scottish Executive* 2005d.

70 HMP Cornton Vale is a female only prison in Scotland.

71 *HM Inspectorate of Prisons* 2006.

72 *Ibid*. at para 8.14.

73 *Brookes* 2006.

bullying strategy adopted within a female prison needs to recognise this. As she states, *"a bullying strategy based on demeaning the bully, trying to identify them, or taking privileges away seems ineffective and potentially damaging to the self-esteem of women who are already vulnerable. Interventions need to start early in induction and be focused on how bullying makes people feel rather than what will be 'taken off you' if you engage in it. Follow up interventions need to be provided as refreshers at key intervals in sentence and approaches such as mentors, restorative practices for those living in a community setting and peer group supports are preferable."*[74]

Within this report though there is recognition that restorative approaches are not an end in themselves and that it is needs to be seen as part of a whole systems approach or support programme for that individual. Polmont YOI have used restorative approaches for some violence related cases between young offenders within the prison and was identified in the Inspectors report of 2007[75] as an area of good practice coupled alongside the Personal Support Plan for each young person. *"In some violence cases "Restorative Justice" has been used successfully. Another very positive initiative is the "Personal Support Plan" which is used for suitable individuals involved in low level violence. This initiative originates from the Violence Steering Group and is operated in partnership between residential staff and the youth centre. The intervention is usually used after a fight. At the Orderly Room the individuals involved are given the opportunity to be assessed for the programme. If both agree, the Orderly Room award is suspended pending successful participation in the programme. The main activity is completing a work book which provides a self-analysis and then invites the participants to respond to scenarios. Residential staff are on hand to check progress and offer support. The work book takes approximately two weeks to complete and may identify a need for further interventions such as assertiveness skills or participation in a youth project. At the end of the work book the adjudication manager will review its contents with the individual, and advise and encourage as appropriate."* (at para 3.44).

3.7 Other initiatives

Shuttle Dialogue. This involves a facilitator acting as a go-between for the person harmed and the person responsible. Communication can be by various methods – letters, audio or visual recordings – or by the facilitator reporting directly. This is used when the parties do not want to meet directly – due to safety implications or practicalities. Again an Action Plan may be developed as an outcome.

74 *Brookes* 2006.

75 *HM Inspectorate of Prisons* 2007.

Victim Awareness. If the person harmed does not want to communicate or again if there are practical difficulties a facilitator may meet on a one-to-one basis with the person responsible or within a group session with other person(s) responsible. The outcome may include the person responsible taking part in some form of community reparation task or behaviour modification programme.

Support for Persons Harmed. This model is currently in place for persons harmed who do not know or do not want the person responsible revealed to them or do not want to communicate with them. Whilst this has been developed for use within prison there is potential for it to be used in another context. *"The process involves a discussion between the facilitator and the person harmed, with the aim of addressing the hurt, fear and anger experienced by person harmed. The process also seeks to raise their awareness of how to protect themselves in the future, and to assess whether they require professional help in their recovery process."*[76]

Restorative Conversations. Restorative conversations are used in institutional settings and are short discussions between the person responsible and a teacher or manager that should be undertaken very soon after the breach. The aim is for the conversation to have a learning element rather than telling someone 'off' or ordering them to do something. This process of self discovery in their learning can help persons responsible to reflect on how their behaviour could have impacted on a person harmed and how they might modify that behaviour in the future.

TASC (talking after severe crime). The aim of TASC is to provide those directly affected by severe violent crimes the opportunity to: move toward personal healing, recovery and reconstruction; attend to needs they feel were left unaddressed by the criminal justice process; increase their awareness and understanding of the human consequences of the offence.[77] Those who have been harmed by severe crimes are provided with an opportunity to have a structured Face-to-Face Meeting, Conference or some other form of communication with the person responsible. The meeting or communication takes place in a secure and safe environment.

Some key components of the service that were identified when TASC was developed in Scotland were preparation, outcome, delivery, person centred approach, training, knowledge and partnership working.

In terms of preparation the developers identified that a significant period of time needed to be allocated to working with people involved in severe crimes with preparation taking at least six months and in some cases more. Preparation time was case specific. Preparation involved establishing the motivation for both parties wanting a meeting or agreeing to take part in a meeting and dealing with

76 *Ibid*.

77 *Kearney* 2005.

any factors that might hinder a positive outcome for that meeting. *"Issues common to both those hurt and those responsible that emerged during the preparation period included: guilt, shame, loss. In the early preparation phase, there were issues of trust and confidence in the process. In the middle of the preparation phase, there was a noticeable synchronicity between the parties that was exhibited in, for example, unprompted questions about each other. In the final pre meeting phase, there were last minute difficulties, such as agreeing time and venue. Immediate feedback after SACRO's first face-to-face meeting of this type was positive: one mother said that she had found answers to questions and felt as if she had got her life back again; the person responsible said that it was the hardest thing he had ever done but that he was glad he participated."*[78]

It is also important to recognise that the service did not guarantee any particular outcome so no set outcome was prescribed. This helped manage expectations as to what the process could achieve. The outcome depended on the case and the individuals involved and it was recognising that the process had to be flexible and adaptable enough to take account of this.[79]

The TASC service was delivered on a national basis by trained SaCRO staff and volunteers in co-operation with relevant statutory and voluntary agencies with a service advisory group ensuring safe practice and procedures. SaCRO led this initiative and developed a person-centred approach to working with people in this type of intervention and in addition knowledge of the effects of emotional trauma was described as 'vital'. Staff training is crucial in the theory and application of mediation and restorative justice.

Effective partnership working was seen to be an important factor in the success of the process. Those agencies included SaCRO, organisations that support victims of crime and work with those responsible in both the voluntary, statutory and private sectors.[80]

The findings of the TASC initiative are very useful for developing a similar approach within the context of historical institutional abuse. Much can be learnt from the work that has already been undertaken within SaCRO and Scotland.

However, the necessary resources have to be available and costs have to be met. Given the concern to enhance personal well-being a model of evaluating the social cost of improving the lives of persons harmed and persons responsible needs to be properly developed.[81]

Restorative Justice Circles. Restorative Justice Circles are used in an institutional context (schools, residential units and prisons) but they can also be

78 *Ibid*.

79 See *section 5* regarding potential for developing restorative approaches for survivors of historical institutional abuse.

80 A key requirement for further development of restorative justice within Scotland.

81 See *Survivor Scotland Strategy* 2005.

used to address anti-social behaviour in the community and in other contexts. They involve situations where there have been a number of people involved who have caused harm to themselves and others. The Circle allows everyone to participate and discuss what happened and should result in the group identifying how to prevent the harm happening again. *"In other words, like every other restorative practice, the circle discussion is structured by a focus on the facts (what happened), the consequences (who has been affected) and the future (how can we stop this from happening again)."*[82]

Restorative Warning. Trained police officers can give Restorative Warnings to persons responsible who have committed minor first or second offences. The person responsible meets for approximately 20-30 minutes and the specially trained police facilitator should allow everyone to speak honestly and openly about the facts, consequences and the future. The person harmed does not attend but can be informed of the outcome and in some cases receive a letter of apology and/or appropriate reparation.

Support for different types of RJ approaches. Whilst there is support for the majority of the following RJ approaches there is also a tendency for participants to say that they 'may' support these approaches.

- RJ as an alternative to the prosecution where the V would like to meet O;
- RJ as part of a court sentence;
- RJ while a person is serving a court sentence in prison;
- Alternative to court in minor cases;
- Alternative to court in serious cases
- Once a person is on licence in the community;
- As part of a structured deferred sentence programme.

Reflecting on and applying the most appropriate RJ responses based on an individual assessment of each case would influence their decision as to the "most appropriate restorative approach in the circumstances". This raises questions about how we appropriately select these cases for RJ and matching the appropriate response to the individuals involved. Participants did suggest that they may support in serious cases (56%) but this would be dependent on the individual circumstances, the risk management of these cases, appropriate deliverers and creating a safe environment pre, during and post the process being crucial to implementation. This would be especially in cases of serious violent and sexual offences.

82 *The Scottish Restorative Justice Training Service* 2007.

3.8 Enforceability of Action Plans

For all these approaches the aim is to achieve an outcome agreement and action plan. One of the concerns here is the enforceability of such agreements and what, if any, impact it should have on any criminal justice outcome, for example, any sentence. The Restorative Justice Survey (2010) asked practitioners and criminal justice practitioners what the outcome of a restorative justice process should be. The majority, 70%, of participants deemed the following to be definite outcomes of RJ: for both the O and V to have more *meaningful* involvement in the justice process; for the offender to make *amends in a meaningful* way; for the offender to *understand and accept responsibility* for their behaviour; for the offender to be helped to *reintegrate* back into society; for the offender to be helped to *desist* from offending. When participants were asked for further elaboration on the practical outcomes participants felt that the outcomes should be identified and determined by the person responsible and person harmed. This suggests that there needs to be some discretion as to what the outcome should be and specifically ensuring it meets the needs of each individual within each case. As one respondent to the survey stated:

> *"Ideally the outcomes should not focus on reducing reoffending but instead focus on the specific crime therefore allowing all involved to develop from the process. It should basically restore all parties to a balanced state which existed before the crime and where possible to build on that in a positive way. The person harmed feels that their views have been heard and finds some resolution about the offence that has been committed. The person responsible has a better understanding of the consequences of their actions and where possible made some reparation for any damage they have caused." (Respondent to SCCJR Restorative Justice Survey (2010)).*

The Children's Hearings Panel and/or Reporter will be notified of the outcome of a restorative justice process and as part of the Prosecution diversion process the Procurator Fiscal will have to be informed of the outcome in order to make a decision as to whether to proceed any further. Part of this decision may rest on the individual offenders' participation and ensuring they undertake the agreed outcomes.

In the SCCJR survey (2010) there seemed to be a general consensus that court orders could provide an effective RJ resolution through community service orders. This challenges the notion that it should be direct reparation to the individual victim. Fewer respondents were agreeable to 'direct reparation to the victim through work that the victim wants doing' is RJ. The vast majority agreed that a *"V and O communicating face to face about the crime with the help of a facilitator"* (92%) and that resulting in an agreement (74%) would be a practice they would describe as restorative based on the models described in this section.

However, interestingly only 19% thought that the victim meeting the offender should definitely be an outcome of RJ – further exploration of this is required in respect of the other outcomes that could be achievable and through what means – the formal criminal justice orders or through a restorative model.

4. Research, evaluation and experiences with Restorative Justice

There has been limited research on the effectiveness of restorative practices in Scotland with no large scale evaluation evident. Much of the research has focused on the provision of restorative justice service within the youth justice system due to the lack of provision in any cohesive and consistent level for adults.

A problematic area is in measuring effectiveness whether that is through re-offending rates, satisfaction levels, and emotional well-being in respect of the victim or inclusion in the criminal justice process. Research has focused on both re-offending rates and satisfaction levels. For example, *Dutton/Whyte* (2006) conducted a study of the Glasgow's Youth Justice Service which found that there was a high level of satisfaction with this type of intervention by professionals, young people responsible for harm, and people affected by youth crime. In addition an evaluation of SaCRO's Youth Justice Service in Fife was ultimately inconclusive as to any impact on re-offending rates having taken part in a restorative justice process but pointed towards other outcomes of addressing the offending behaviour and facilitating the young people to make amends as being positive.

As terminology has been a contentious issue within Scotland a recent survey[83] attempted to identify what practitioners and criminal justice professionals perceived the definition of restorative justice to be. The majority of participants recognised the process or practice involving the person who has caused the harm accepting responsibility for the impact of that harm. Whilst there was some recognition that the 'victim' or person harmed should also be involved in the process this might not necessarily be through a face to face meeting. Participants also suggested that restorative justice had a dual-purpose – 1) providing an alternative to the formal criminal justice process for the offender and for them to address the harm caused and 2) empowering the victim to ensure their needs are met.

When asked for examples participants tended to refer to face to face meetings, family group conferencing, mediation, shuttle dialogue but also included victim awareness. One participant gave some examples of practice: *"Two young boys broke into an empty council flat. Both attended a meeting with*

83 The Restorative Justice/Practice Research Working Group (SCCJR, Scotland) has been involved, along with Viewpoint in undertaking a Restorative Survey for Criminal Justice Professionals (Scotland) conducted in 2010.

the Local Housing Manager and apologised. The manager asked them to complete a leaflet drop to other tenants in the area as a way of making amends for their actions. A teenage girl lifted a stone and scratched some parked cars. Two car owners participated in RJ. Two RJ conferences were held where the car owners spoke of the difficulty and expense this had caused them. The girl apologised; during one conference she mentioned that she is very fond of cats. One owner asked that the girl attend an upcoming cat show to help out behind the scenes which the girl did. A boy went into a school playground and pulled up flowers which had been planted by Primary One pupils to welcome visitors to their school. The Head Teacher refused the boy's offer of a verbal apology; instead she asked that he write a letter of explanation and apology which she would read to the child at school assembly." (Respondent in SCCJR Restorative Justice Survey (2010)).

However, when asked for examples this did highlight the difficulties surrounding definitions within Scotland as to restorative justice. Restorative practice, restorative justice and restorative approaches are almost used inter-changeably within the responses given by the participants in the survey. This discussion did give rise to a debate as to what 'type' of approach would be deemed to be restorative justice. This suggests that further exploration is required as it is not clear as to whether all the models described align to the Scottish Government models. *"Other than conferencing and meeting or at a push shuttle anything else is NOT restorative justice. The whole area gets confused and muddied through people adding a 'basket' of possibilities as they have in the schools work – this has led to serious problems in some cases." (Respondent in SCCJR Restorative Justice Survey (2010)).* This illustrates the need to differentiate between restorative practice, restorative justice and the practices which utilise some but not all of the principles underpinning restorative justice. The way in which practices are perceived will impact on the way in which they are facilitated and the potential outcomes. For example, is it clear that "justice" is being achieved in all cases to the satisfaction of participants? *"In addition to the various practices which provide means of dealing with incidents by repairing the harm done (in line with the UN definition) many refer to restorative approaches as important. Restorative Approaches promote restorative values/ethos and the interpersonal aspects of restorative justice as a means of "citizenship" education and as a means of creating a restorative culture (particularly in schools) with a view to preventing harm or addressing lower level interpersonal tension or conflict." (Respondent in SCCJR Restorative Justice Survey (2010)).* This was a common theme – a recognition that whilst the practice they were describing was not true restorative justice the practice was drawing upon some of the values and principles of RJ. One participant related this to the sorts of situations or cases to which RJ should or shouldn't be used and if there was any added benefit in integrating some form of RJ: *"It is not always appropriate for offenders to meet with victims (e. g. sex*

offenders). However work can still be done with offenders during probation supervision and this can link with RJ. If work is undertaken to increase their awareness of the impact of the offence/behaviour on the victim, this at least means the offenders have made the effort to try to understand, even if it is not strictly restorative." (Respondent in SCCJR Restorative Justice Survey (2010)).

The findings of the survey demonstrated that there is a differentiation of knowledge and use across the country which in turn makes it difficult for any clear regulatory function or model to apply. Agencies have different ideas about what restorative justice is and their practice methods do not always necessarily fit with the nationally recognised definitions set by the Scottish Executive/ Government. In addition the research also suggests that the terminology is not consistently used between different local authority areas. This could lead us to conclude that we are looking at Restorative Justice/approaches as providing a set of guiding principles underpinning practice that can be applied in different contexts. Responsibility, restoration, repairing harm, empowering the victim are key words and phrases used by the participants and they do provide examples of how these outcomes can be achieved. The research highlights that there are differences in application and understanding, so reliance on any evaluative data may prove 1) difficult to find and 2) difficult to apply. The research also highlights the willingness of organisations and those involved in restorative practice to consider developing and applying RJ in serious cases (69% responded that they would definitely support or may support RJ process for these types of cases.).

4.1 Statistical data on the use of restorative justice measures in the criminal justice system

Growth in Restorative justice-based services in the criminal justice system are operated by SaCRO existing as diversion from prosecution options for the Procurators Fiscal service and have only been used pre-sentencing or post-sentencing sporadically. SACRO conducted an evaluation which found a rise from just one specialist youth justice service in 1999 to 31 in 2008.[84] Figures show that in 2010-11, the police issued 1,677 restorative justice warnings to juveniles. In addition, we know that where the alleged offender is a juvenile, a referral can be made to the Reporter to the Children's Panel. One outcome of that process is for the police or the reporter to issue a warning letter to the offender; 2,105 such warnings letters were issued in 2010-11. A total of 11,500 includes number of people from CHS and includes formal adult warnings, restorative justice warnings, warning letters and other police warnings.[85] The recent Scottish Prisons Report (2008) suggested that for the less serious offences

84 *Viewpoint* 2009.

85 *Scottish Government* 2011.

restorative justice may have an important part to play in its recommendation that paying back in the community should be the default position for these types of offences[86]. The Commission also recommended that the 'Government extend the types and availability of effective alternatives to prosecution coordinated by enhanced court-based social work units' (2008, para 3.9). To this end it was suggested that victim – offender mediation and other restorative justice options be made available as options for the prosecution to utilise.[87] The Report also recommended that *"judges should be provided with a wide range of options through which offenders can payback in the community, but that, where sentences involving supervision are imposed, there should be one single Community Supervision Sentence (CSS) with a wide range of possible conditions and measures. By payback, we mean finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community whether by unpaid work, engaging in rehabilitative work that benefits both victims and the community by reducing reoffending, or some combination of these and other approaches." (para 3.28).*

The new Victims and Witnesses Bill[88] has been put forward as ensuring the victims are at the heart of the criminal justice system. Whilst the consultation paper proposes a form of victim surcharge[89] that offenders would have to pay in order to provide some form of "pool of revenue" to provide money and support to victims of crime and make offenders accountable for their actions there has been no specific mention of the potential for restorative processes.[90] The surcharge is being seen as some form of "payback" which is not fully in sync with the "community payback" as mentioned in Government policy.[91] An example of a successful Community Payback is highlighted in Orkney with Community Service Clients building a serpentine shaped wall which the local

86 *Scottish Prison Commission* 2008.

87 Note here the difficulty in terminology with the Prison Commission bringing together victim-offender mediation and 'other restorative justice options'.

88 *Scottish Government* 2012b.

89 "In England and Wales the Domestic Violence, Crime and Victims Act 2004 amended the Criminal Justice Act 2003 to include a victims' surcharge with effect from 1 April 2007. The legislation also includes provisions to allow the surcharge to be applied where a custodial or community sentence is imposed and fixed penalties on traffic offences. The UK Government recently consulted on proposals to apply these provisions as part of a wider consultation on victims and witnesses. The Justice Act (Northern Ireland) 2011 includes provisions for imposing an offender levy." Para 130, *Scottish Government* 2012b.

90 *Scottish Government* 2012b.

91 *Scottish Government* 2008f.

school children decorated. This was seen as a positive benefit to the younger members of the community.[92]

The Prison Commission Report[93] also highlighted the need to look beyond custody and at community based sentences, including Community Payback. Whilst the new Bill to some extent addresses some of the requirements in the new EU Directive[94] it does not adequately respond to the need for member states to consider more acutely the role of restorative justice within the criminal justice system.

4.2 Participation rates and types of restorative justice process

Dutton/Whyte's (2006) study found that where communication between person harmed and person responsible was the approach used, 51% involved conferences, 32% involved shuttle dialogue and 17% involved face-to-face meetings. Sacro have conducted a number of studies and Kirkwood (2009)[95] highlighted that participation rates were approximately 42-43% in Scotland. Whilst a predominant view is that participants should take part in this process voluntarily and 'opt in' to the process the Glasgow Restorative Justice service is one that was set up as an 'opt out' rather than an 'opt in' approach to consent. Dutton and Whyte (2008)[96] in their review of the Glasgow service noted that there was limited involvement by persons harmed (victims) but highlighted the importance of them being involved in Restorative Justice processes, *"whilst rates of participation amongst victims contacted by R. J. S. were relatively high, overall there has been limited victim participation in interventions. International research suggests one of the most potent influences on young peoples desistance from offending is the "victim factor"; thus, consideration needs to be given to increasing victim involvement with interventions."*[97]

One of the key issues is the amount of information provided to the person harmed (victim) in order to be able to make a decision as to whether to participate or not. *Kirkwood* in his review suggested that the decision involved a weighing up of the psychological or emotional benefits as well as practical

92 *Scottish Government* 2008f.

93 *Scottish Prison Commission* 2009.

94 European Parliament legislative resolution of 12 September 2012 (COM(2011)0275 – C7-0127/2011 – 2011/0129(COD)). Available: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0327+0+DOC +XML+V0//EN &language=EN#top (accessed: December 2012).

95 *Kirkwood* 2009.

96 *Dutton/Whyte* 2006.

97 *Dutton/Whyte* 2006.

benefits outweighing there fears or concerns of meeting with the offender. In weighing up these factors it was argued that the person harmed (victim) would be more likely to attend if the person responsible (offender) had agreed to participate. *"Participation was more likely to result in cases where the accused was contacted before the victim. This suggests that victims are more likely to participate once they know that the accused has taken responsibility for the offence and is willing to make amends. This information is likely to reduce the perceived risks of re-victimisation to the point where the benefits of participating outweigh the costs This suggests that – given appropriate ethical and safety considerations – the default practice should be to approach the accused first, as this is linked with higher uptake while also reducing the chances of re-victimisation."*[98]

Whyte concluded that reducing offending, as opposed to addressing the offence, is likely to be a secondary outcome. Again, primary success of the Restorative Justice process is thought to be more likely in relation to addressing the offence, paying attention to communication and repairing relationships and personal narratives, as described by Kirkwood (2009, 2010).[99] In view of this, Whyte suggests that Restorative Justice should not involve first time offenders with minor crimes, but at the same time, if more serious multiple offenders or offences are to be included, there is a clear need to ensure integrated practice and referral to other support services is properly used, with an appropriate targeting of resources.

4.3 Impact on re-offending rates

Analysis of the rates at which young people were re-referred to the Scottish Children's Reporter Administration on offence grounds showed no evidence that the restorative justice-based interventions reduced re-offending rates compared with pre-existing interventions. However, it was suggested that the service provides other important benefits, such as including people harmed by youth crime in the justice process. It is also worth noting that the Scottish Executive has recently recognised that there are limitations to this type of analysis of offending rates, and has stated that in measuring re-offending it is better to include analyses of the frequency and seriousness of offending.[100]

Data from SaCRO's Youth Justice Services show a willingness on behalf of most young people referred to the services to take part in a restorative justice-

98 *Kirkwood* 2009.

99 *Kirkwood* 2010.

100 *Scottish Executive* 2006.

type intervention. There was also some success in the action plans with 97% of people harmed willing to take part completing the actions agreed.[101]

Participant feedback suggested that young people responsible for the harm, those affected by the harm, and the parents of the young people, felt that the service was beneficial, and the large majority stated that they would recommend the service to others in a similar position to themselves, although it should be noted that response rates for this feedback were relatively low. The majority of young people who responded stated that the service gave them a greater understanding of the impact of their behaviour and that it changed their views about the person harmed. Most of the people harmed who responded stated that they felt the service allowed them to influence what happened to the young person. This evidence suggests that the service is well received in many instances and has benefits for all involved.

4.4 Diversion from prosecution

SaCRO are the main providers of alternatives to prosecution through Mediation and Reparation however there are very few services offered.[102] The diversion schemes are seen as an "opportunity for persons accused normally of relatively minor offences and where it would otherwise not be in the public interest to prosecute, to be dealt with outwith the court system."[103] Local Authority Social Work Departments provide the funding and referrals are taken from the local Procurator Fiscal's offices. Evaluation on SaCRO's early pilot reparation and mediation projects and more recent research on diversion from prosecution schemes have been favourable to this type of provision.[104] Regarding diversion schemes in general, McInnes Report on Summary Justice Diversion reported the following: *"We received very positive feedback from sentencers, procurators fiscal and social workers about the value of diversion schemes and recommend that effective schemes be made available nationally. We note, however, that little has been done to evaluate the costs and benefits of diversion schemes compared with other types of disposals. We recommend that steps should be taken to ensure that, where a scheme has proved to be successful, it is available consistently across the country."*[105]

In addition to this, mediation and reparation services provide accused persons with the opportunity to make amends for their actions to the victim of

101 *Nicol/Kirkwood/MacFarlane* 2007.

102 Aberdeen City, South Lanarkshire, Edinburgh and Midlothian.

103 *Scottish Executive* 2002, p. 1.

104 *Warner* 1992; *Barry/McIvor* 1999.

105 *Scottish Executive* 2004b, p. 127.

their crime.[106] This is achieved through the use of face-to-face meetings and shuttle dialogue. The facilitators who work on referrals include local volunteers recruited from the community and trained and supported by SaCRO staff.

West Lothian and Borders Police in 2011 launched their Restorative Meetings for Victims of Juvenile Hate Crime in Edinburgh and West Lothian but also looked to offer the service to adult victims of crime. A hate crime involves any crime motivated by prejudice against disability, race, religion, sexual orientation or transgender. The McPherson-Report articulated it as "any incident, which is perceived to be racist by the victim or any other person",[107] whilst the Scottish Executive define it as a "crime motivated by malice or ill will towards a social group."[108] The project was set up for a 12 month period and involved a trained police officer facilitating such a meeting covering the following – allowing the victim the opportunity to tell the young person how they feel about the crime and how it has impacted on their life. In addition they can ask questions and have a say in how the young person can repair the harm they have caused. Family and supporters can attend these meetings.[109] Gavrielides included the West Lothian and Borders service in his research on the potential for RJ in cases of hate crime.[110] One interesting finding was the view that offenders and victims had of the potential for RJ in this context viewing a community element as important. As Gavrieldes states "RJ should look at the emotional impact on families, the local community and the wider community – anyone who has an interest in the conflict". Another respondent said it is an "opportunity to engage with the victim, perpetrator and the community, to enhance community understanding about the causes that led to hate. Another respondent said, "RJ aims to bring about a more peaceful environment in the community where the hate incident occurred."

4.5 Pre-sentencing

There has been very few examples[111] of pre-sentence restorative processes. SaCRO have facilitated those that have taken place and this was part of a

106 For further examples and case studies of restorative practices, see Sacro Case Studies at http://www.sacro.org.uk/html/case_studies.html.

107 *Home Office* 1999, para. 46.1; *Home Affairs Committee* 2009.

108 *Scottish Executive* 2004a.

109 *Gavrielides* 2012.

110 *Gavrielides* 2012.

111 See Sacro Case Studies at http://www.sacro.org.uk/html/case studies.html.

deferred[112] sentence. The cases are described by *Kirkwood*[113] but allowed for the court to defer sentencing until a restorative intervention had taken place, the judge received a report and then passed sentence. The feeling was that through this process the judge had been able to provide a more 'informed' decision when it came to sentencing and also allowed for the person harmed to engage in the justice system by contributing to the action plan.[114]

4.6 Post-sentencing

In relation to post sentencing this tends to relate to the more serious offences and the needs of the victims and families of victims can be left victimised not only by the offence but by going through the criminal justice process itself.[115]

SaCRO state that requests have been made of them to provide restorative services which can address more serious crimes including homicide and sexual offences. This led to SaCRO funding training from Concentric Journeys[116] (USA) for some of its staff to be able to facilitate these types of requests. This led to an initiative called TASC[117] *(Talk After Severe Crime*), which operated on a limited *spot purchase* basis.[118] The cases tended to be very high profile court cases. One such case involved the death of a 15 year old boy who was knocked off his bicycle and killed by a drunk driver. The driver was given an 8 year sentence but the parents of the 15 year old boy were informed that the driver was to be released on licence, half way through his sentence. The parents wanted to meet the driver and one reason they gave is that they were not sure how they would react if they met him on the street. A process of shuttle dialogue took place before a 5 hour meeting was held in SACRO offices, facilitated by two workers. There were a number of outcomes articulated – an apology from the driver to the parents, an acceptance of their son's tragic death and for the offender to apologise and overcome his fear of meeting the parents in the street.[119]

In another of the cases facilitated by Sacro the person responsible was the mother who had killed her son. The restorative justice intervention took place between her and her mum. In another a surrogate victim was used. Notable

112 A deferred sentence is one in which the final decision about any punishment is deferred or put off to another date, usually 3 to 12 months later.

113 *Kearney/Kirkwood/MacFarlane* 2006.

114 Be aware that some persons harmed might find this onerous.

115 *Adams* 2007.

116 Concentric Journeys.

117 *Kearney* 2005.

118 *Kearney* 2005.

119 *Maclean* 2006.

concerns surrounding these cases is ensuring safeguards are put in place with the provision of support throughout the whole process and additionally that means the preparation is crucial. These concerns have figured recently in the exploration of whether restorative services can be used in the cases of historical abuse.[120]

5. Summary and outlook

The main providers of restorative practices in Scotland are Sacro along with Local Authority based schemes. The research findings show that whilst there is use among criminal justice practitioners, it is also used in a wider social context, for example in schools. Much of the debate in Scotland has focused on conceptualising restorative justice with some holding the view that restorative justice is a subset of restorative practice whilst others believe restorative practice and restorative justice mean the same thing. The research suggests that whilst the Scottish Government have been very clear in their terms and definitions when it comes to practice there is still a wide ranging use of practices which are termed restorative and these also include mediation.

In Scotland the predominant use of restorative justice has been in cases involving young people rather than adults. This gap or lack of appropriate restorative interventions for adults requires the Scottish Government to have a shift in thinking about how this can apply and work effectively with adults. One suggestion has been the lack of confidence in the effectiveness of such practices. Within the UK recent research led by Victim Support has suggested that whilst they would prefer the use of community based sentences rather than prison/ custody they are unsure as to their effectiveness and would want more proof as such to increase their confidence in these processes. The Out in the Open Report[121] recommends more effective use of Victim Personal Statements; greater focus on reparation from offenders to victims; more information and engagement of victims in Community Payback however a lack of understanding and the need for greater awareness of how these processes work is required. This would suggest that further robust evaluations on the effectiveness of these approaches need to be undertaken.

There is still much debate over the use of restorative justice for the more serious cases and there were a significant number of respondents to the SCCJR survey that were in favour of considering restorative justice in such cases. The application of restorative justice philosophies to serious cases such as domestic abuse, sexual abuse, and historical abuse has not been an easy one. As the literature shows there have been attempts at responding to this type of case by modifying various models of restorative justice practice to deal with the

120 *Sacro* 2011 and *Johnstone/Brookes* 2011.

121 *Victim Support/Make Justice Work* 2012; *Matrix Evidence Ltd/Make Justice Work* 2012.

complexities and unique 'dynamics' amongst those involved in serious crime or harm. The capabilities of the facilitators are crucial in the effectiveness of such an intervention. However such approaches have been used infrequently and therefore research evidence about their effectiveness is sparse. Talking after Severe Crime (TASC) is an example of Scotland's attempt to consider RJ practice in cases of serious harm and more recently in considering the potential for restorative justice in case of historical abuse.[122] One development has been the launch of InterAction to consider how survivors of historical abuse can seek justice. The new Victims and Witnesses (Scotland) Act 2014[123] introduces provisions for a new National Confidentiality Forum following the Time to be Heard Forum pilot to respond to survivors of historical abuse.[124] The Act (s 2C) also creates a provision for the Scottish Government to develop and provide guidance and safeguards for those providing restorative services in Scotland. This is an important statutory provision for several reasons. First, it recognises and puts restorative justice on a statutory footing and secondly, it aims to suggest that the Scottish Government can provide Guidance to those offeering restorative services, thereby protecting and safeguarding the interests of those participating. However, this provision has yet to be acted upon. It is also interesting to note that Section 2C was a late addition to the Victim and Witnesses (Scotland) Bill and the original Bill and consultation process ignored the use of restortaive justice.

The new EU directive will require the Scottish Government to think more critically about their use of restorative justice within the criminal justice system. The recent statement by the UK government which has called for victims of crime to have a say in the actual sentence of the offender[125] may also have an impact on the use of restorative practice. This is not dissimilar from the discussions that took place concerning the new Victims and Witnesses (Scotland) Act 2013.[126] However, this statement needs to be met by resources and funding. Funding is perceived by practitioners as an issue, with local authorities possibly viewing restorative justice as an 'add on' and an 'extra expense' rather than a fully integrated option within the criminal justice system. A cultural shift in understanding as to the positive outcomes of restorative practice is required to fully integrate this into the criminal and youth justice systems.

One of the suggestions from the more collaborative and joined up work between victim and offender based services needs to be as well as partnership

122 See launch of InterAction to consider ways in which survivors of historical abuse can seek justice.

123 Victims and Witnesses (Scotland) Act 2014.

124 See Victims and Witnesses (Scotland) Bill 2013; *Shaw* 2011.

125 Conservative Party Conference, Home Secretary, *Theresa May*, Oct 8, 2012.

126 *Scottish Government* 2012b.

between the voluntary sector, Police, courts and SCRA. Whilst the rhetoric requires more input for victims within the criminal justice system the recent Consultation, Making Justice Work for Victims and Witnesses[127] shows a lack of inclusion in any substantive way of restorative approaches within their recommendations. For restorative justice to have a future there needs to be a driver for change and acceptance.

References:

Adams, L. (2007): Violent criminals to say sorry to victims in prison, Herald Newspaper. Available: http://www.heraldscotland.com/violent-criminals-to-say-sorry-to-victims-in-prison-1.854986 (accessed: 11 November 2011).

Barry, M., McIvor, G. (1999): Diversion from prosecution to social work and other agencies: Evaluation of the 100% funding pilot programmes. Crime and Criminal Justice Research Findings No. 37.

Braithwaite, J. (2002): Restorative justice and responsive regulation. Oxford: Oxford University Press.

Brookes, S. (2006): Female Offenders: A strategy for positive relationships. Avialable: http://www.pfi.org/cot/prison/offender/women/female-prisoner-policy-strategy-scotland-oct-2006 (accessed: November 2011).

Campbell, C., Devlin, R., O'Mahony, D., Doak, J., Jackson, J., Corrigan, T., McEvoy, K. (2005): Evaluation of the Northern Ireland youth conference service. Available: http://www.nio.gov.uk/evaluation_of_the_northern_ireland_youth_conference_service.pdf (accessed: 13 Dec 2011).

Carruthers, D. (2005): Restorative justice: A judicial perspective. An address to the SACRO Annual Conference 10 February 2005, Edinburgh. Available: http://www.sacro.org.uk/carruthersaddress2005.pdf (accessed: November 2011).

Children (Scotland) Act (1995): Available: http://www.legislation.gov.uk/ukpga/1995/36/contents (accessed: December 2011).

Children's Hearings (Scotland) Act (2011): Available: http://www.legislation.gov.uk/asp/2011/1/contents (accessed: February 2013).

Children's Hearing System: Available: http://www.scra.gov.uk/children_s_hearings_ system/index.cfm.

Christie, N. (1997): Conflict as property. British Journal of Criminology, 17, pp. 1-15.

Criminal Justice (Scotland) Act (1980).

127 *Scottish Government* 2012b.

Crime and Justice Research Centre, Triggs, S. (2005): A summary of: New Zealand court-referred restorative justice pilot: Evaluation. Avialable: http://www.justice.govt.nz/pubs/reports/2005/nz-court-referred-restorative-justice-pilot-evaluation/just-published.html (accessed: November 2011).

Concentric Journeys: Available: http://concentricjourneys.com.

Council of the European Union (2001): Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Brussels.

Council of Europe (2006): Recommendation 8 of the Committee of Ministers to member states on the assistance to crime victims (Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies).

Curran, J., MacQueen, S., Whyte, B. (2007): Forced to Make Amends: An Evaluation of the Community Reparation Order Pilots. Scottish Government. Available: http://www.sccjr.ac.uk/publications/forced-to-make-amends-an-evaluation-of-the-community-reparation-order-pilots/ (accessed: November 2011).

Dutton, K., Whyte, B. (2006): CJSW briefing no. 8: Implementing restorative justice within an integrated welfare system: The evaluation of Glasgow's restorative justice service, summary report. Edinburgh: CJSW Development Centre for Scotland.

Gavrielides, T. (2012): Conceptualising and Contextualising Restortaive Justice for Hate Crimes. Crimsoc Vol. 1 Issue 1. Available: http://crimsoc.org/the-journal/volume-i-issue-1/74-4-conceptualising-and-contextualising-resto-rative-justice-for-hate-crimes-theo-gavrielides (accessed: February 2013).

Gehm, J. (1990): Mediated victim-offender restitution agreements: An exploratory analysis of factors related to victim participation. In: Hudson, J., Galaway, J., Galaway, B. (Eds.): Criminal Justice, Restitution and Reconciliation. Monsey, NY: Criminal Justice Press, pp. 177-182.

Gehm, J. (1998): Victim-offender mediation programs: An exploration of practice and theoretical frameworks. Western Criminology Review, 1. Available: http://wcr.sonoma.edu/v1n1/gehm.html (accessed: October 2011).

Hamilton, J., Wisniewski, M. (1996): The use of the compensation order in Scotland. Edinburgh: Scottish Office.

HM Inspectorate of Prisons (2006): Report on HMP and YOI Cornton Vale. Available: http://www.scotland.gov.uk/Publications/2006/07/18095811/0 (accessed: October 2011).

HM Inspectorate of Prisons (2007): Report on HMYOI Polmont: Inspection 30 April - 4 May 2007. Available: http://www.scotland.gov.uk/Publications/2007/10/12103659/0 (accessed: October 2011).

Home Affairs Committee (2009): The Macpherson Report – Ten Years On. HC 427. London. Available: http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/427/427.pdf.

Home Office (1999): The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny, Cm 4262-I. London: Home Office.

Howard, J., Wirtz, H. (1999): Putting the pieces back together again: Narrative therapy and ideas of restoration in working together with victims of crimes of violence, Paper presented at the Restoration for Victims of Crime Conference, Melbourne, September 1999. Avialable: http://www.aic.gov.au/media_library/conferences/rvc/howardwr.pdf_ (accessed: December 2011).

InterAction: Available: www.shrcinteraction.org.

Johnstone, G. (2002). Restorative justice: Ideas, values, debates. Devon and Oregon: Willan Publishing.

Johnstone, J., Brookes, D. (2011): Restorative Justice Consultation, Summary and Recommendations accessible. Avalable: Survivor Scotland http://www.survivorscotland.org.uk/confidential-forum/time-to-be-heard/restorative-justice-toolkit/.

Johnstone, J., Chistyakova, Y., Restorative Justice/Practice Research Working Group (SCCJR, Scotland) (2010): Restorative Survey for Criminal Justice Professionals (Scotland) Summary Report. Available: http://www.restorativepracticescotland.co.uk/.

Kearney, B. (2000): Children's Hearings and the Sheriff Court, London: Butterworth.

Kearney, N. (2005): Talking after severe crime. Available: http://www.cjscotland.org.uk/pdfs/TASC.pdf accessed December 2011 and http://www.cjscotland.org.uk/index.php/cjscotland/dynamic_page/?title=talking_after_severe_crime (accessed: 1st November 2011).

Kearney, N., Kirkwood, S., MacFarlane, L. (2006): Restorative justice in Scotland: An overview. British Journal of Community Justice, Vol 4, No 3, Winter 2006, pp. 55-65.

Kirkwood, S. (2009): Restorative justice cases in Scotland: Factors related to participation, restorative process, agreement rates and forms of reparation. Available: http://www.restorativejusticescotland.org.uk/Article_on_RJ_Cases_in_ Scotland_18-06-09.pdf (accessed: December 2011).

Kirkwood, S. (2010): Restorative justice cases in Scotland: Factors related to participation, the restorative process, agreement rates and forms of reparation. European Journal of Criminology, 7, pp. 107-122.

Kirkwood, S., Richley, T. (2008): Circles of support and accountability: The case for their use in Scotland to assist in the community reintegration and risk management of sexual offenders. SCOLAG Legal Journal, October 2008, pp. 236-239.

Lockyer, A., Stone, F. (1998): Juvenile Justice in Scotland: 25 Years of the Welfare Approach, Edinburgh: T & T Clark.

MacKay, R. E. (1988). Reparation in criminal justice. Edinburgh: Scottish Association for the Care and Resettlement of Offenders.

McGuire, J., Priestly, P. (1995). "Reviewing "what works": Past, present and future". In: McGuire, J. (Ed.): Reducing Reoffending. Chichester: Wiley & Sons.

McNeill, F., Whyte, B. (2007): Reducing reoffending: Social work and community justice in Scotland, Devon: Willan Publishing.

Maltz, M. D. ([1984] 2001): Recidivism. Originally published by Academic Press, Inc., Orlando, Florida. Available: http://www.uic.edu/depts/lib/forr/pdf/crimjust/recidivism.pdf_ (accessed: December 2011).

Marshall, T. F. (1999): Restorative justice: An overview. London: Home Office.

Matrix Evidence Ltd, Make Justice Work (2012): Final Report: An Economic Analysis of alternatives to short term custody. Available: http://www.makejusticework.org.uk/wp-content/uploads/Matrix-MJW_updated-Final-Report_June-2012-2-1.pdf (accessed: September 2012).

Maxwell, G., Morris, A. (2001): Putting restorative justice into practice for adult offenders. The Howard Journal of Criminal Justice, 40, pp. 55-69.

Miers, D. (2001): An international review of restorative justice. London: Home Office.

Miers, D., Willemsens, J. (Eds.) (2004): Mapping restorative justice: Developments in 25 European Countries. Leuven, Belgium: European Forum for Victim-Offender Mediation and Restorative Justice.

Miers, D., Maguire, M., Goldie, S., Sharpe, K., Hale, C., Netten, A., Uglow, S., Doolin, K., Hallam, A., Enterkin, J., Newburn, T. (2001): An exploratory evaluation of restorative justice schemes. London: Home Office.

Nicol, W. J., Kirkwood, S., MacFarlane, L. (2006): Youth Justice Services Evaluation Report: April 2004 – March 2005. Edinburgh: Sacro. Available: http://www.sacro.org.uk/YJ_Eval_Report.pdf (accessed November 2011).

Norrie, K. (1997): The Children's Hearing System. Edinburgh: W. Green/Sweet & Maxwell.

Restorative Justice Scotland: Avialable: www.restorativejusticescotland.org.uk.

Restorative Justice Scotland (2006): Census 2006. Available: http://www.restorativejusticescotland.org.uk/RJSCensusReport2006.pdf (accessed: November 2011).

Restorative Justice Scotland (2008): Census 2008. Available: http://www.restorativejusticescotland.org.uk/html/youth_justice.html (accessed: November 2011).

Restorative Practice Scotland: Available: http://www.restorativepracticescotland.co.uk/.

Richards, P., Richards, E., Devon, C., Morris, S., Mellows-Facer, A. (2012): Summary Justice Reform: Evaluation of Fiscal Work Order Pilot. Available: http://www.scotland.gov.uk/Resource/Doc/339704/0112293.pdf (accessed: February 2013).

Richley, T., Kirkwood, S. (2008): The case for circles of support and accountability in Scotland. The Scottish Journal of Criminal Justice Studies, 14, pp. 26-30.

Robinson, G., Shapland, J. (2008): Reducing recidivism: A task for restorative justice? British Journal of Criminology, 48, pp. 337-358.

Sacro (2005): Restorative Justice and the Children's Hearings System. Avialable: http://www.sacro.org.uk/rjspublishedaug05.pdf (accessed: December 2011).

Sacro (2005): Case Study of Restorative Justice in the context of the Children's Hearing System. Available: http://www.restorativejusticescotland.org.uk/CS_CHS_RJS.pdf (accessed: November 2011).

Sacro (2008): Strategic Plan 2008-2011. Available: http://www.sacro.org.uk/Sacro_StategicPlan_2008-2011.pdf (accessed: November 2011).

Sacro (2011): Restorative Justice Interim Report and Final Report. Available: http://www.survivorscotland.org.uk/confidential-forum/time-to-be-heard/restorative-justice-toolkit/.

Sacro Case Studies: Available: http://www.sacro.org.uk/html/case_studies.html.

Sawyer, B. (2000): An evaluation of the Sacro (Fife) young offender mediation project. Edinburgh: Scottish Executive.

Sawyer, B. (2000): An evaluation of the Sacro (Fife) Young Offender Mediation Project. Edinburgh: Scottish Executive Central Research Unit.

Scottish Children's Reporters Adminsitration: Available: http://www.scra.gov.uk/children_s_hearings_system/index.cfm.

Scottish Community Mediation Network or the Scottish Mediation Network: Available: http://www.scmc.sacro.org.uk.

Scottish Executive (2002): National guidelines for diversion to social work and other agencies as an alternative to prosecution. Edinburgh: Scottish Executive.

Scottish Executive (2004a): Police Restorative Warnings in Scotland: Guidelines. Available: http://www.scotland.gov.uk/Publications/2004/06/19497/38776 (accessed: January 2012).

Scottish Executive (2004b): Summary justice review committee: Report to minister. Available: http://www.scotland.gov.uk/Publications/2004/03/19042/34176 (accessed: November 2011 and February 2013).

Scottish Executive (2005a): Guide on the use of Restorative Justice Services in the Children's Hearings System. Available: http://www.scotland.gov.uk/Publications/2005/07/11160004/00062 (accessed: December 2011).

Scottish Executive (2005b): Restorative justice services in the children's hearing system. Available: http://www.scotland.gov.uk/Resource/Doc/55971/0015402.pdf (accessed: November 2011).

Scottish Executive (2005c): Restorative justice services in the children's hearings system. Edinburgh: Scottish Executive.

Scottish Executive (2005d): Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps. Available: http://www.scotland.gov.uk/Publications/2005/03/20888/55016 (accessed: January 2012).

Scottish Executive (2006): Reducing reoffending: National strategy for the management of offenders. Available: http://www.scotland.gov.uk/Resource/Doc/121591/0029340.pdf (accessed: January 2012).

Scottish Executive (2007): Community sentencing: Public perceptions and attitudes: Summary research report. Available: http://www.scotland.gov.uk/Publications/2007/11/15102229 (accessed: January 2012).

Scottish Government Website: Available: http://www.childrens-hearings.co.uk/background.asp.

Scottish Government (2007): Reforming and Revitalising: Report of the Review of Community Penalties. Available: http://www.scotland.gov.uk/ Publications/2007/11/20142809/2 (accessed: January 2012).

Scottish Government (2006): The Children's Hearing System: A Brief Background. Available: http://www.scotland.gov.uk/Resource/Doc/133089/0031717.pdf (accessed: November 2011).

Scottish Government (2008a): Best practice guidance for restorative justice practitioners and their case supervisors and line managers (Scotland). Available: http://www.scotland.gov.uk/Resource/Doc/226996/0061358.pdf (accessed: November 2011).

Scottish Government (2008b): Restorative justice services for children and young people and those harmed by their behaviour. Available: http://www.scotland.gov.uk/Resource/Doc/226988/0061357.pdf_ (accessed: December 2011).

Scottish Government (2008c): Criminal proceedings in Scottish courts, 2006/07, Edinburgh: Scottish Government.

Scottish Government (2008d): Preventing Offending by Young People: A Framework for Action. Available: http://www.scotland.gov.uk/Publications/2008/06/17093513/0 (accessed: December 2011).

Scottish Government (2008e): Restorative Justice guidance and protocols for practitioners working with young people and those harmed by their

behavior. Available: http://www.scotland.gov.uk/Publications/2008/06/10143757/0 (accessed: 30 October 2011).

Scottish Government (2008f): Protecting Scotland's Communities: Fast, Fair and Flexible Justice, part 5. Available: http://www.scotland.gov.uk/Publications/2008/12/16132605/5.

Scottish Government (2010): Thematic Report on Compensation Offers. Available: http://www.scotland.gov.uk/Publications/2010/01/28095318/0 (accessed: February 2013).

Scottish Government (2011): Statistical Bulletin: Crime and Justice Series: Criminal Proceedings in Scotland, 2010-11. Available: http://www.scotland.gov.uk/Publications/2011/12/12131605/5 (accessed: December 2011).

Scottish Government (2012a): Guide to Getting it Right for Every Child (GIRFEC). Available: http://www.scotland.gov.uk/Resource/0041/00411151.pdf (accessed: August 2012).

Scottish Government (2012b): Making Justice Work for Victims and Witnesses, Victims and Witnesses Bill – A Consultation Paper. Avialable: http://www.scotland.gov.uk/Publications/2012/05/8645 (accessed: May 2012).

Scottish Prison Commission (2008): Scotland's Choice: Report of the Scottish Prison Commission. Available: http://www.scotland.gov.uk/Resource/Doc/230180/0062359.pdf (accessed: February 2011).

Scottish Restorative Justice Training Service (2007): An overview of restorative justice in Scotland. Avialable: http://www.restorativejusticescotland.org.uk/ RJ_in_Scotland_1.10_TextOnly.doc (accessed: November 2011).

SCRA: Available: http://www.scra.gov.uk/children_s_hearings_system/index.cfm.

Shapland, J., Atkinson, A., Atkinson, H., Chapman, B., Colledge, E., Dignan, J., Howes, M., Johnstone, J., Robinson, G., Sorsby, A. (2006): Restorative justice in practice: The second report from the evaluation of three schemes. Available: http://www.shef.ac.uk/content/1/c6/07/76/55/Restorative%20Justice%20Report%20-%20final%20version.pdf (accessed: December 2011).

Shapland, J., Atkinson, A., Atkinson, H., Chapman, B., Dignan, J., Howes, M., Johnstone, J., Robinson, G., Sorsby, A. (2007): Restorative justice: The views of victims and offenders: The third report from the evaluation of three schemes. Available: http://www.justice.gov.uk/docs/Restorative-Justice.pdf (accessed: December 2011).

Shaw, T. (2011): Time to be Heard: A Pilot Forum. An Independent Report by Tom Shaw Commissioned by the Scottish Government (2011). Available: http://www.scotland.gov.uk/Resource/Doc/344008/0114448.pdf (accessed: August 2012).

Survivor Scotland (2005): Survivor Scotland Strategy. Available: http://survivorscotland.org.uk (accessed: December 2011).

The Scottish Restorative Justice Training Service (2007): An overview of restorative justice in Scotland. Available: http://www.restorativejustice scotland.org.uk/RJ_in_Scotland_1.10_TextOnly.doc.

United Nations (2002): UN Economic and Social Council: Resolutions and decisions adopted by the Economic and Social Council at its substantive session of 2002 (1 – 22 July 2002) 2002/12. Basic principles on the use of restorative justice programmes in criminal matters.

United Nations (2006): Handbook on restorative justice programmes. Available: http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf (accessed: January 2012).

Victims and Witnesses (Scotland) Bill: Available: http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses %20(Scotland)%20Bill/b23s4-introd.pdf (accessed: February 2013).

Victims and Witnesses (Scotland) Act 2014: Available: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/59133.aspx.

Victim Support and Make Justice Work (2012): Out in the Open: What Victims Really Think about Community Sentences. Available: http://www.makejusticework.org.uk/wp-content/uploads/Out-in-the-Open1.pdf and also see the cost benefit analysis of Community based sentences (accessed: December 2012).

Victim Support (2006): In the aftermath. The support needs of people bereaved by homicide: A research report. London: Victim Support.

Viewpoint (2009): National Evaluation of Restorative Justice Youth Services in Scotland, 2009. Available: http://www.sacro.org.uk/RJ_Evaluation_ Report_2008-2009.pdf (accessed: December 2011).

von Hirsch, A., Ashworth, A., Shearing, C. (2003): "Specifying Aims and Limits for Restorative Justice". In: von Hirsch et al. (Eds.): Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms? Oxford: Hart Publishing.

Ward, T., Maruna, S. (2007): Rehabilitation. New York: Routledge.

Warner, S. (1992): Making amends: Justice for victim and offenders, an evaluation of the SACRO reparation and mediation project. Aldershot, England: Avebury.

Warner, S. (1992): Making Amends: Justice for Victim and Offenders, an evaluation of the SACRO reparation and mediation project. Aldershot, England: Avebury.

Wemmers, J.-A., Canuto, M. (2002): Victims' experiences with, expectations and perceptions of restorative justice: A critical review of the literature. Montréal: Research and Statistics Division, Policy Centre for Victim Issues, Department of Justice. Available: http://www.justice.gc.ca/eng/ pi/rs/rep-rap/2001/rr01_9/p1.html (accessed: December 2011).

Whyte, B. (2002): Crime and restorative justice. Edinburgh: Criminal Justice Social Work Development Centre for Scotland.

Whyte, B. (2002): CJSW briefing no. 4: Crime and restorative justice. Edinburgh: CJSW Development Centre for Scotland.

Youth Justice Scotland (2006): Funding. Cited in *Kearney* 2005, *Kearney/Kirkwood/MacFarlane* 2006.

Zehr, H. (2002): "The Little Book of Restorative Justice", Good Books.

Serbia

Milan Škulić

1. Origins, aims and theoretical background of restorative justice

Restorative justice or special restorative approaches to responding to offending and resolving conflicts between victims and offenders arising from that offending are most frequently associated with the application of diversionary mechanisms in that they can serve as conditions or grounds for non-prosecution.

Restorative justice is principally a very humane concept. It covers a range of activities all aimed at repairing the harm caused by crime and involving victims as well as offenders in the process. It includes such practices as victim-offender mediation, restorative conferencing, family group conferencing, victim-offender groups, victim awareness work and reparation to the victim.[1] The hallmarks or typical constants of restorative justice are as follows: victim support and healing are the priority; offenders take responsibility for what they have done; there is dialogue to achieve understanding; there is an attempt to put right the harm done; offenders look at how to avoid future offending; the community helps to re-integrate both victim and offender.[2]

In fact, restorative justice is not an entirely new concept. Even though "the term gained popularity in most of the western world only in the past decade, restorative decision-making in the form of victim-offender mediation programs has a 30-year history in the United States" and it is considered that "this history began in 1972 with an experimental program in the Minnesota Department of Corrections using victim-offender meetings as a component of a restitution program designed for adult inmates eligible for early release."[3] By the early 1980s,

1 *Goldson* 2008, p. 301.

2 *Goldson* 2008, pp. 301 f.

3 *Bazemore/Schiff* 2005, p. 27.

a number of community-based victim-offender mediation programmes had taken hold primarily in juvenile courts and non-profit agencies and by the late 1990s some 300 such programmes had been identified.

The most commonly known practices that are associated with restorative justice are:

1) procedural-law mechanisms for victim support,
2) provisions for victim-offender mediation,
3) restorative conferencing,
4) healing and sentencing circles,
5) peace committees,
6) citizens' boards and
7) community service.[4]

However, not all of these measures can be found in Serbia.

1.1 Overview of forms of restorative justice in the criminal justice system

The concept of restorative justice first emerged in jurisdictions that are traditionally characterized by very weak legal possibilities for protecting and enforcing victims' rights in criminal proceedings. This is mostly the case in common-law systems where there are often no possibilities for criminal courts to make decisions about restitution and compensation claims – that is only possible in civil court proceedings and often occurs completely independent of the outcome of criminal proceedings. Also, in a typical Anglo-Saxon system, the injured party or victim of a crime can only appear as a witness and has no right to initiate criminal proceedings, to interrogate, question or examine witnesses etc. The injured party can never be or become authorized prosecutor in cases of offences for which prosecution is "official", i. e. the decision to prosecute lies in the hand of the police or prosecuting agencies. Basically, in these systems the possibilities for victims and injured parties to play an active procedural used to be pretty modest, i. e. very limited. This led to the development of a strong movement to improve the position of the victim. That movement played a strong role in the recent (re-)emergence of the concept of restorative justice in the context of criminal matters, and strongly tied into the concept of alleviating the "disenfranchisement" and "helplessness" of victims of criminal offences in criminal proceedings.

Contrary to that, the injured party or the victim[5] traditionally has a more important role in the Serbian system of criminal justice. The same applied to

4 For more see *Walgrave* 2008, pp. 31 ff.

5 There is a difference between "victim" and "injured parties". While the victim is the passive subject of the crime – a person against whom a crime has been committed – the

former Yugoslavian legislation. Therefore, long before the emergence of the restorative justice movement and its growth in popularity, in Serbia the injured party has already had the following possibilities:[6]

- to file restitution claims in the criminal procedure;
- to examine witnesses and propose other evidence (active role in evidential procedure);
- to prosecute criminal offences themselves or through legal representation, either as a private or a subsidiary prosecutor.

In addition, the so-called "reconciliation hearing" – a particular form of victim-offender mediation initiated by the trial judge – has existed in Serbian law for the last few decades.

Apart from these long-standing measures, the overall popularization of the concept of restorative justice has brought some new procedural possibilities, like "conditional deferment of criminal prosecution", and alternative sanctions, like public community work. In the pre-trial procedure, the law provides for "conditional dismissal of criminal prosecution", while at the court level, the judge can order victim-offender mediation or make a restitution order that implies compensation of damage to the injured party. Furthermore, the so-called "plea-agreement" has strong restorative connotations that are described below, as do "diversion orders" that can be imposed on juveniles at both the pre-court and the court level.

1.2 Reform history

In the last decades, the concept of restorative justice has attracted the attention of legal scholars. Entry of this idea into Serbian legal thought is visible in the Code of Criminal Procedure from 2001 (CPC/2001) that still applies in practice. This Code introduced the principle of conditional opportunity – criminal prosecution is conditionally dismissed if the suspect fulfils certain obligations set by the public prosecutor (Art. 236). This was a very important development, bearing in mind the strict principle of mandatory prosecution that had traditionally prevailed in Serbia.

The new Code of Criminal Procedure was introduced in 2006 and was the first Serbian CPC that explicitly regulated victim-offender mediation, introduced

injured party is the person – natural or legal – whose rights have been breached by the crime. For example, in the case of murder, the victim is person who has been killed, while the injured party is his/her family. However, bearing in mind that this difference is not emphasized enough, especially in the common law literature (i. e. restorative justice instruments talk about victim-offender mediation etc.), in this paper, the terms "injured party" and "victim" are interchangably.

6 *Škulić* 2011, pp. 110 ff.

plea-bargaining and many other novelties. However, due to political reasons the code was never enforced in practice.

In the meantime, the Serbian Law on Mediation was passed in 2006. It refers to all kind of disputes – civil, commercial, administrative and criminal.

In the same year (2006), a new Criminal Code was enforced, explicitly providing for mediation in criminal matters. It also introduced some alternative sanctions like community service, a new system of fines, etc.[7]

In 2009 the CPC from 2001 was modified and some new institutes and provisions like plea-bargaining, protection of particularly vulnerable witnesses and victims, and such were introduced. Although plea-bargaining is not a restorative measure as such, the particular way in which it has been regulated in the Serbian CPC indeed strengthens the role of victims and gives them wide authority, thus permeating this measure with a strongly restorative spirit and in turn justifying a closer look at it in this report.

In 2011 a new Code of Criminal Procedure was passed that shall come into force in January 2013 (CPC/2011). Contrary to the general restorative tendency, this Code declined the position of the victim, i. e. of the injured person in the criminal procedure. According to these provisions, the victim cannot become prosecutor for crimes prosecuted *ex officio* in the investigative phase, and the position of victims and injured parties in the plea-bargaining procedure shall be weakened. Since these provisions had not yet been enforced at the time of writing, this analysis is based on the CPC from 2001.

1.3 Contextual factors and aims of the reforms

The introduction of certain restorative measures into the Serbian system of criminal justice has been primarily motivated by the general desire to improve the position of the victim without disregarding the rights and interests of the accused. As already noted above, the position of the victim has always been favourable in Yugoslavian and later Serbian Codes of Criminal Procedure. However, the problem has lain in legal practice, in the sense that some of the possibilities provided by the law are only reluctantly implemented, like reconciliation hearings for instance.

The NGO sector, particularly the Victimology Society of Serbia established in 1997, strongly promoted the idea of mediation and its introduction in Serbian law, with the purpose of improving the position of the victim in the criminal process. As a result, the Serbian CPC from 2006 for the first time regulated victim-offender mediation in detail, but unfortunately this Code has never been enforced in practice.

7 *Škulić* 2007, pp. 1,346 ff.

Nowadays, Serbia is characterized by significant reforms of the criminal law (substantial and procedural), as well as of the judicial system as whole. New general elections of judges and public prosecutors were held, followed by many difficulties and objections, and the general impression is that expectations have not been fulfilled at all. This election was later re-examined, a process that discredited the legal system as a whole. More specifically, the Serbian Constitutional Court overturned the decisions of the High Judicial Council dismissing a group of judges, because they did not satisfy the requirements for being elected to judicial office with permanent tenure. As a consequence, the Court ordered the Council to re-elect the judges within 60 days.[8] In addition, too fast changes of criminal law and enforcement of the new, very poor Code of Criminal Procedure contributed to that picture. Such a situation does little to provide fertile soil in which a wider implementation of restorative justice can flourish. On the other hand, the Juvenile Justice Law prescribes adequate restorative measures that will be further improved and broadened in the near future.

To summarize, there is the general overall aspiration to implement restorative justice more widely in Serbia and to avoid traditional retributive concepts whenever possible, but the main problem lies in the fact that the laws are changed too quickly and frequently, which in turn fosters a certain degree of insecurity and fear among judges and other authorities responsible for their implementation.

1.4 Influence of international standards

Since Serbia seeks to harmonize its legal system as quickly as possible with EU legal standards, some international instruments – like the Council of Europe's recommendation on Mediation in Penal Matters (Rec (1999) 20) – are in principal very significant, notwithstanding that such normative instruments are so-called "soft law".[9]

In Serbia, direct implementation of the provisions of international law is only possible under very restrictive conditions. Although it is prescribed in Article 16 of the Constitution of the Republic of Serbia that the generally accepted rules of international law shall form part of the legal order of the Republic of Serbia and be implemented directly, said Article does allow international law to be automatically implemented directly and *a priori*.[10] That is because same article also states that ratified international contracts must be in

8 See more at: *http://www.diritticomparati.it/2012/12/judicial-independence-and-impartiality-in- serbia-between-law-and-culture.html#sthash.KxVBbH44.dpuf*.

9 See *Stojanović* 2012, pp. 29 f.

10 See *Etinski* 2010, pp. 77 ff.

balance with the Serbian Constitution and that provision applies per analogy for generally accepted rules of international law.

Direct implementation of these rules is not possible in Serbia due to Art. 145 of the Serbian Constitution. In accordance with that Article, court decision shall be established on Constitution, on Code, on ratified international contracts or on other provisions adopted in accordance with the law. That means that generally accepted rules of international law cannot be a source for the court's decision. Because the implementation of international law is logically impossible without a court decision, direct implementation of the general accepted rules of international law is factually impossible in Serbia.

The direct implementation of international provisions from other law sources is possible under certain conditions. International law can be directly implemented in Serbia under two cumulative conditions: 1) the rules must exist in ratified international contracts and 2) the rules must be fully in accordance with the Serbian Constitution.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

2.1 Pre-court level (police and prosecution service)

2.1.1 Adult criminal justice

The main actors of the pre-trial procedure are the police, public prosecutor and investigative judge. Pre-trial procedure is divided into "pre-criminal procedure" and "investigation". The pre-criminal procedure precedes the formal initiation of the criminal procedure and its purpose is to identify suspects and collect evidence. In the pre-criminal procedure, public prosecutor and police, under his/her supervision, play the most important role. Investigation currently remains the responsibility of the investigative judge, but the new CPC/2011 shall modify this once it actually comes into force, relocating competence for the investigation into the hands of the public prosecutor. Bearing in mind the dominant role of the public prosecutor at this stage of the procedure, the fact that he/she also plays such a dominant role in the implementation of restorative practices is not surprising.

As an alternative to criminal prosecution, he/she can conditionally dismiss the case. This is an exception from the principle of mandatory prosecution, the foundation of the Serbian criminal procedure that obliges the public prosecutor to initiate and conduct criminal prosecution whenever there is sufficient evidence. This principle seeks to ensure the equal application of the criminal law by mandating its full enforcement and precludes the prosecutor from dismissing charges simply because he/she deems the case unimportant. For a long time, this

principle did not allow any exceptions, which resulted in huge case-loads and a slow, inefficient judicial system. It also undermined any form of restorative justice for crimes prosecuted *ex officio*, since the public prosecutor – as the representative of the State – was obliged to initiate prosecution and bring the charge in all cases in which there was sufficient evidence to justify doing so.

"Conditional dismissal of criminal prosecution" (Art. 236) was introduced in 2001, and slightly amended in 2009, in order to relieve overburdened courts.[11] This measure involves an agreement between the public prosecutor and the suspect, who obliges him/herself to fulfil certain obligations in exchange for non-prosecution. This is not a typical restorative measure as such, bearing in mind that the opinion of the victim is not always a condition that must be taken into account when ordering it. Instead, according to the law, the focus lies on the prosecutor-offender context, but in practice, the public prosecutor often considers the interests of the victim when deciding whether or not to divert the case from criminal prosecution. Nonetheless, one of the obligations that can be imposed – compensation to the victim – has strong restorative elements, which is why conditional dismissal (as a gateway into the system for restorative practices) is more closely looked at here.[12] Other obligations that can be imposed are: to pay a sum to a humanitarian organization, fund or public institution; to perform certain humanitarian services; to fulfil unpaid maintenance obligations; to submit to an alcohol or drug treatment programme; to submit to psycho-social treatment for the purpose of eliminating the causes of violent conduct; to fulfil an obligation determined by a final court decision, or observe a restriction determined by a final court decision.

This procedure is applicable only to "minor" offences, regularly such that are prosecuted in a summary procedure. Initially, it only concerned offences punishable by a fine or imprisonment for up to three years. In 2009, this scope was broadened to cover all offences with a statutory sentence of less than five years of imprisonment. In practice, these offences comprise the great majority of cases reported to the police. The law does not impose any other particular preconditions in the sense of offence type, criminal history, evidential requirements, etc., but consent of the suspected person is logically required. As the measure is based on mutual agreement, without consent of suspect, the measure could not be implemented.

The measure is available in the pre-criminal procedure, after having received the criminal report. According to Serbian law, criminal prosecution starts when an offence is charged or by the decision to investigate. Pre-criminal procedure is not formally a part of the criminal procedure. Therefore, if this measure is implemented successfully, the criminal prosecution will not start at

11 For more detail see *Škulić* 2011, pp. 746 f.

12 *Škulić* 2011, p. 53.

all. Success of the measure depends on fulfilment of certain obligations by the suspected person. If he/she fulfils the obligations, the public prosecutor will reject the criminal report and the criminal procedure will not start. Otherwise, the prosecutor will initiate the procedure and charge the suspect.

In the case of "conditional dismissal of criminal prosecution", the suspect only has to have defence council in the cases in which such defence is mandatory:

- if the defendant is deaf, dumb or unable to conduct own defence because of some physical or mental defect;
- if the defendant is charged with a serious crime punishable by more than 10 years of imprisonment;
- in the case of detention;
- in the case of trial *in absentia*.

Conditional dismissal of criminal prosecution is possible only for minor crimes. Thus, mandatory defence is possible only in the first scenario listed above. Otherwise, he/she can represent him/herself during procedure of this measure. Since the measure is voluntary, the law provides no right to appeal.

Conditional dismissal of criminal prosecution does not depend on the victim's consent. In fact, his/her consent is only required for certain obligations that can be imposed on the offender (community work or payment to charitable cause), but even without such consent, the public prosecutor, under certain circumstances, is allowed to implement this measure. The victim does not have a right to appeal and cannot initiate criminal prosecution if the suspect fulfills his/her obligations. All the victim can do is initiate civil litigation for compensation of damages, if said damages have not been fully compensated via the obligations that the offender has fulfilled.

2.1.2 Juvenile criminal justice

In recent years there has been a dramatic growth in alternative responses to criminal offending, and one form of that alternative response is the use of mediation and restorative approaches, which have emerged as important innovations and have come to exert an increasingly strong influence in criminal justice systems across Europe.[13] The juvenile public prosecutor (JPP)[14] is the only authorized prosecuting agent in juvenile justice procedures. This implies that, contrary to adult offenders, victims cannot bring a charge as a private or subsidiary prosecutor. Rather, victims can only ask the JPP to initiate procee-

13 *Doak/O'Mahony* 2010, p. 1,691.

14 These are specialised public prosecutors who have acquired special skills in the field of children's rights and juvenile delinquency.

dings. If the JPP refuses that, the victim can demand a review of that decision by the juveniles' court.

The principle of opportunity (non-mandatory prosecution) is more widely used in the juvenile criminal procedure.[15] Therefore, the JPP may decide not to instigate proceedings against a juvenile in the following cases:

1) Regarding offences punishable with a fine or up to five years of imprisonment, the JPP may decide not to initiate the procedure, taking into consideration following circumstances:
   a) The nature of the criminal offence;
   b) the circumstances under which a criminal offence has been committed;
   c) previous living conditions of juvenile offenders;
   d) personal characteristics of the juvenile (Art. 58, § 1). In order to verify these circumstances, the JPP may request information from the juvenile's parents or guardians and other persons and institutions. He/she can also ask for the guardianship authorities' (social workers) opinion about the appropriateness of further prosecution, or – following agreement with the guardianship authority – may refer the juvenile to a youth home or an educational institution for up to thirty days (Art. 58, § 2);

2) When a juvenile is already serving a penalty or an educational measure, the JPP may decide not to press charges for another criminal offence committed by the juvenile, if, due to the gravity of such new offence and the sentence or educational measure being served, conducting proceedings and pronouncing a criminal sanction for that new offence would serve no purpose (Art. 58, § 3).

Juvenile Justice Law regulates so-called "diversion orders", that could be considered as one kind of restorative measure. Diversion orders could be implemented during both the pre-trial and the court procedure. In the pre-trial procedure, the JPP is responsible for making decisions concerning diversion orders, and he/she can condition non-prosecution on fulfilment of that order. According to the Juvenile Justice Law, the juvenile public prosecutor may base the decision not to prosecute (on the) readiness of the juvenile to accept and comply with one or more diversion orders (Art. 62, § 1). In selecting particular diversion orders, the JPP shall have particular regard to their congruence with the character of the juvenile and the circumstances in which s/he is living, taking into account his/her readiness to co-operate in their implementation (Art. 62, § 2). The enforcement of a diversion order implying settlement with the injured party requires the prior agreement from the said party as a special condition (Art. 62, § 3). Diversion orders include:

15 For more see *Škulić* 2011a.

- settlement with the injured party, so that by compensating the damages, making an apology, working or otherwise, the detrimental consequences can be alleviated either in full or partly;
- regular attendance of classes or work;
- engagement, without remuneration, in the work of humanitarian organisations or community work (welfare, local or environmental);
- Undergoing relevant check-ups and drug and alcohol treatment programmes;
- Participation in individual or group therapy at a suitable health institution or counselling centre.

In selecting particular diversion orders, the juvenile public prosecutor shall have regard for their suitability for the character of the juvenile and his/her living circumstances, while taking into account his/her readiness to co-operate in their implementation (Art. 62, § 2). Furthermore, the enforcement of diversion orders involving victim participation requires the agreement of the latter as a special condition (Art. 62, § 3). It means that agreement of the injured party is necessary only for the enforcement of diversion orders that imply settlement with the victim through compensation, apology, work or otherwise. If the juvenile fully complies with the imposed diversion order, the juvenile public prosecutor shall drop all charges and/or dismiss the motion of the injured party to instigate the proceedings (Art. 62, § 4). The juvenile public prosecutor can also reject charges and/or motions of the injured party if the juvenile complies only partially with his/her conditions, when he/she feels it would not be pertinent to instigate further proceedings, due to:

1) The nature of the criminal offence and the circumstances of its commission,
2) the previous living circumstances of the juvenile, his/her personal character, and
3) reasons for failure to fully comply with the accepted ordered recommendation (Art. 62, § 5). On the other hand, if the juvenile fails to comply with the imposed diversion orders, or only complies to a degree that justifies further proceedings, the juvenile public prosecutor files a motion with the juvenile judge of the competent court to initiate preparatory proceedings (Art. 62, § 6).

Where the juvenile public prosecutor decides to conditionally discharge the juvenile, he/she shall notify the injured party that the criminal charges and/or the motion of the injured party, who shall not be entitled to request the initiation of the proceedings, have been rejected (Article 62, § 7). If a juvenile has made full restitution of the damages resulting from the criminal offence, the injured party shall not be entitled to exercise property claims, and where damages have been

compensated only in part, the victim can exercise his/her property claims in civil proceedings (Art. 62, § 8).[16]

In general, diversion (especially such involving a restorative approach) in Serbian juvenile justice is implemented according to the following principles: "1) Diversion is a meaningful and effective response (particularly) to juvenile first and second-time episodic offenders, 2) diversion by non-intervention should be given priority in most of these cases, 3) diversion combined with restorative or educational measures is sufficient in many of the more serious cases, and 4) juvenile court disposition should be reserved for persistent and/or more serious offenders."[17]

2.2 Court level

2.2.1 Adult offenders

When the case comes before the court, the application of restorative measures lies solely in the hands of the judge. The parties' initiative is an important factor in cases of mediation. Before we take a closer look at the available restorative measures, it is necessary to make some basic comments about the Serbian system of criminal justice, in order to boost our understanding of central restorative justice issues and their implementation in Serbia. Criminal offences prescribed by the Serbian Criminal Code are divided into:

a) "*Official crimes*"-prosecution is in the hands of the public prosecutor. The vast majority, about 95% of all criminal offences, belong to this group. The public prosecutor, as a representative of the State who is obliged by the principle of mandatory prosecution, is primarily responsible for their prosecution. If the public prosecutor does not initiate prosecution, or dismisses it, the injured party could "step into his shoes" and become prosecutor. In such cases, the victim is referred to as the "subsidiary prosecutor". The principle of mandatory prosecution does not apply to the victim, which means that he/she can freely decide whether or not to take over the prosecution.

b) "*Private offences*"-prosecution is solely in the hands of the victim, who assumes the role of "private prosecutor". This category predominantly includes minor offences like minor bodily harm, minor theft, insults, defamation etc. that endanger private interests, but not the general public. Therefore, injured party (victim) freely decides about initiating criminal prosecution by submitting a private charge. Logically, this category of crimes leaves more space for various restorative measures, and victim-offender mediation and reconciliation hearings are applicable only to this category of crimes.

16 See *Škulić* 2011, pp. 100 f.

17 *Dünkel/Pruin/Grzywa* 2011, p. 1,682.

Regarding procedural guarantees, general provisions related to defence council and attorney also apply here. This means that the victim or injured party is allowed to engage legal attorney in any case, regardless of whether the dispute is resolved via restorative measures or in regular criminal proceedings. The same applies to the accused. He/she is free to choose whether he/she wants legal counsel, except in the cases of mandatory defence stated earlier. In 2009, one further case in which defence is mandatory was introduced, the "plea-bargaining procedure". During such plea-bargaining before the judge, an accused must be represented by defence counsel.

Restorative measures available at the court level are victim-offender mediation, reconciliation hearings and restitution orders. Since 2009, conditional dismissal of criminal prosecution, as already described in *Section 2.1* above, has also been possible up to the end of the main hearing Finally, "plea bargaining" entails some specific restorative elements.

Victim-offender mediation and reconciliation hearings are available only for "private offences". These crimes are usually minor, but the Criminal Code explicitly restricts mediation to crimes punishable by up three years of imprisonment or a fine. The law stipulates no other formal requirements, for instance in terms of offender age, prior convictions, confessions etc.

Victim-offender mediation is prescribed by the Criminal Code (Art. 59), according to which the court may acquit an offender of a crime punishable by up to three years of imprisonment or a fine, if the offender meets all obligations arising from the agreement reached with the injured party.[18] The mediation procedure is regulated by the Law on Mediation that relates to the all kinds of disputes – civil, commercial, administrative and criminal. Regarding criminal cases, mediation is possible only "in disputes in which the parties act freely" (Art. 1), indirectly implying "private offences". The principle of mandatory prosecution does not allow to the public prosecutor to "act freely" with the charge.

The Code of Criminal Procedure regulates *reconciliation hearings* (Art. 447), a special form of mediation before the trial-judge. This procedure is possible only for private offences, regardless of the prescribed punishment. *Ratio legis* of this measure is based on the *ultima ratio* character of the criminal law. Therefore, in cases of private offences, instead of the regular criminal trial, the court can initiate reconciliation of the parties. Where reconciliation is achieved, the private charge is withdrawn and the court passes a judgement of rejection. If the reconciliation is unsuccessful, the ordinary procedure will continue to the main hearing. The outcome of successful reconciliation could result in compensation of damages, monetary compensation, etc., and is entirely dependent on the parties and on what they have agreed.

Another restorative measure that has traditionally formed the part of the Serbian criminal procedure is the *restitution claim*. The court is obliged to notify

18 *Stojanović* 2011, pp. 97 f.

an injured party about his/her right to file a claim for restitution. This claim may relate to the compensation of damage, the returning of objects or the annulment of a certain legal transaction, and may be submitted until the end of the main hearing. The court will then decide about the restitution claim in its judgment. In this regard, courts have the following options:

- If the offender is found guilty, the court can either order the offender to fulfil the restitution claim, or refer the injured person to file the claim in civil litigation.
- Where an offender is found "not guilty", the court refers the injured person to file the claim in civil litigation.

Therefore, a criminal court cannot refuse or turn down the claim for restitution. It always either imposes a restitution order on the offender, or refers the injured party to civil litigation.

In 2009, the common-law institute of *plea-bargaining* was introduced.[19] Although plea-bargaining as such cannot be regarded as a restorative measure or process, the particular position that the injured person has in this procedure justifies its analysis in this context. The main actors of plea-negotiations are the defendant (and his/her defence council) and the prosecutor, but the plea-agreement has to be confirmed by the court in order to take legal effect. The judge decides about the agreement in a special hearing to which the injured party is also invited. In making its decision, the judge is obliged, according to explicit CPC provision, to evaluate, among other factors, whether the agreement poses a threat to the rights of the injured party. If this is the case, the judge has to reject the agreement. One more particular feature of the Serbian plea bargaining is the possibility to appeal a decision relating to the plea-agreement. After examining the agreement, the judge decides either to adopt or to refuse it. If the judge refuses the agreement, the parties (public prosecutor and defendant) can appeal that decision. Contrary, if the judge adopts the agreement, the injured party can appeal. Final verdict can be brought only after the decision to adopt agreement becomes final. Restorative elements in plea-bargaining can be found in the possibility to include some of the obligations that are related to conditional dismissal of criminal prosecution described in *Section 2.1* above (social or humanitarian work, etc.).

2.2.2 Juvenile offenders

First instance proceedings against juveniles are conducted before a juvenile judge and juvenile court bench of the District Court. The juvenile bench in the first instance court shall comprise a juvenile judge and two lay judges, one male

19 See *Bajović* 2009, pp. 37 f.

and one female. The juvenile court bench is presided over by the same juvenile judge as the one responsible for leading the preparatory proceedings of the case.

The juvenile judge of the first instance court conducts preparatory proceedings and performs other tasks in juvenile proceedings. The juvenile bench of the higher court – comprised of three judges – shall have second instance jurisdiction. The juvenile bench in first instance of the higher court consists of two judges and three lay judges. Juvenile judges and juvenile bench judges must be persons who have acquired special qualifications in the field of children's rights and juvenile delinquency. Lay judges are elected from the ranks of teachers, professors, educators and other qualified persons experienced in working with children and youth.

Diversion orders can also be used at the court level, where they are ordered by the juvenile judge rather than by the prosecutor. The public prosecutor can propose to the judge to dismiss the procedure and to impose one or more diversion orders instead. If the judge disagrees, the juvenile bench makes the final decision. The judge will determine one or more diversion orders, taking into account the juvenile's personality, living-conditions and willingness to cooperate. The Guardianship Authority (that is the social service) supervises the execution of diversion orders. If a juvenile fulfills his/her obligations, either fully or in part in certain circumstances, the procedure will be dismissed. Otherwise, the procedure will continue.

The Juvenile Justice Act also provides "special obligations" as a form of alternative sanctioning, with strong restorative elements. In accordance with Article 14 of the Juvenile Justice Act, the Court may order one or more alternative sanctioning measures if, according to the court's assessment, relevant demands or bans are necessary to influence the juvenile and his/her behaviour.

The Court may order the juvenile:

1. to apologise to the injured party; to compensate for the damages caused, within his/her personal capacity;
2. to regularly attend classes and work;
3. to qualify for an occupation commensurate with his abilities and talents; to participate, without remuneration, in the work of humanitarian organizations or perform community work of social, local or environmental character;
4. to be involved in particular sports activities;
5. to undergo relevant check-ups and drug and alcohol treatment programmes;
6. to participate in individual or group therapy in relevant institutions or counselling centres and to act in accordance with work programmes created for him/her in these institutions;
7. to attend vocational training classes or to prepare for exams in a designated field of study;

8. not to leave his/her place of permanent or temporary residence unless the Guardianship Authority or the court grants him/her special permission to leave.

When selecting particular alternative sanctions, the court shall particularly take into consideration that they suit the character of the juvenile and his/her living circumstances, and the likelihood to which he/she will be ready and willing to co-operate in their achievement.

Some types of alternative sanctioning are time-limited. "Qualifying for an occupation commensurate with his abilities and talents", "participation, without remuneration, in the work of humanitarian organizations or performing community work of social, local or environmental character", "being involved in particular sports activities", "participating in individual or group therapy in relevant institutions or counselling centres, acting in accordance with work programmes created for him in these institutions" and "attending vocational training classes" or "preparation for the exams in a designated field of study" and "prohibition to leave his/her place of permanent or temporary residence unless guardianship authority or the Court grants him special permission to leave" may be ordered for a duration of up to one year, with the proviso that while in force, the court may vary or suspend their enforcement.

Regarding the first measure (compensation to the victim), the court shall determine the amount and manner of compensation that the juvenile shall provide through work where such course of action is chosen. The amount of work in such cases may not exceed 60 hours over three months, and is to be served in such a fashion that will not interfere with schooling or employment.

2.3 Restorative Justice while serving prison sentences

Serbian law on the execution of criminal sanctions does not provide any elements of RJ in the context of serving prison sentences. Prisons are still considered strongly retributive institutions, in which traditional retributive approaches to conflict resolution are applied. There are merely local manifestations of RJ in juvenile correctional institutions that serve as experimental elements of pedagogic practice. However, to date no detailed evaluations or data have been published that could give some insight into such localized practices.

3. Organizational structures, restorative procedures and delivery

3.1 Conditional dismissal of criminal prosecution

"Conditional dismissal of criminal prosecution" (Art. 236) had initially only been possible for offences punishable by a fine or imprisonment for up to three

years. In 2009, it was broadened to cover all offences with a statutory minimum sentence of less than five years of imprisonment. In practice, these offences comprise the great majority of cases reported to the police. The focus is on the agreement between public prosecutor and the suspected person, where the public prosecutor obliges not to initiate criminal prosecution, if the suspect fulfills certain obligation.

Concerning the procedure for application of this measure, there is a difference between two categories of minor offences. The first are offences punishable by a fine or imprisonment for up to three years (category I), while the second are the offences punishable with imprisonment for between three and five years (category II).

Application of this measure for category I offences is exclusively in the hands of the public prosecutor and depends on his/her evaluation of all facts and personal circumstances of the suspected person. The public prosecution is obliged, before he/she brings the charge, to examine possibilities for implementation for this measure and shall make an official report about that. During the evaluation, he/she can speak with the suspect, the victim and other persons and collect other necessary data, in order to determine whether such course of action is justified and appropriate.

Regarding category II offences, agreement of the court is a necessary precondition for conditional dismissal of criminal prosecution.

In any case, the procedure is initiated by the public prosecutor. Obligations that could be imposed are:

- Restitution of the damage to the victim or correction of the harmful effects of the crime;
- payment to a charitable cause (to humanitarian organizations, funds or public institutions);
- performing community service or charity work;
- paying alimony owed;
- alcohol or drug treatment;
- psychological therapy;
- fulfilment of an obligation or observing a measures imposed via final court decision;
- taking driving classes or some similar course.

The first obligation (restitution of the damage to the victim or correction of the harmful effects of the crime) is restorative by nature, since it is in the interest of the victim and seeks to achieve the reparation of harm. Consent of the victim is only required in cases of obligations related to charity payments or charity work, while in the other cases agreement from the victim is not explicitly prescribed as a condition for a measure to be implemented. Even if the victim does not agree with the above mentioned charity-obligations, the prosecutor can ask the court to approve them under the following conditions:

a) The damage has been compensated in full to the victim,
b) the victim, for obviously malicious reasons, does not agree with the charity-related obligations,
c) the public prosecutor finds such obligations suitable for the specific case. This possibility was introduced in 2009 with the purpose of preventing victims from abusing the procedure on unfounded, malicious grounds. However, in practice, the prosecutor will always have regard to the interests and fair satisfaction of the victim.

Initially, this measure had been limited to the pre-criminal procedure, which means that it could only be implemented before initiation of criminal prosecution. In 2009, it was broadened to all stages of the criminal process. Therefore, conditional dismissal of the charge is possible up until the end of the main hearing, but in later stages (when the case has already come before the court) agreement of the court is always required, regardless of the level of punishment prescribed for the offence.

In any case, the coordination of the process is always in the hands of the public prosecutor, regardless of the stage of the procedure. He/she imposes the obligations supervises its execution. The defendant is obliged to fulfil the obligation within up to six months. The further course of the criminal procedure depends on whether the obligations are fulfilled, and on the stage of the procedure at which the measure is ordered.

In the pre-criminal procedure, as mentioned above, if the suspect fulfills all imposed duties within the prescribed time-limit, the prosecutor will reject the criminal report and criminal procedure will not start at all. Otherwise, the prosecutor will bring the charge. In the later stages, in the case of successful fulfilment, the public prosecutor will dismiss the charge and the court will pass the decision of "dismissal of the procedure" or, if the main hearing had already started, reject judgment. If the defendant does not perform the imposed duties, the criminal procedure will continue as normal. Regardless of the stage at which the measure is implemented, the injured party cannot continue the procedure as "subsidiary prosecutor" if the accused successfully fulfills the imposed obligations.

3.1.1 Diversion orders (juvenile offenders)

Diversion orders can be applied under certain conditions, depending on the stage of the proceedings, by either the competent juvenile public prosecutor or by a juvenile judge, before the proceedings against a juvenile have been opened or in the course of the proceedings. The purpose of diversion orders is the avoidance of formal criminal proceedings or, where proceedings have already been instigated, to dismiss the case i. e. to "divert" it. Diversion orders, one or more, may be applied to a juvenile offender for criminal offences punishable by fines or imprisonment of up to five years as prescribed by the law (Art. 5 of the Law

on Juveniles).[20] Serbian legislation allows an extensive application of diversion orders by this provision, which is optional, because not only may "petty" criminal offences fall under this provision, but also those falling under "medium criminality".

In order to apply diversion orders, it is necessary that requirements relating to a juvenile are met, which could be referred to as requirements of subjective nature. The juvenile should have pleaded guilty to the crime, but his/her approach to the offence as well as to the injured party is also of importance. The offender's approach to or stance towards the injured party is particularly significant, because victims have been receiving growing attention in modern criminal law.

Diversion orders can only be applied to juveniles aged between fourteen and eighteen years, but not in other cases, e. g. when adults are put on trial for criminal offences committed when they were juveniles, or young adults.

Diversion orders include:

- settlement with the injured party, so that by compensating the damages, making an apology, working or otherwise, the detrimental consequences can be alleviated either in full or partly;
- regular attendance of classes or work;
- engagement, without remuneration, in the work of humanitarian organisations or community work (welfare, local or environmental);
- undergoing relevant check-ups and drug and alcohol treatment programmes;
- participation in individual or group therapy at a suitable health institution or counselling centre (Art. 7).

At the time of selecting a diversion order, two equally important requirements will be taken into consideration: the interests of the juvenile criminal offender on the one hand, and the interests of the injured party (the victim) on the other. The victim has been receiving increased attention in modern juvenile criminal law. Settlement with the injured party is found today in a number of European and overseas legal systems, and many authors find that it is the most valuable alternative to the repressive sanctions under the criminal law.[21]

As far as juveniles are concerned, an additional criterion must be taken into account – not to allow the application of some diversion order to impede their schooling or their employment (if employed).

A diversion order may not exceed six months, but the competent authority shall not specify the exact duration when passing a decision (Art. 8, § 2). This body is authorized to substitute the diversion order being exercised at the time with another because they find that the other will better serve the purpose, or to

20 For simplicity, hereinafter all Articles for which no legal source is stated are contained in the Law on Juveniles.

21 *Perić* 2005, p. 30.

revoke it during the said period if the purpose had already been served, i. e. if the juvenile complied with the diversion order he/she had taken on.

In selecting a diversion order and its application, the competent juvenile state prosecutor or juvenile judge should consult some persons (the juvenile's parents, adoptive parent, guardian), i. e. some competent authority (guardianship authority) and pass joint decisions resulting from cooperation with these subjects. The role of these persons, i. e. the guardianship authority, is consultative. Their possible disagreement, therefore, will not have any impact on the decision passed by the competent authority. The competent authority will pass a decision within an informal procedure, thus avoiding the traumatic effects of the criminal proceedings (Art. 8, § 3).

3.2 Victim-offender mediation

Victim-offender mediation was introduced by the Criminal Code of 2005, and is further regulated in the Law on Mediation that was passed one year later. Participants in the mediation procedure are the mediator and the parties (offenders, and victims who are private prosecutors, i. e. complainants). If the parties have legal representatives, they are also allowed to participate. The mediation procedure is not public, and other interested persons can be present only if the parties so agree. All information, proposals and statements given during mediation are confidential and cannot be used in any trial procedure.

Mediation is conducted by an impartial arbiter or mediator, who is nominated by the president of the court and must fulfil the legislative conditions to be a mediator. The parties are free to choose a mediator from the list of approved mediators, but if the parties cannot agree on a mediator, he/she will be selected by the president of the court. The mediator could be a judge, lawyer or another expert for a certain field, depending on the matter of the dispute. Mediators must fulfil the following requirements by law:

1. University degree;
2. Minimum five years of relevant work experience in dispute and conflict resolution;
3. Passed the training programme for mediators, offered by the Judicial Academy of the Republic of Serbia and the National Centre for Mediation;
4. Must be registered in the official list of mediators (there are no official data on the number of mediators in Serbia);
5. Not currently under criminal investigation and no criminal record;
6. Possess integrity for performing the mediation role.

Exceptionally, a mediator may be also a person not fulfilling all the conditions under 1.-4. above, if he/she has special experience and knowledge in the field of mediation.

A mediator cannot be a trial judge in the concrete or some other dispute of the same party, the person who acts or has acted on behalf on the parties in other disputes, or a lawyer representing or having represented the parties in the procedure.

The Minister of Justice specifies the mediators' training programme. The Law does not provide any particular time limit within which mediation should be concluded, providing only that it shall be conducted and concluded "without unnecessary delay".

The procedure of mediation is left to the agreement of the parties. Otherwise, the mediator will conduct the procedure under conditions he/she deems suitable for the concrete case. The mediator may propose possible options for the settlement of the dispute, but shall not propose the final settlement solution.

If the mediation procedure results in agreement of the parties, the private prosecutor (i. e. the victim who in a complainant's crime is prosecuting the case) will withdraw his/her private charge, which immediately results in dismissal of the criminal procedure. If the mediation procedure does not succeed, the regular criminal procedure will continue.

The parties' agreement is also crucial for covering the costs of mediation. The basic rule is that each of the parties shall bear their own expenses and share the mediator's expenses in equal parts, unless otherwise stated in the agreement. If the mediation process is not successful (i. e. no agreement is reached between the parties), the cost rules depend on the stage of criminal procedure when mediation was initiated. In the case of mediation before the criminal procedure, the rule is that each of the parties shall bear their own expenses and share the mediator's expenses in equal parts. If the criminal procedure had already begun, unsuccessful mediation means that the regular procedure will continue, and the costs of mediation are included in the costs of the criminal procedure. In that case, the judge will decide about all costs in the final verdict.

"Victim-offender settlement" between the juvenile perpetrator and the injured party is provided as a type of diversion order (Art. 7, § 1). Such a mechanism had not existed in our legislation thus far. Settlement has previously not been exercised fully in practice due to a lack of appropriate by-laws, and our court practice seems relatively conservative, too. Now, proper by-laws have been developed, and a proposal of the Law on Amendments and Additions to the Law on Juveniles is underway, which would allow a broader application of the settlement solution. The proposal of the Law on Amendments to the Law on Juveniles also introduces the required elements of a separate mediation procedure aimed at completion of the settlement between juvenile offenders and the injured parties, which will create conditions for the settlement between juvenile offenders and the injured parties to be fully exercised in practice.

3.3 Reconciliation hearing (adults)

The Code of Criminal Procedure regulates *reconciliation hearings* (Art. 447), a special form of mediation before the trial-judge. After reception of the private charge, and before a main hearing, the trial judge can invite the parties to a special hearing. The purpose of this hearing is to clarify the dispute and to try to achieve a peaceful resolution thereof. Here, the trial judge acts as mediator, trying to support the parties in finding a mutually acceptable solution. If the private prosecutor (victim) does not attend this hearing, the judge will dismiss the case, presuming that the private prosecutor has dismissed the charge since he is not interesting in his own case. If the defendant fails to appear, he/she risks being condemned *in absentia*. In summary procedure, namely, the trial judge can hold the main hearing *in absentia* of the defendant under the following conditions: a) he/she was invited to the main hearing, but failed to appear; b) his/her presence is not necessary, c) he/she has already been heard. According to CPC Art. 447 para. 4, the main hearing can be immediately held if the reconciliation hearing is unsuccessful, and there is no need to collect further evidence. Therefore, if the defendant does not appear to the reconciliation hearing, there is a possibility that he/she will be sentenced *in absentia*.

The desired result of reconciliation hearings is mutual agreement between the parties and the withdrawal of the private charge. In that case, the costs of the procedure are also the matter of agreement. If reconciliation fails, the regular procedure will continue with evidentiary proposals and ordering of the main hearing, with the possibility of it being opening immediately.

4. Research, evaluation and experiences with Restorative Justice

Despite the fact that reconciliation hearings were introduced into Serbian law a long time ago, it is rarely used in practice. The same applies to the more recently introduced victim-offender mediation. One of the reasons could be the fact that these restorative measures are limited to privately prosecuted crimes (complainant's crimes), and it is difficult to convince the victim, who has already decided to bring the criminal charge, to resort to some peaceful, restorative solution. Bearing in mind the very low implementation of these measures in practice, no statistical research into them has been conducted to date. According to data from the Public Prosecutor's Office, cases are conditionally dismissed (which includes the restitution order, community service etc.) in only about 5% of the cases in which it would be possible in accordance with the Code of Criminal Procedure (i. e. when the criminal offence is punishable with up to 5 years of imprisonment). The number of reconciliation hearings is very low in practice, because it

is possible only for a very small number of criminal offences, i. e. only for the private charge offences.

The Serbian Public Prosecutors' Society recently conducted research into "conditional dismissal of criminal prosecution". As should have become evident from what has been stated in the course of this article, this measure cannot be considered a typically restorative measure, since participation and consent of the victim are not always necessary for its implementation. Restorative elements are strong only in cases when the public prosecutor obliges the suspect to compensate the damage to the victim, or to correct harmful effects of the crime. Therefore, in this study, we will present statistical data regarding this obligation.

The study by the Public Prosecutors Society is based on 337 cases randomly selected from eight prosecutor's offices. According to these data, prosecutors most frequently impose the obligation of "payment to humanitarian purposes" (in 63.5% of cases), while "compensation to the victim" was required in 23.7% of the cases. In 5% of cases the offender was required to pay alimony owed. It is interesting to note that these three measures, that make up 92.2% of all implemented measures, are proprietary by nature, since they all imply certain payments. The reason for that could lie in the fact that these measures are deemed most suitable to offenders in terms their ability or willingness to execute them.

Although the law does not explicitly reserve this institute to persons without criminal records, prosecutors in practice are mostly focused on them. Thus, 85% of cases of "conditional dismissal of criminal prosecution" involved first-time offenders.

Regarding offenders' gender, 83% of the cases covered in the study involved males, 17% of offenders were female. According to statistical data, males commit 90% of all registered crime. Comparison of these data shows that conditional dismissal is more often implemented against female offenders, which could in part also be due to the fact that their offending tends to be less serious overall.

48% of offenders against whom the measure was applied were employed, 12% were unemployed, and for the remaining 40% no data were available.

Concerning criminal offences committed, the data are as follows: dangerous driving (30%), stealing electricity (15%), family violence (8%), non-payment of alimony (6%), minor bodily harm (4%), illegal drug possession (3%), theft (3%), threat to safety (12%).

In practice, the measure was mostly initiated by the prosecutor (83.8%) of cases, while the suspect or his/her defence council initiated it in 10.6%. For the rest of the cases no data are available.

As already noted above, consent of the victim is required in cases in which the offender is required to make a payment to a charitable cause or to perform humanitarian work. In such cases, public prosecutor has a duty to contact the injured party and to ask for his/her consent. According to data, victims agreed to this measure in 82.2% of cases. It was denied in 4.5% of cases, and for the

remaining 13.3% no data were provided. The reasons why victims denied their agreement vary, but what seems to prevail is their subjective opinion that conditional dismissal is not in the interest of justice, and that the offender deserves to be punished in the regular criminal procedure. In any case, the public prosecutor has to inform the victim about the possibility to ask for compensation in civil litigation. If the public prosecutor finds that the victim's denial is not justified, and the damage has been fully compensated, he/she can ask the court for permission to implement this measure without the victim's consent. Such permission was requested in 14.6% of cases.

According to the research, the main drawbacks of conditional dismissal of criminal prosecution are:

a) Lack of judicial control- judicial control of this institute is undermined, since the victim is not allowed to undertake criminal prosecution as subsidiary prosecutor in the case if the suspect fulfills the measure and the public prosecutor, therefore, dismisses criminal prosecution. This problem applies to offences punishable by up to three years of imprisonment, while offences facing three to five years require judicial approval.
b) Lack of guidelines and precise criteria for public prosecutors regarding the implementation of this measure. The discretionary power of public prosecutors implies a certain freedom in evaluating if conditional dismissal is suitable for a particular case. This evaluation needs to be objective, fair and transparent in order to ensure public confidence in the judicial system. Detailed guideline criteria are required in order to prevent arbitrariness and misuse by public prosecutors and avoid unequal implementation of the principle of opportunity.
c) Unequal judicial practice – incomplete and imprecise legal regulation leads to different levels of use of this measure in practice and to different forms of implementing it, which could result in inequality before law and loss of the trust in the judiciary. The fact that the measure of "charity payment" is the most applied in practice resulted in the public prejudice that conditional dismissal is only a "privilege of the rich".
d) Position of the victim – contrary to the some comparative legal provisions throughout Europe that require agreement of the victim in all cases of conditional dismissal, in Serbian law his/her agreement is required only exceptionally, and even then it is not an absolutely necessary precondition. Even worse, the new CPC (2011, not yet in force at the time of writing) does not require the victim's agreement at all. There are no studies about recidivism, i. e. re-offending rates following mediation, or levels of participant satisfaction with mediation and the perceptions of criminal justice. There have, likewise, been no official cost-analyses, but even without that, it is clear that the costs of mediation are far lower than those caused by a classical criminal procedure.

5. Summary and outlook

Implementing restorative justice ideas in Serbia more widely and broadly would certainly be very beneficial not only for victims and offenders, but for the legal system and society as a whole. Through restorative measures, victims receive adequate satisfaction, while offenders avoid classical retributive criminal sanctions and at the same time can assume responsibility for their offence. General society also has an interest in a wider implementation of restorative measures, since they create a better "climate" and improve dialogue and relations between victims and offenders which reduces recidivism-risk. The legal system also "wins", as restorative justice is more effective, quicker and cheaper than classical retributive proceedings, bearing in mind that personnel and technical potentials are more rationally used.

Serbia has an adequate normative framework for implementing the restorative justice concept, especially in cases of minor crimes and juvenile offenders. The problem underlying the insufficient use of restorative possibilities lies in criminal justice practice. One of the reasons is that it can be difficult to alter or change ingrained habits and ways of thinking, a problem that is further exacerbated by a lack of precision in certain legal provisions. For example, the Law on Juvenile Justice prescribes that some measures will be more closely specified by regulations, but the competent authorities (Ministerial departments) have still not passed them. Therefore, there is a good excuse to choose not to use restorative measures. However, there are implications that this will be changed in the near future, since an apparent political will does seem to exist.

Judges, prosecutors and other legal actors are usually open to a wider implementation and use of restorative measures, but at the same time call attention to the problems they face. The mediation procedure, for example, is not regulated precisely. "Conditional dismissal of criminal prosecution", which can imply compensation to the victim, is sometimes considered in the public as favouring offenders. Therefore, this mechanism is very cautiously and rarely used in practice in cases of violent crimes.

Juvenile justice law also provides adequate normative possibilities for restorative ideas that are still insufficiently used in practice. According to juvenile judges and prosecutors, the basic problem is a lack of adequate administrative regulations, i. e. supplements to legal rules. This problem certainly exists, but is not crucial, bearing in mind that some juvenile courts and prosecutor's offices have nonetheless successfully implemented restorative measures for juveniles without supplementary regulation. However, the future looks more promising, since amendments and changes to the Juvenile Justice Act are currently under development. The purpose of these novelties will be to fill some "legislative holes" primarily in the procedure of executing restorative measures that will enable them to be used more broadly in practice.

Serbian judiciary reform, as mentioned above, is fraught with many problems, but the general intention is to make criminal procedures faster and more efficient. It raises hope that a more convenient context will be created that is open to the implementation of restorative ideas.

Restorative justice certainly has a future in Serbia. The traditional system of Serbian criminal justice pays adequate attention to the interest of the victims and their protection, and there is a tendency that new procedural forms will contribute not only to a more efficient criminal procedure, but also to the reconciliation of the interests between victim and offender whenever possible. Thus, it should be expected in the forthcoming years, especially after adoption of some legislative amendments (Juvenile Justice Law, for example), that ideas of restorative justice will be used in Serbia much more widely than is the case today.

References:

Bajović, V. (2009): Agreement on Confession of Guilt, Faculty of Law, University of Belgrade, Belgrade.

Bazemore, G., Schiff, M. (2005): Juvenile Justice Reform and Restorative Justice – Building theory and policy from practice, Devon: Willan Publishing.

Doak, J., O`Mahony, D. (2011): Developing mediation and restorative justice for young offenders across Europe. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments. 2nd ed., Mönchengladbach: Forum Verlag Godesberg, pp. 1691-1720.

Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (2011) (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments, 2nd ed., Mönchengladbach: Forum Verlag Godesberg.

Dünkel, F., Pruin, I., Grzywa, J. (2011): Sanctions systems and trends in the development of sentencing practice. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments. 2nd ed., Mönchengladbach: Forum Verlag Godesberg, pp. 1623-1690.

Etinski, R. (2010): International Public Law, «Službeni glasnik» and Faculty of Law. University of Novi Sad, Belgrade.

Goldson, B. (Ed.) (2008): Dictionary of Youth Justice. Collumpton: Willan Publishing.

Perić, O. (2005): Commentary of the Code about Juvenile Perpetrators and Criminal Law Protection of Juveniles, „Službeni glasnik“, Belgrade.

Stojanović, Z. (2011): Criminal Law – General Part, "Pravna knjiga", Belgrade.

Stojanović, Z. (2012): International Criminal Law, "Pravna knjiga", Belgrade.

Škulić, M. (2007): Commentary of Criminal Procedure Code, «Službeni glasnik», Belgrade.

Škulić, M. (2011): Commentary of Criminal Procedure Code, «Službeni glasnik» and Faculty of Law. Belgrade: University of Belgrade.

Škulić, M. (2011a): Serbia. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments. 2nd ed., Mönchengladbach: Forum Verlag Godesberg, pp. 1195-1244.

Škulić, M. (2013)*:* Criminal Procedure Law, «Službeni glasnik» and Faculty of Law. Belgrade: University of Belgrade.

Walgrave, L. (2008): Restorative Justice, Self Interest and Responsible Citizenship. Collumpton: Willan Publishing.

Slovakia

Miroslava Vráblová

1. Origins, aims and theoretical background of restorative justice in Slovakia

Nowadays, traditional criminal policy is facing its limits and is unable to cope with rising criminality. Current criminal justice based on repressive approaches is unable to face up to serious obstacles and problems, most particularly in terms of the efficiency of punishment, the poor protection of victims, slow procedures and overburdened criminal courts. New models of criminal judiciary based on principles of restorative justice have been unveiled while traditional systems of criminal justice are facing a serious crisis.

The concept of restorative justice is one of the most modern and progressive current approaches to criminal law that deserves to be implemented into the Slovakian criminal justice system. The main foundation of restorative justice is the conviction that a criminal offence itself does not only imply a breach of the Criminal Code (legal provisions), but is also synonymous for social conflict between individuals and an invisible breach of social and interpersonal relationships. Because of this, we think the conflict should be resolved on an elementary level of interpersonal relationships with the aim of restoring damaged social relations and compensating damages or other harms suffered. Nevertheless, it will hardly ever be possible to repair damaged social relationships fully, so instead of repression we should focus on preventing criminality and on protecting victims. The main goals of restorative justice are to decrease the number of those incarcerated, crime prevention and to motivate offenders to repair or compensate damages, refrain from reoffending and live in a socially responsible way. We should protect society against criminality with special attention to victim's rights.

Criminal justice in the Slovak Republic is based on traditional continental criminal procedure. Both substantive as well as procedural criminal law are more or less rigid and there is little discretionary space for the judges, attorneys-

general, prosecutors and police officers to independently determine the best practices to cope with criminality while at the same time protecting the interests of victims, offenders and the general public. Modern features of restorative justice in the Slovak criminal judiciary are appearing and it could be the way out of the criminal justice crisis in Slovakia.

1.1 Overview of forms of restorative justice in the criminal justice system

The main reforms of the Slovak criminal procedure were implemented in 2005 during the process of re-codifying Slovak criminal law. Some restorative measures and concepts came into effect on 1 January 2006, when Criminal Code No. 300/2005 Coll. and Code of Criminal Procedure No. 301/2005 Coll. came into effect, as well as act No. 215/2006 Coll. on Compensation to Victims of Violent Criminal Offences, and the Probation and Mediation Officers Act No. 550/2003 Coll. which had come into force a few years earlier.

First of all, the criminal procedure was amended in that the position of victims and other injured persons was strengthened by providing them with better possibilities to claim damages. There is another progressive move: an effort to allow victims and other injured persons to take part in the criminal proceedings in order to ensure quick and satisfactory claim of damages (using so-called "diversions"). Finally, some modern informal processes have been implemented, e. g. conditional discharge, reconciliation and agreement of guilt and sentence (Arbitration and Mitigation in criminal proceedings).

Last but not least, in the course of the criminal justice reforms, substantive criminal law has been amended in that alternative sanctions have been introduced. The most important of them are the Community Service Order, and the possibility to impose Protective Supervision – exercised by the Probation and Mediation Officer – on *juvenile* offenders in case of "conditional suspension of imprisonment with probation supervision", and "waiver of sentence with probation supervision".

There is also a new institute of mediation, a form of formal arbitration or mitigation proceedings outside the criminal procedure. It is an alternative to the criminal procedure that creates an opportunity for imposing alternative sentences, using diversions in criminal procedure or substituting protective custody with less intrusive protective measures. However, several concepts of restorative justice have never been implemented in the Slovak Republic, like for instance restorative group conferencing, restorative police cautioning, community reparation boards and sentencing circles.

1.2 Reform history

The 1990s witnessed broad discussion about the possible implementation of restorative justice instruments in the context of "conditional discharge" and "conditional discharge enforced via probation supervision." Though it sounds odd, the first efforts to implement conditional discharges were in the 1980s during the totalitarian regime in the Czechoslovakian Socialist Republic, where it was sought to be used as a means for resolving issues of criminal liability for minor criminal offences, misdemeanours, anti-social and "morally derelict" behaviour. There was also the issue of so-called criminal conciliation outside the criminal trial proceedings. The proposed conception of such criminal conciliation proceedings was as a form of diversion from the traditional course of criminal proceedings. The reform efforts were successful, and some instruments reflecting restorative justice thinking have finally been implemented in the Slovak Republic.

First of all, diversion in criminal proceedings, conditional discharge, was enacted by Amendment No. 247/1994 Coll. to the Criminal Procedure Code No. 141/1961 Coll. and came into force on 1 October 1994. Moreover, in Amendment No. 422/2002 Coll. to the Criminal Procedure Code No. 141/1961 Coll., which came into effect on 1 October 2002, criminal conciliation proceedings were implemented. Criminal conciliation ensures faster criminal proceedings as well as a strengthened position for victims and other damaged parties (to help them claim damages).

In order to impose alternative sentences and non-custodial protective measures the Probation and Mediation Service was created. The Probation and Mediation Officers Act No. 550/2003 Coll. was enacted and came into force on 1 January 2004. Last but not least, a new alternative sentence was implemented in Slovakia – Community Service Orders (Sentence to Community Work). Moreover, for juvenile offenders, there was an opportunity to create the "conditional waiver of sentence" (or "conditionally refraining from imposing sentence").

The primary factor that served to facilitate the introduction of the Probation and Mediation Service in the Slovak Republic was the need for efficient alternative models for resolving criminal cases, underpinned by highly positive research and evaluation results from abroad. On 1 August 2001, the "Office of Head Coordinator – Clerk" (an officer of the Ministry of Justice of the Slovak Republic, Department of Criminal Law) was created, tasked with coordinating and implementing the pilot project for the Probation and Mediation Service in the Slovak Republic.

Immediately, a respective Action Group was created, consisting of representatives of the criminal prosecution services, judges, attorney-of-the-state, criminal police and non-profit organizations. The pilot project was initiated in several selected courts (County Court Bratislava IV, County Court Nové Zámky,

County Court Spišská Nová Ves) in order to test the approach so as to inform any future nationwide application and implementation of the project.

Finally, the project was successful and the Probation and Mediation Service was implemented for all Slovak county courts as of 1 January 2004, when the Probation and Mediation Officers Act No. 550/2003 Coll. came into force. Mediation and probation appear to be quick, inexpensive and efficient means of alternative arbitration and mitigation in cases of less serious offending.

1.3 Contextual factors and aims of the reforms

According to the Submission Report submitted to the Criminal Conciliation Implementation Act, criminal conciliation proceedings should enable agreement between prosecution (the Slovak Republic, victim, other damaged parties) and defence outside of the regular formal criminal proceedings. Of course, regular statutory criminal proceedings cannot be diverted entirely, but it would focus exclusively on matters of guilt and sentence. On the other hand, when a criminal conciliation agreement comes into effect, it influences regular criminal proceedings in various ways: First of all, in order for conciliation to be successful, there should be an agreement on awarding damages to the victim (this will make criminal proceedings quicker, less expensive and far more efficient). Furthermore, if there is a valid and effective conciliation decision and an agreement on the awarding of damages, so-called "Agreement of Guilt and Sentence" at the criminal court level, which also reflects restorative elements to a certain degree, is still a possibility.

Re-Codification of the Criminal Code in 2005 created ideal circumstances for the implementation and application of concepts and approaches of restorative justice into the Slovak system of criminal judiciary. The reform process had several main goals, some of which are compatible with the concept of restorative justice, for instance decriminalization, depenalization and helping overburdened courts. Moreover, trial proceedings have become less complicated and less time consuming as well as more efficient. Finally, Probation and Mediation Officers were created, who try to resolve as many criminal cases as possible outside the criminal proceedings and without involvement of the criminal judiciary.

1.4 Influence of international standards

Criminal justice in Slovakia is strongly influenced by contemporary European trends, such as extending use of alternative sentences in substantive criminal law and diversions in procedural criminal law. Also, international standards played an important role in the process of recodifying Slovak criminal law and introducing restorative measures.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

2.1 The Pre-court level

There are several restorative measures within the criminal procedure in Slovakia, namely: conditional discharge, reconciliation (criminal conciliation proceedings) and "agreement of guilt and sentence". All these measures are optional and can be implemented according at the discretion of the prosecutor or attorney-general. The same legislative provisions apply for both adults and juveniles.

2.1.1 Conditional Discharge

Only the attorney-general is allowed to issue a decision of conditional discharge. The attorney-general could decide to drop the case and stop criminal proceedings (discharge) or continue the trial for indictable offences, thus trying the case (for grave offences). Conditional discharge is suitable for offences of medium severity or less. In some cases the attorney-general is required to clarify fundamental circumstances of the criminal offence, which are relevant and inevitable for the decision of conditional discharge.

Conditional discharge can be issued only under specific circumstances (according to Criminal Procedure Code No. 301/2005 Coll.):

a. *In cases of offences of medium gravity or less grave offences ("prečin" in Slovak), when the sentence of imprisonment provided by law does not exceed 5 years.*
b. *When the accused pleads guilty and there is no doubt (beyond reasonable doubt) that his plea of guilt (confession) has been made voluntarily, seriously and intelligibly.*
c. *When the accused has compensated the damages, or has agreed to compensate damages claimed and concluded a respective agreement with victims and other damaged parties ("agreement of compensation of damages claimed"), or the accused has already compensated or restored damages via other means.*

According to the mode of compensating damages, there are several possibilities for the accused: First of all, he/she could compensate all the damages immediately or conclude a compensation agreement, if he/she is unable to compensate or restore it immediately (paying the damages in instalments), or he/she could use other suitable restorative or reparatory measures. On the other hand, if the pledge of the accused to compensate damages claimed is on its own not satisfactory, other restorative and reparatory measures are required (for conditional discharge). Of course, the accused is obliged to compensate for all the damages to all victims of his/her offence and to other damaged persons.

d. *The accused agreed voluntarily, seriously and intelligibly with the conditional discharge (consent with diversion from the due course of criminal proceedings). This is a special situation of criminal proceedings (preliminary consent with conditional discharge could be withdrawn).*
e. *When conditional discharge is satisfactory in light of the seriousness of the criminal case (less grave offences), the person of the offender (juvenile criminal) and other circumstances of the case.*

To meet this latter criterion, it should be investigated whether the case and the offender are suitable, and the ad-hoc decision should be based on surrounding material circumstances (for example personal, social and psychological characteristics of the offender as well as age, mental health and social status of the criminal). The attorney-general should take into account whether the offender is a juvenile criminal or a recidivist, the offender acted in a state of diminished sanity (mental capacity) as well as how the offence was committed (modus of criminal action), the resulting harm (effect of causing material and immaterial damages) and the degree of offender culpability.

Conditional discharge is a particular case of reacting moderately to criminal offences using an educational approach that strongly reflects restorative justice thinking. In such cases, the attorney-general finds the offender guilty of committing a minor offence, but imposes a conditional discharge, under the assumption that the effect of imposing and executing a proper punishment could already be achieved by the criminal proceedings to which the offender has already been subjected by that point. On the other hand, conditional discharge means that criminal proceedings are conditionally suspended (during the probationary period for one to five years). If the accused leads a regular, crime-free life during the probationary period, compensates for damages caused and fulfils any other duties and observes any imposed protective measures, the case will finally be dismissed and criminal proceedings end (unconditional discharge is then issued by the attorney-general or the court). The conditional discharge order may involve some restrictions for the accused, namely prohibition of attending sporting events, consuming alcoholic beverages or gambling, as well as orders to fulfil other obligations in due course. If the accused does not observe any imposed measures and other restrictions or does not fulfil his/her duties in due course, the trial proceedings restart and the criminal proceedings continue.

2.1.2 Reconciliation (criminal conciliation proceedings)

Criminal conciliation proceedings take place outside the main criminal proceedings and are a non-compulsory part of the pre-trial proceedings. Even the reconciliation agreement is subject to supervision of the attorney-general, who is obliged to accept the agreement (as a "Decision of Reconciliation Agreement") or withdraw the agreement (if required circumstances and other criteria are not met).

Mandatory requirements for admissibility of a reconciliation agreement are:

a. in cases of offences of medium gravity or less grave offence ("*prečin*" in Slovak), when the sentence of imprisonment provided by law does not exceed 5 years.
b. *Both the accused and the victim agreed voluntarily, seriously and intelligibly with conciliation proceedings as well as with the final "Decision of Reconciliation Agreement" of the attorney-general (consent with diversion from the due course of criminal proceedings).* The right to agree with the criminal conciliation agreement is reserved only for the accused and the victim. The accused is not allowed to authorise his/her attorney or any other person to answer on his/her behalf (then the consent has no legal effect). Criminal conciliation proceedings are not admissible unless all victims and damaged persons agree. Even if there is discontent by one of the victims based on subjective or personal reasons (the victim thinks he/she deserves more compensation), then it is deemed a discontent with the whole criminal conciliation and cancels the possibility of a reconciliation agreement.
c. *The accused pleads guilty and there is no doubt (beyond reasonable doubt) that his plea of guilt has been given voluntarily, seriously and intelligibly.* Of course, the accused is not required to confess his/her guilt. The statement of guilt should be made voluntarily as a foundation for compensating damages in order to restore and repair damaged social relationships especially between the accused and the victim.
d. *The accused has compensated the damages caused by the offence or agreed to compensate damages and concluded a special agreement with victims and other damaged persons, or the accused has already used other measures to compensate or restore damages.* The obligation to compensate damages does not only encompass material damages, but also includes non-material damages caused by committing the offence. *Restitutio in integrum* (natural restitution) is preferred, but it is hardly ever possible to achieve 100% restoration and reparation of damaged social relationships. On the other hand, the most common form of compensating damages is monetary compensation (compensation *in reluto*).
e. *The accused pays a certain amount of money in trust to the court (during trial proceedings) or to the office of the attorney-general (during pre-trial proceedings) for specific community purposes (public interest purposes only), unless certain amount of money is inadequate to the gravity of the offence committed.* Adequacy of the sum will be judged by the attorney-general (pre-trial proceedings) or by the judge (Trial Proceedings) according to material circumstances of the case. The attorney-general or judge shall take into account the gravity of the offence committed as well as the social and economic status of the offender.

f. *Such a decision is adequate and acceptable according to the essence and gravity of the offence as well as the public interest which has been harmed and taking into account the offender's person and his/her personal, social and proprietary status.* The court should take into account the fact whether the offender is a juvenile or a person of an age proximate to juvenile age, as well as the offender's mental health and possible pro-social and anti-social behaviour before and after the offence. Moreover, the court must take into account whether the offender has been convicted in the past or not as well as the personal, social and proprietary status of the offender (namely social and labour status, working record, personal and marital status, and wealth, income, proprietary rights and financial status in general).

Of course, criminal conciliation proceedings may seem too moderate for punishing an offender adequately. On the other hand, there are hard-law conditions as well as soft-law conditions for concluding the agreement. There are more compulsory conditions (hard-law clauses or conditions *sine non qua*) for concluding reconciliation agreements than anywhere else in the system of Slovak criminal law. Finally, the restorative-justice instruments mentioned in *Sections 2.1.1* and *2.1.2* should not been imposed concurrently because they serve different purposes, have different essences and are suitable for different criminal cases and, of course, for different types of offenders.

2.1.3 Agreement of Guilt and Sentence (Plea Bargaining)

The first stage of plea bargaining proceedings is an optional part of pre-trial proceedings and is usually supervised by the attorney-general or a judge sitting alone. The "Agreement of Guilt and Sentence" is an agreement between the attorney-general (prosecution) and the accused (defence). In specific cases the victim and other injured person can also take part, in order to express their consent or disagreement. First of all, it is an agreement of pleading guilty (agreement of guilt) as well as an agreement of sentence (acceptable for both prosecution and defence) plus consent to pay damages, etc. The "Agreement of Guilt and Sentence" is a result of negotiation between the attorney-general and the accused of the "reasonable and acceptable sentence" in the case (called plea bargaining). To be honest, the "Agreement of Guilt and Sentence" is a very serious instrument, because when the agreement comes into force, the accused loses his/her right to appeal and the confirmed "Agreement of Guilt and Sentence" has the same essence and legal effect as condemnatory judgment. Such an agreement is subject to examination by a court and possible confirmation or rejection in order to come into force. If the agreement is concluded, the attorney-general submits the proposal of the "Agreement of Guilt and Sentence" to the court. Because of concluding the agreement, the court cannot exercise examination, it could only re-examine procedural and other legal

aspects of the proceedings and the agreement itself (whether the compulsory legal criteria are met or not). The court level is the second stage of plea bargaining. Usually, the attorney-general acts *ex officio* while initiating plea bargaining, but he/she could also act upon an action of the offender (when the accused applies for plea bargaining in hope of receiving a mitigated sentence).

There are several compulsory conditions (requirements *ex lege*) for the initiation of the plea bargaining procedure, according to Section 232 (1) of the Criminal Procedural Code:

a. *results of examinations or summary examination give us reasonable grounds to conclude that the action of the accused is a criminal offence and that the accused person committed the offence,*
b. *the accused voluntarily pleads guilty and he feels guilty and culpable and agrees with the imposition of punishment,*
c. *the plea of guilty seems to be true, serious and voluntary according to results of examination.*

The plea bargaining procedure is sufficient for trying not only contraventions (offences of the lowest gravity), but also for crimes (offences of medium gravity), while excluding the gravest crimes such as treason, etc. ("*obzvlášť závažné zločiny*" in Slovak). The first requirement for admissibility of plea bargaining is a voluntary, serious and intelligible guilty plea (oral expression of guilt and culpability) – an offender pleads guilty to the crime he/she is already accused of. When the accused pleads guilty, the attorney-general examines the evidence, whether each piece of evidence individually and all the evidence together indicate beyond reasonable doubt that the accused person is the offender in the given case. When the attorney-general finds the evidence to be adequate, the prosecution starts negotiations with the accused about all issues of "Agreement of Guilt and Sentence". However, there is a relevant difference to the traditional course of criminal proceedings, that there is a lower standard of proof for proving guilt as well as a smaller scope of evidence is required for condemnation.

The object of plea bargaining is the agreement of guilt and sentence, as well as agreement of compensation and reparation of damages and other caused harms. As a result, there are two essential parts of the "Agreement of Guilt and Sentence": agreement on guilt and sentence, and agreement regarding the damages and other related issues. If the parties (prosecution and defence) agree on the essential parts of the agreement, the attorney-general submits a written proposal of the "Agreement of Guilt and Sentence". To come into effect, the agreement should be signed by the attorney-general, the accused and his/her solicitor as well as by the victim and other injured persons (if they claimed damages in due course and agreed with plea bargaining). Signing the agreement is essential for expressing consent with concluding the agreement according to the Criminal Procedure Code.

In summary: the first phase of plea bargaining is an optional part of the pre-trial proceedings and is supervised by the attorney-general who negotiates with the offender in order to conclude an "Agreement of Guilt and Sentence". When the agreement is ready, the attorney-general submits the proposal (draft) of the agreement to the court. In the second phase of plea bargaining, the presiding judge examines the submitted proposal in order to confirm it or reject it (content of the agreement is not legally binding for the presiding judge).

2.2 Court level

2.2.1 Conditional Discharge

Conditional discharge and reconciliation are not restricted to the pre-trial proceedings. In fact, they are useful and effective when implemented in trial proceedings as well. The court is entitled to use these instruments during Trial by Indictment after the indictment has been issued (Statement of Indictment). According to Section 349 (1) of the Criminal Procedure Code No. 301/2005 Coll. a sole judge ("*samosudca*" in Slovak) or occasionally a presiding judge ("*predseda senátu*" in Slovak) is entitled to decide whether it is adequate to use the aforementioned legal instruments. The use of conditional discharge during trial proceedings depends on specific circumstances of the criminal proceedings.

2.2.2 Conciliation

Furthermore, criminal reconciliation proceedings ("*zmierovacie konanie*" in Slovak) can also take place beyond the pre-trial stage, i. e. at all stages of the criminal proceedings. Although criminal reconciliation proceedings are by no means part of trial proceedings, any agreement concluded in such proceedings is subject to judicial examination in terms of whether the legal conditions are met or not. In each case, the parties shall submit the agreement concluded to the court for further examination and for possible confirmation or rejection. While during pre-trial proceedings the sole judge is approved to examine the agreement and decide, once trial has begun only the presiding judge has a right to confirm or reject the agreement. When an agreement has been rejected, it cannot be amended and has no legal effect.

2.2.3 Plea bargaining

As already described in *Section 2.1.3* above, plea bargaining proceedings also involve the court level. The plea bargaining procedure consists of two stages. The first phase of plea bargaining is supervised by the attorney-general who negotiates with the offender in order to conclude an "Agreement of Guilt and

Sentence". When the agreement is ready, the attorney-general submits the proposal (draft) of the agreement to the court. The presiding judge examines the submitted proposal in order to confirm it or reject it (content of the agreement is not legally binding for the presiding judge). Once the proposal is confirmed, the "Agreement of Guilt and Sentence" comes into force as part of a condemnatory judgement. The presiding judge should reject the proposed agreement if he/she detects serious breaches of offender´s procedural rights (for example, right for defence, etc.) as well as when the agreement is clearly inappropriate (to the offence committed) or is appropriate but clearly unfair. The court cannot exercise further examination and evidence, because this has already been done and concluded by the police, prosecutors and the attorney-general (during pre-trial proceedings) and the court is entitled only to examine matters of guilt and fact as well as legal conditions necessary for confirmation of the "Agreement of Guilt and Sentence". There is a specific procedure for confirming the concluded Agreement of Guilt and Sentence. If there is no reason for rejecting the agreement, the presiding judge conducts a trial where the agreement is publicly tried and confirmed. The presiding judge ought to re-examine the agreement and cross-examine the offender using specific questions according to the Criminal Procedure Code and Criminal Code (in order to get to know specific information about material and procedural circumstances of the agreement at hand).

According to procedural rules, the accused ought to respond to all questions of the presiding judge by declaring consent or disagreement (simply saying "Yes" or "No"). Other parties (victims, injured persons) to the agreement can respond to the questions of the court that concern them (or that they have a legal interest in) in the same way (expressing consent or disagreement). If any subject of the agreement declares disagreement by declaring "No", the proposed agreement is void and cannot be confirmed by court.

When consent of all subjects of the agreement has been expressed, examination and confirmation of the agreement takes place. All the matters of guilt and fact are subject to the "Agreement of Guilt and Sentence", so the court cannot overrule it. Therefore, the court only decides matters of legal qualification of the offence, legality and adequacy of punishment and protective measures as well as issues of claiming damages. Nevertheless, the court is limited by the limits stated in the proposed Agreement of Guilt and Sentence. When the proposed Agreement of Guilt and Sentence meets all the criteria mentioned above, the court confirms the agreement by issuing a condemnatory judgment called "Statement of the Agreement of Guilt and Sentence", which comes into force immediately (simply by declaration by the presiding judge). Of course, there is a provision favouring the accused in order to motivate offenders to conclude such an agreement: If the offender pleads guilty and concludes an Agreement of Guilt and Sentence, the court may decrease the rates and scales for imposing sentences to imprisonment by one third (under the lower limit of rates and scales for imposing sentences according to the Criminal Code).

2.2.4 Other manifestations of Restorative Justice at the court level

Various elements of restorative justice have been implemented in several instruments of the Slovak substantial criminal law, namely "Community Service Orders" (Sentence to Community Work), the "Conditional Suspension of Execution of Sentences of Imprisonment, with Probation Supervision", "Waiver of Punishment" and "Conditionally Refraining from Imposing Sentence" (for juvenile offenders).

Conditional Suspension of Sentences of Imprisonment with Probationary Supervision (Probation) (CSSIPS) is one of the new alternative sentences and an alternative to imposing unconditional custodial sentences. In the context of CSSIPS, the court determines a probationary period during which the offender is subject to supervision by Probation and Mediation Officers. This period of one to five years is intended to ensure the offender's rehabilitation as well as the protection of society from further criminal actions. If the offender leads a regular (i. e. crime-free) life during the probationary period, it is regarded as evidence that the aim of the punishment imposed has been achieved even without the execution of the sentence. Supervision during the probationary period is intended to provide assistance and professional guidance to the offender and to support the offender's positive motivation to re-socialize and to facilitate his/her re-socialization. Moreover, probation supervision aims to reduce the risk of further criminal offences being committed by the offender.

Of course, probation supervision may involve further restrictions and duties for the convict. For example, it could involve prohibition from attending sporting events, prohibition from consuming alcoholic beverages, from gambling, prohibition from meeting certain people who allegedly have a negative influence on the offender. Various duties could also be imposed, such as the prohibition of coming within five meters of the victim, to move out of the house or flat, to pay damages, to submit to psychotherapy or to submit to treatment for addictive substances. If the convict leads a regular, crime-free life and observes all restrictions and duties imposed, the court will declare that the convict has successfully completed probation. If the court fails to do so within two years of expiration of the probationary period without the convict being at fault, the convict is deemed to have passed probation. If the convict does not pass probation, the court will order that the unconditional sentence of imprisonment be enforced.

Community Service Orders (Sentence to Community Work) have been available in the Slovak system of criminal judiciary since 1 January 2006 (as the new Criminal Procedure Act No. 301/2005 Coll. came into force). The "Sentence to Community Work" is a particularly new alternative sentence, which could be imposed on both juvenile and adult offenders, under material circumstances according to the Criminal Code No. 300/2005 Coll:

a. When the offender is sentenced for a minor crime (least grave offence) punishable under the Criminal Code with a sentence of imprisonment

with a maximum term of five years. Community Service may be imposed only alternatively with explicit consent of the convict.

b. Community Service Orders impose a duty on the convict to perform community work (work in public interest or for public interest purposes) defined by the court. Although the type of community work is not defined within the Criminal Code, it involves cleaning public areas and parks in municipalities as well as additional work in hospitals, libraries or retirement homes, in charitable facilities and social facilities, etc.
c. Furthermore, Community Service Orders involve 40 to 300 hours of unpaid work (during free-time, of course). Juvenile offenders can be ordered to work for "only" 30 to 150 hours in total. The sentence must be performed by the convict personally within the period of one year of the execution of sentence being ordered. If the sentence of community service is not served at all or is not served in due course and time, the sentence or its remainder will be transformed according to the decision of the court into an unconditional prison sentence (two hours of community service are one day of imprisonment).
d. Finally, Community Service Orders are compatible with other forms of punishment except for unconditional prison sentences, so these sentences cannot be served concurrently. The efficiency of such sentences is strongly dependent on supervision exercised by Probation and Mediation Officers. The aim of executing sentence is not only to motivate the offender to perform well at work, but also to make him respect educational measures and to re-socialize and lead a regular, law-abiding life.

Another example for restorative justice is so-called "Conditionally Refraining from Imposing Sentence" (CRIS), which is suitable for juvenile offenders. CRIS can be imposed when the court finds the offender guilty of committing a minor offence (least grave offence), but conditionally imposes no sentence. First of all, to impose CRIS, the convict should meet specific criteria according to the Criminal Code. The most important is that the offender regrets committing the offence and shows an effective effort of restoration and compensation of damages, and consents to CRIS. Furthermore, there is a condition of reasonability and adequacy of CRIS in the given case. It means that, in light of the minor gravity of the offence committed and taking the offender´s person into account, the court may reasonably expect that the trial itself is satisfactory as a means of punishing and reforming the juvenile offender.

Refraining from imposing a prison sentence is not unconditional, as the court additionally imposes educational measures as well as several duties and restrictions (during the probationary period of up to one year). Probationary supervision is imposed as well in order to ensure that the juvenile offender leads a regular life and successfully reintegrates. Probation supervision during the

probationary period is exercised by Probation and Mediation Officers. Finally, there is another provision and protection of juvenile offenders: If the convict is in breach of rules and conditions of his/her probation in a non-serious fashion, the court may decide not to impose and execute the withheld sentence (usually unconditional sentences to imprisonment), and can only strengthen or intensify rules and conditions of probation, impose probationary supervision or prolong the probationary period and impose additional educational measures.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

Mediation proceedings are a tool not only for reconciling the social conflict connected with the offence, but also for repairing and restoring damaged social relationships and compensating damages and other harms caused by the offence. However, mediation (for this purpose called also criminal conciliation proceedings) is an informal, arbitrative quasi-proceeding for resolving and preventing social and other conflicts. It is useful for the purposes of restorative justice in order to solve conflicts connected with the offence committed and to solve subsequent cases and issues such as claiming damages. Of course, mediation is based on mutual consent, so the case mediator requires the explicit consent of the offender, victim and all other injured persons before initiating the process. Mediation proceedings are different from diversions from the traditional course of criminal proceedings, such as plea bargaining for example, that are not compulsory, but nonetheless an integral part of the criminal procedure.

The criminal mediation proceedings are run and supervised by a mediator. In Slovakia, mediators should be at least 18 years old and possess adequate education and knowledge (preferably a university degree in law and related fields of study). According to the Probation and Mediation Officers Act No. 550/2003 Coll., mediators are only required to have a university degree (2nd stage of a Master's) in the field of law, theology, teaching and any other Master's degree in humanities (also if he/she graduated abroad and his/her degree has been accepted by the Slovak educational authorities). Of course, special compulsory education for mediators is required, too. That is not all – a mediator must also have full capacity for legal action, permanent residence within the territory of the Slovak Republic, proficient knowledge of the official language of the Slovak Republic (Slovak language) and advanced knowledge of an optional foreign language. Last but not least, a mediator must also have acquired special knowledge, education and training and must be in a good state of health.

For theoretical purposes, we can divide the actions of mediators into four stages throughout all criminal proceedings. First, a preliminary face-to-face

meeting between offender and victim is held and supervised by the probation and mediation officer. This stage of the reconciliation proceedings is focused on communication between the offender and victim and involves the introduction of both sides and a brief description of their roles in the process. Furthermore, the rules for further communication are laid out, and the mediator explains the mediation process. The mediator invites both parties to make statements of their claims in order to achieve their goals and the aim of the overall mediation proceedings. Furthermore, mediator invites both parties to make their own analyses of the case and to submit evidence, if is it applicable.

In the second stage, the mediator tries to understand the statements, claims and goals of both parties. These statements and expressions form the basis upon which the mediator shall form an opinion and propose a solution for the case (in the form of a "criminal reconciliation agreement", as already described above).

In the third stage of the mediation proceedings, the mediator summarises the statements of the parties, all available information and all submitted evidence. Moreover, he/she helps the parties to understand the case and to find an adequate peaceful solution for the issue.

The fourth and final stage of the mediation process is its termination. The mediator submits his/her proposal for a peaceful resolution (proposed "criminal reconciliation agreement"), which can be accepted or denied by both parties.

Therefore, there are three possible formal outcomes of mediation proceedings in criminal cases: conclusion of a "criminal reconciliation agreement" in mediation proceedings (100% agreement on all issues), a "compensation of damages agreement" (agreement on issues relating to harm and damages) and a "Record of Mediation Proceedings" (when one or both parties disagree(s) with the proposed agreement on all fundamental issues).

Although mediation proceedings are a unique instrument of restorative justice in Slovakia, there is a strong connection between criminal reconciliation supervised by a mediator and the actions of the Probation and Mediation Service exercised by probation and mediation officers as public officials (comparable to "Justice's Clerks" in the UK). If it is suitable, probation and mediation officers intervene in the mediation proceedings in order to influence both the offender, victim and other injured persons so that they resolve the criminal case via one of the various diversionary routes (for example, Agreement of Guilt and Sentence; plea bargaining, etc.). Furthermore, probation and mediation officers intervene in criminal conciliation proceedings in order to replace custody by less harmful non-custodial protective measures, and alternative sentences instead of unconditional prison sentences.

For the purposes of public interest, probation and mediation officers seek for evidence and information on the surrounding circumstances of the criminal case and of the person and life of the offender, in order to enable a peaceful yet adequate solution to the case, or at the very least to resolve some aspects and issues via mediation (criminal reconciliation proceedings). Their aim is to

achieve that unconditional sentences to imprisonment are substituted by less harmful interventions or ideally by alternative sentences. For instance, they try to influence the offender and victim to agree on the reparation of monetary and immaterial damages and harms. If the criminal conciliation proceedings are successful and "probationary supervision" is imposed, the same probation and mediation officers are responsible for supervising the juvenile offender. Of course, Probation and Mediation Officers as civil servants cannot act voluntarily; they exercise their duties *ex officio* according to orders and instructions of sole judges, presiding judges (in trial proceedings) or attorney-general (pre-trial proceedings). When it is suitable, they can also act on the impulse of a mediator, an offender, a victim or another injured person.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

Despite the fact that probation and mediation officer have been part of Slovak criminal law and actors in the criminal justice process since 1 January 2004, official statistical monitoring of their activities has been carried out from 2006 to 2009. More recent statistical data on the use of probation and mediation have not been made available yet.

In 2009, a total of 7,279 probationers were assigned to probation and mediation officers, amounting to nearly 94 probationers per officer. This is a stark increase compared with 2006, when it was nearly 62 probationers.

Table 1: Number of referrals to Probation and Mediation Officers, 2006 to 2009

County/Year	2006	2007	2008	2009
Bratislava	1,336	2,528	2,466	2,434
Trnava	313	400	485	551
Trenčín	582	179	270	279
Nitra	566	500	496	626
Žilina	853	894	606	648
Banská Bystrica	1,445	953	1,036	927
Prešov	1,523	784	1,180	1,240
Košice	530	700	662	574
Probation	**7,151**	**6,938**	**7,201**	**7,279**

The number of assigned mediations has been falling slightly. While in 2006 a total of 3,231 mediation cases were referred to probation and mediation officers, by 2009 it had decreased by 19% to 2,601. In 2006, there were less than 28 mediations per probation and mediation officer, while by 2009 the caseload had increased to 34 mediation cases. This interesting trend indicates that, since the number of cases had been on the decrease, there must have been an even greater decrease in active probation and mediation officers. In 2009, a total of 2,724 mediations were completed (implying a certain degree of caseload carry-over from the previous year), of which 1,087 ended in reconciliation.

Table 2: Number of cases of mediation assigned to probation and mediation officers, 2006 to 2009

County/Year	2006	2007	2008	2009
Bratislava	253	99	81	71
Trnava	191	255	218	229
Trenčín	363	281	300	284
Nitra	56	35	8	25
Žilina	619	869	719	690
Banská Bystrica	387	466	347	282
Prešov	246	341	227	274
Košice	1,116	1,439	813	746
Total	**3,231**	**3,785**	**2,713**	**2,601**

Table 3: Statistical data on the use of restorative justice measures

		Conditional Discharge		Reconciliation		Agreement of Guilt and Sentence	
		by prosecutor	by judge	approved by prosecutor	approved by court	completed at pre-court level by proposal of Agreement of Guilt and Sentence	approved by court
2006	Adult	5,254	484	583	50	2,982	1,924
	Juvenile	584	125	74	n/a	341	281
2007	Adult	5,165	339	1,130	197	5,328	4,642
	Juvenile	705	72	159	36	567	487
2008	Adult	4,452	281	971	231	6,039	5,455
	Juvenile	637	52	154	23	704	616
2009	Adult	4,207	311	1,032	181	7,209	6,547
	Juvenile	557	66	181	26	691	673
2010	Adult	4,277	192	991	158	7,619	7,091
	Juvenile	505	18	170	8	702	659
2011	Adult	4,172	224	1,116	102	8,012	6,558
	Juvenile	523	35	139	16	809	756

4.2 Findings from implementation research and evaluation

There are sadly no published evaluations or studies that could give some insight into restorative justice in Slovakia in terms of effects on recidivism, opinion/ perception polls among justice system practitioners, satisfaction rates among victims, offenders and mediators, etc.

5. Summary and outlook

Although the Probation and Mediation Service has been a successful project for more than eight years, the Ministry of Justice is still responsible for supervising the actions and decisions of probation and mediation officers. However, providing effective supervision and evaluation of a nationwide system is not an easy task. In practice, evaluation is based on a performance ranking system that measures the number of cases initiated (by courts, the prosecution service or

attorney-of-the-State, as well as upon demand of accused or people claiming damages) against the number of completed/finished cases. Further variables are the efficiency of compensating damages and total amount of awarded and paid damages.

Even though the project is very successful, there are still some problems. Astonishingly, such a successful project is not used often and there are only few mediation and probation cases every month. First of all, there is a lack of coordination between national prosecution service authorities and probation and mediation officers. Moreover, probation and mediation officers have no effective legal means to achieve the aims of probation and mediation service efficiently. Of course, communication with convicted persons (obliged to pay damages or serve community duties during the probationary period in connection to the imposed conditional suspension of execution of sentence of imprisonment) and with victims who were awarded damages as well is not easy. Furthermore, the scope of work of probation and mediation officers is very specific and different from the work of social security advisors and clerks. Thus, probation and mediation officers have a very narrow field of work and cannot use legal means available to social security officials. Finally, Slovak probation and mediation officers do not possess adequate education, training and knowledge. According to the Probation and Mediation Officers Act No. 550/2003 Coll. they are only required to have a university degree in law, theology, teaching or any other master's degree in humanities. Of course, such education cannot be regarded as adequate or sufficient considering the duties and daily routines of the Slovak probation and mediation officer profession.

Last but not least, one key problem is the insufficient number of probation and mediation officers. While in 2006 there were 116 such officers in office all around Slovakia, by 2009 their number had decreased to 78 and in 2011 there were only 62. The main reason for this decrease is the very weak financial background of Slovak judiciary.

References:

Baláž, P., Vráblová, M. (2011): Introduction to Slovak Substantive Criminal Law. Plzeň: Aleš Čeněk.

Burda, E., Čentéš, J., Kolesár, J., et al. (2010): Trestný zákon, všeobecná časť: Komentár, 1. diel (Criminal Code, Commentary, 1st part). Praha: C.H. Beck.

Jalč, A. (2011): Fundamentals of Procedural Criminal Law. Plzeň: Aleš Čeněk.

Klátik, J. (2007): Odklon v trestnom konaní ako prostriedok racionalizácie trestnej spravodlivosti (Diversion in criminal proceedings as a way of rationalization of criminal justice). Právny obzor 90, pp. 53-64.

Klátik, J. (2010): Zrýchlenie a zhospodárnenie trestného konania (Acceleration and rationalization of the criminal proceedings). Banská Bystrica: Univerzita Mateja Bela v Banskej Bystrici, Právnická fakulta.

Mašľanyová, D., et al. (2011): Trestné právo hmotné. Všeobecná a osobitná časť. (Substantive Criminal Law). Plzeň: Aleš Čeněk.

Prokeinová, M. (2010): Probačná a mediačná činnosť (Probation and Mediation Service). In: Acta Facultatis Iuridicae Universitatis Comenianae. Bratislava: Právnická fakulta Univerzity Komenského v Bratislave, pp. 329-335.

Sotolář, A., Púry, F., Šámal, P. (2000): Alternativní řešení trestních věcí v praxi (Alternative solutions of penal matters in practice). Praha: C.H.Beck.

Šimovček, I., et al. (2011): Trestné právo procesné (Procedural Criminal Law). Plzeň: Aleš Čeněk.

Slovenia

Katja Filipčič

1. Historical development and overview of restorative justice elements in current Slovenian criminal law

1.1 Forms of Restorative Justice

In the last 15 years various forms of restorative justice have been introduced in Slovenia, and are available both at the pre-trial stage and the court-level of the criminal procedure. In the course of the relatively young history of restorative justice, the greatest attention in Slovenian legislation and practice has been devoted to mediation, but other restorative measures are also in place that focus primarily on the restitution or reparation of damages, or the reintegration of offenders through the delivery of community service.

In Slovenia, *mediation* between victims and offenders is predominantly used in pre-trial procedures, but can also take place once court proceedings have been introduced. If mediation is successful, the conflict between the offender and the victim is resolved, and thus the prosecutor has to dismiss the criminal complaint or withdraw the criminal charge. For juvenile offenders (aged 14 to 18) mediation is also available as a court sanction.

Restitution for damages as a measure issued by the State Prosecutor (and not as a result of victim-offender mediation) also plays an important role in Slovenian criminal law. The relevant legislation (see *Section 1.2* below) defines different forms of damage restitution:

a) An apology to the victim as a form of restoring moral damages,
b) the offender can repay the damages by paying a certain amount to the victim, or by working for the victim,
c) restitution can also take place through a payment to certain causes (public institutions, humanitarian organisations, into the compensation

fund for the victims of criminal offences), which represents a form of reparation to the community.

The State Prosecutor can conditionally postpone the beginning of the criminal procedure until the damages have been restored (deferment of prosecution). If the offender follows the prosecutor's instructions, the criminal complaint will be dissmised. Additionally, juvenile offenders can be ordered to restore damages as a court-ordered sanction.

Community service can also be understood as a type of restoration towards the community, even though this measure is more important due to its other element of restorative justice – its focus on reintegrating the offender into the community. The Slovenian criminal justice system recognises community service in all phases of dealing with the offender: as a form of diversion, as a court sanction (for juvenile offenders) and as an alternative mode of serving a prison sentence or fine.

1.2 Reform history

Slovenia started to introduce elements of restorative justice into its criminal justice system later than the western European countries, a 'delay' that is a reflection of the criminal law policies in Slovenia. Over the last thirty years the development of Slovenian criminal policy can be divided into two main periods, both of which are closely connected with the social conditions of the time.

The first period coincides with the socialist period. State paternalism was typical for the socialist economic and political era, in which the social function of the State was greatly emphasised, and individual autonomy was drawn quite narrowly. The sentencing policy was lenient[1] and was as such a reflection of the care and responsibility that the State had for individuals, including perpetrators of criminal offences.[2] The main intention of punishment was to reintegrate the offender into society. The sentencing policy was sufficient in reaching this goal (criminality was stable), and thus there was no need to search for new approaches.

The second period in the development of the criminal policy started in 1991 with the secession from Yugoslavia, when Slovenia introduced democracy and started to establish similar social conditions to those that have been developed by western European countries since World War II. The new social context that emerged also enabled and effected changes in the field of criminal law. On the one hand, changes occurred in the model of the penal procedure.[3] By acknowledging a greater autonomy of individuals within society in general, the autonomy of the parties to the criminal procedure grew stronger. In the 1990s this was

1 *Meško/Fields/Smole* 2011.

2 *Petrovec/Meško* 2006; *Filipčič* 2009a.

3 *Šugman* 2008.

exemplified in the relaxation of the principle of legality, in the strengthening of the elements of the adversarial model, and in the introduction of alternative forms of dealing with criminal cases that included elements of restorative justice (mediation, deferment of prosecution). Change also occurred in the field of sentencing policy and practice, which was characterised by a 'toughening up' that led to overcrowded prisons.[4] In order to alleviate this problem, alternatives to serving prison sentences were introduced in 2008, some of which included elements of restorative justice.

1.3 Contextual factors

As already stated, in the course of introducing restorative justice in Slovenia, in the last 15 years various forms of restorative justice have been introduced. The greatest attention in our legislation and practice has been devoted to mediation. This focus is a consequence of different factors.

On the one hand, mediation is considered to be a suitable means of resolving various conflicts and has as such become a part of everyday life, and mediation procedures are institutionalised in different aspects of social life:[5] on the international and political level; in post-conflict situations and ethnic conflicts; in educational settings (school mediation); in social matters (as an obligation to use mediation between social partners), in labour related matters (mediation at the work-place); in civil law cases (mediation in family conflicts, consumer mediation). Introducing forms of mediation as an alternative approach to treating conflicts between offenders and victims was merely a continuation of this trend.

A second noteworthy factor that fostered the focus on mediation lay in the high workloads of the courts, a large share of which was made up of minor offences. Slovenia saw the possibility of disburdening the court system through the introduction of mediation and other forms of alternative procedure.

A third relevant factor was that, in the 1990s, Slovenia was in the process of adopting its own penal legislation. This period of transition was viewed as an opportunity to introduce new approaches into the system – approaches that have been tried and tested by other states and that have proven to be good alternatives to traditional ways of dealing with criminal offences.

4 With 63 prisoners per 100,000 residents in 2010 Slovenia still has one of the lowest prisoner rates in Europe (Prison Administration of RS, *http://www.mpju.gov.si*).

5 *Završnik* 2008; *Bošnjak* 2007.

1.4 The role of international standards in the development of Restorative Justice in Slovenia

Since independence in 1991 Slovenia has been trying to create a modern criminal law and to harmonise it with international standards. International documents have had a particularly important role in the introduction of mediation in 1999, especially standards from Council of Europe's recommendation on Mediation in Penal Matters (No. R (1999) 20). This recommendation also had great influence on all amendments to the Criminal Code and Criminal Procedure Code which have extended the possibilities for the use of mediation.

2. Legislative basis for restorative justice at the different stages of the criminal procedure

2.1 Pre-court level

In the Slovenian criminal justice system, the police have to report all cases that come to their attention to the state prosecutor. Strict adherence to the principle of legality makes diversion on the police level impossible. Only the State Prosecutor may decide to refer the case to one of two forms of alternative procedure: mediation, or deferment of prosecution. Both procedures include several elements of restorative justice, and can only be implemented if both the victim and the offender agree to it after referral of the case.

2.1.1 Adult criminal justice

2.1.1.1 Mediation

When the prosecutor receives a criminal report from the police he may refer it to mediation. The victim or the offender cannot initiate the mediation procedure independently from the prosecutor, nor (at least formally) can they demand or suggest it to him. Their desire for (or opinion on) mediation can only be expressed once the prosecutor has referred the case to mediation. Once the prosecutor has decided to refer a case, the mediator invites them to express their opinion.[6] Research conducted by the Institute of Criminology at the Faculty of Law[7] in 2008 suggested that – similar to the state of affairs in some other European jurisdictions – the police could notify the offenders and victims of the mediation process and its effects. If the offender and the victim were both willing, the

6 *Bošnjak* 2006.

7 *Filipčič et al.* 2008.

police could use a special protocol through which it would notify the state prosecutor. Such information could help the prosecutor in selecting and identifying cases that are suitable for a referral to mediation. However, the proposed changes have not yet been introduced into the Slovenian system.

The Code of Criminal Procedure (CCP) defines two conditions that have to be met before the case can be referred to mediation. The main condition is the severity of the criminal offence. The prosecutor can refer the case to mediation if the offender has committed a criminal offence for which a fine or a prison sentence of up to three years is prescribed, as well as certain criminal offences for which a prison sentence of up to five years is prescribed (such as for instance grievous bodily harm, burglary, domestic violence).

Apart from the severity of the criminal offence, the prosecutor also needs to take into account the following circumstances: the type and nature of the offence; the circumstances in which the offence was committed; the personality of the offender; his degree of culpability. An offender's history of previous convictions is not an obstacle to referring the case to mediation. If it is a criminal offence for which a penalty of up to five years in prison is prescribed, special circumstances should be present. These special circumstances are defined in the guidlines that were adopted by the General State Prosecutor in 1999 and amended in 2004 and 2011 (General Instructions on the Conditions and Circumstances on Referring the Case to Mediation) and are mainly connected to the relation between the offender and the victim (if for instance the criminal offence was a consequence of a long lasting conflict between offender and victim, if the victim contributed to the conflict in any way).

The consent of the victim or offender is not a precondition for referring the case to mediation. Their consent only needs to be obtained once the prosecutor passes the case to the mediator. Gaining the consent of the parties to the offence is already a part of the mediation process led by the mediator and falls within his responsibilities.

The prosecutor's decision whether or not to make a referral for mediation is not dependent on an admission of guilt by the suspect. In Slovenian theory and practice, it is established that in order for various forms of diversion (including mediation) to be used, there needs to be "*at least the probability that the offender has committed a criminal offence, the same as is necessary for the introduction of a criminal procedure (well grounded suspicion – probable cause).*"[8] If any of the preconditions for the introduction of a criminal procedure (whether a criminal offence has been committed, whether there is a well grounded suspicion that a person has committed a criminal offence) are insufficient or missing, the prosecutor has to acquire the data and information necessary to

8 *Fišer* 2000, p. 32.

alleviate these shortcomings. If he fails to do so, he has to drop the case and cannot refer it to alternative procedures.[9]

The prosecutor's decision to refer (or not) a case to mediation is not subject to any judicial review. It is his discretionary right, and thus it is even more important that the criminal policy is the same in all prosecution offices so as to promote uniformity in prosecutorial decision-making. "*Mediation is not a right or a privilege. It is a legal possibility, recognised by law under certain conditions and available to anyone, if so determined by the State Prosecutor*."[10] In order to harmonize the utilization of prosecutor's discretionary power, the State Prosecutor General issued national guidelines (2004) with concrete directions as to when to select a case for mediation.

2.1.1.2 Deferment of prosecution (conditional dismissal)

The State Prosecutor can conditionally defer prosecution. He can condition his decision by setting the offender a certain task as defined in the CCP (see below). Successful fulfilment of the task by the offender results in the case being dropped by the prosecutor. Deferment of prosecution is used when it would be inappropriate for the offender to pass without some form of intervention, but where punishment is not absolutely necessary. When opting for deferred prosecution, the prosecutor also has to take into account the following conditions.

1. He can defer prosecution for offences that are punishable by a fine or a term of imprisonment not exceeding three years, as well as for some specific offences punishable by a more severe sentence. The scope of severe criminal offences is broader than the scope of severe criminal offences that the prosecutor can refer to mediation (see *Section 2.1.1.1*). Previous convictions are not an obstacle to deferring prosecution.
2. Additionally, both the offender and the victim need to agree to the deferred prosecution.
3. Prior to adopting the decision to defer prosecution the prosecutor has to ascertain that the case is not suitable for mediation (both forms of diversion have similar conditions, however mediation is given priority). A list of offences which are generaly more suitable for deferred prosecution than for mediation (for example if the injured party is the State or in the case of road accidents) is included in guidance issued by the State Prosecutor General in 2004.

The State Prosecutor invites the offender and the victim to the Public Prosecutor's Office. The offender's defence lawyer can also be present. If the victim is a juvenile, the prosecutor invites the parents (and the juvenile victim

9 *Fišer* 1997.

10 *Mežnar* 2000, p. 488.

himself, depending on the circumstances of the case) to the hearing and if the offender is a juvenile, the juvenile's parents need to be present. If one of the parties fails to respond (and the victim does not send written consent for prosecution to be deferred) it is considered that the conditions for a deferred prosecution have not been reached.

At the hearing, at which offender and victim can meet together with the prosecutor, the victim can state his/her expectations and suggest a task that the prosecutor is to define more precisely and then oblige the offender to fulfill. The victim can withdraw his/her consent until the decision on deferred prosecution has been officially adopted. This means that the victim's consent will usually depend on whether he/she thinks that the proposed task is sufficient or appropriate. If the offender and the victim agree on deferred prosecution, the prosecutor sets the task and defines how long prosecution will be deferred for, and thus how much time the offender has to fulfil his/her obligations (up to a maximum of six months). If the State Prosecutor receives proof that the offender has fulfilled the task within this time limit, the case is dropped and the offender receives no entry on his criminal record. If the offender fails to fulfil the task, the prosecutor will file an indictment and unsuccessful deferment of prosecution could not be an aggravating circumstance in sentencing.

The tasks that the prosecutor can demand the offender to perform are defined in the CCP:

- Repairing or delivering compensation for any caused damage;
- Paying a certain contribution to a public or charitable institution, or to the compensation fund for victims of criminal offences;
- Paying alimony;
- Performing community service.

The elements of restorative justice included in deferred prosecution are mainly expressed in the nature of the tasks that the prosecutor sets the offender (various forms of reparation, community service). The restorative idea is also reflected in the consent of the offender to perform the task he is set. The task is not a result of the agreement between the offender and the victim, however the victim has to consent to the decision of the prosecutor for the prosecution to be temporarily deferred. As a rule this consent is given at the hearing at which he meets the offender (the consent can also be given in written form). The victim can also propose the task the prosecutor should set the offender, however the prosecutor is not bound to this proposal.

2.1.2 Juvenile justice

If the offender is a juvenile (aged 14 to 18) the prosecutor can refer a much greater scope of criminal offences to alternative procedures (mediation and deferment of prosecution). He can use this discretion for all criminal offences

punishable with up to five years of imprisonment. All other conditions are the same as for adult offenders.

2.2 Court level

2.2.1 Adult criminal justice

2.2.1.1 Mediation

The prosecutor can refer less serious cases (criminal offences punishable with up to three years of imprisonment) to mediation even after the indictment has been filed. At the main hearing, he announces that he will refer the case to mediation and the judge postpones the main hearing for a maximum of six months. This court decision is automatic after the State Prosecutor has requested the suspension.[11] If mediation is successful, the prosecutor withdraws the criminal charge, the court proceedings are terminated and the offender does not receive an entry on his criminal record. If the mediation is not successful the judge continues with the main hearing. If the offender is found guilty, the unsuccessful mediation does not have any negative consequences for him in terms of being an aggravating factor in sentencing.

2.2.1.2 Community service as a way of serving a prison sentence or a fine

The Slovenian criminal justice system does not provide for a restorative sanction that the court could impose on adult offenders upon conviction.[12] However, if the court imposes a prison sentence of up to two years or a fine, it can decide – upon the proposal of the convicted person – that he should serve this sentence through community service. This means that community service only comes into play where the offender indicates a desire for such substitution. The Criminal Code determines the amount of community service; one day in prison equals two hours of community service and for fines one day-fine equals one hour of community service. If a convicted person fails, either fully or in part, to perform community service the court shall decide that the imposed prison sentence or the fine be enforced so that it corresponds to the work that has not been performed at the time of failing to comply with the community service order.

---

11 *Bošnjak* 2004.

12 In the case of juvenile offenders, the court can impose the sanctions with restorative justice elements, including community service (see *Section 2.2.2.1*). This is the reason why a prison sentence imposed on a juvenile cannot be substituted by community service; the judge can impose community service as an educational measure instead of imposing a prison sentence.

The Criminal Code makes no limitations in terms of which offences are eligible for such a decision. It only stipulates that sex offenders cannot serve their prison sentence in such a way. The Criminal Code offers additional criteria that should be taken into account by the court when ordering an offender to perform community service instead of going to prison or paying the fine. These are: the behaviour of the convicted at and up to the time the decision is reached; the risk of the offence being repeated once the offender has been set free; the possibility and capability of performing work; and finally also the personal and family circumstances of the offender at the time during which it is foreseen that he would serve his penalty. The admission of guilt is not a precondition for serving the prison sentence or fine by community service.

2.2.2 Juvenile justice – Educational measures with elements of Restorative Justice

There is no special law in Slovenia dealing with juvenile offenders. Their treatment is regulated within the Criminal Code, the Criminal Procedure Code and the Enforcement of Criminal Sanctions Act. The new Criminal Code from 2008 stipulated that this sphere should be regulated within a special statute. Until such a statute has been adopted, however, provisions from the Criminal Code, which was in force until 2008, apply.

The purpose of imposing a sanction is to ensure that the juvenile receives the necessary education and appropriate support for his/her personal development. Consequently, educational measures and juvenile penalties must not only provide for assistance and protection, but also for the supervision that the juvenile needs in order to be rehabilitated or re-integrated into society. The chronological age of an offender is the fundamental criterion in the court's decision whether to impose an educational measure or a juvenile penalty. A penalty (a fine or juvenile imprisonment) may be imposed only on older juveniles (aged 16 or 17 at the time of the offence), and this only exceptionally. Upon the imposition of a juvenile penalty the court must explain why it did not impose an educational measure in each individual case.

Over the last 25 years, the courts imposed an educational measure in approximately 98% of all cases. The educational measures in an open environment (reprimand, instructions and prohibitions, supervision by a social welfare agency) account for more than 90% of all cases. After 1980, the number of juveniles sent to an educational institution has decreased considerably (in 1980, 14% of all sentenced juveniles were sent to an educational institution, in 2002 this fell to just four percent).[13]

In the case of a juvenile offender, the court can impose the educational measure "Instructions and Prohibitions" and order him/her to perform one or

13 Statistical Office of the Republic of Slovenia, *kriminaliteta.asp.*

more tasks within a certain period of time. Some of these tasks include elements of restorative justice. Such tasks are:

- To make a personal apology to the victim;
- To reach a settlement with the victim by means of payment, work or other ways in order to restore the damage caused;
- To perform community service.

The educational measure "Instructions and Prohibitions", which can entail one or more instructions, is imposed if the court considers that this is the best way to promote the education and reintegration of the juvenile. A strong element of restorative justice can be found in the provision in the Criminal Code, which stipulates that when selecting instructions, the court has to take the juvenile's will to cooperate into account. An apology to the victim and a settlement with the victim should be delivered through a mediation (and thus a restorative) process and this is another important element of restorative justice in Slovenia.

If the juvenile fails to comply with the imposed instructions, the court can replace this measure with a different one called "supervison by a social agency".[14] The judge informs the juvenile and his parents as regards this option when ordering the original educational measure of "Instructions and Prohibitions".

3. Organisational structures and restorative procedures

3.1 Victim-offender mediation at the pre-court level

3.1.1 Participants in the mediation

The participants in mediation are: the mediator, the offender and the victim. The suspect's defence lawyer can also participate, however this is rarely the case in practice. An analysis of mediations in Slovenia shows that the defence lawyer was present merely in 2% of all cases.[15] In 2008 a survey was conducted[16] amongst 64 mediators. The results showed that mediators do not consider the defence lawyer to have a positive role in the mediation process.

14 The court orders supervision for an indeterminate period of time ranging from a minimum of one year to a maximum of three years. The appointed advisor shall carry out the supervision of the juvenile and, above all else, shall be responsible for his education and employment, for keeping him away from any environment which has a harmful effect on him, for any necessary medical treatment and for the general arrangement of the perpetrator's life. The social agency must send a progress report about the improvement of the juvenile's behaviour to the juvenile judge every six months and the judge could order for the implementation of this measure to be stopped.

15 *Filipčič et al.* 2008.

16 *Filipčič et al.* 2008.

If a juvenile is involved in the mediation (as an offender or as a victim), the juvenile's parents need to be present in the process. A representative from the social welfare agency (known as the Centre of Social Work)[17] or another person that the juvenile trusts can also be present in the procedure.

3.1.2 Mediators

In Slovenia mediation is not carried out by a particular organisation, but by mediators as individuals, who are appointed by the Minister of Justice. They have to fulfil the conditions stipulated by the State Prosecutor Act (2011):

- University level education, at least first level;
- A statement that he/she will, if appointed, provide equipment and premises necessary and appropriate for conducting mediation procedures;
- Suitability for performing mediation activities. This condition automatically disqualifies anyone with a criminal record, for that would render a person morally unsuitable for mediation. Also anyone for whom it has been ascertained that he/she will not perform mediation professionally and fairly is not eligible for the role of the mediator;
- Minimum age of 30 years.

In 1999, when mediation was introduced to the Slovenian system, the State Prosecutor's Office organised an introductory training course. After their appointment, mediators are obliged to attend special training courses organised by the State Prosecutor's Office, the Ministry of Justice or by other appropriate institutions each year.

The Minister of Justice can also relieve mediators from their duty due to the following reasons: the mediator demands to be relieved; he/she no longer fulfils the conditions to be a mediator; he/she does not perform his/her duties regularly or conscientiously; or he/she is involved in profitable activity that could influence his/her objectivity and independent performance in the role of the mediator.

In 1999 the introductory course was completed by 194 individuals. Over the following ten years their numbers have declined. In 2011 the list of mediators bore just 136 names. Mediators come from very different professions. About 40% are lawyers, while the rest come from a variety of academic backgrounds (e. g. economists, teachers, social workers, medical doctors, engineers). 37% of the mediators are women.[18]

When selecting the mediator for a case, the prosecutor takes into account the specialisation and special skills of the mediator, as well as the town in which the mediator, offender and victim live (Art. 10, General Instructions issued by the

17 In Slovenia, a country of two million inhabitants, there are 62 Centres for Social Work. They are well organized institutions for preventing different forms of social exclusion.

18 Ministry of justice *www.mp.gov.si.*

State Prosecutor General in 2011). Taking into account the addresses of all involved in the mediation should (apart from reducing costs) ensure that the mediator is a representative of the same local community as the offender and the victim. On average a mediator receives ten cases per year.

In his work the mediator has to be impartial; in the process of reaching an agreement, the mediator cannot decide or influence the amount to be paid or the tasks that the offender needs to perform, however he has to ensure that the contents of the agreement are in proportion with the seriousness of the committed criminal offence (Art. 23, "Instruction on mediation" issued by the Minister of Justice in 2004). The impartiality of the mediator is also ensured by the possibility for the participants to demand the exclusion of the mediator for the same reasons as the judge can be excluded in court proceedings (Art. 13, Instruction on mediation).[19]

The work of the mediators is monitored by the Supervisory Board that was established by The Office of the State Prosecutor General in 2000; one member is a State Prosecutor, the second is a representative of the mediators and the third is a representative of the Ministry of Justice. The Supervisory Board checks approximately 100 randomly selected mediation cases each year (regular supervision) with the intent to ascertain possible irregularities, any recurring problems in the work of mediators and any potential reasons for unsuccessful mediation processes. It notifies all mediators of their conclusions and in this way draws attention to any irregularities in their work. The board can also monitor the work of an individual mediator. If it ascertains that the mediator has not performed his obligations regularly and diligently, it proposes to the minister that he be taken off duty. Such proposals are very rare.

3.1.3 The process of mediation

The mediation process is defined in the Instruction on Mediation, issued by the Minister for Justice in 2004 and includes the following steps. Once the dossier has been received, the mediator has to immediately obtain written consent from both parties. In order to achieve this he/she conducts separate interviews with the offender and the victim. If one party does not agree to participate in the mediation process, the mediator will send the dossier back to the State Prosecutor who will file an indictment. The State Prosecutor may also defer prose-

19 Reasons for exclusion of a mediator are: if he himself has suffered harm through the criminal offence; if he is married to or lives in a domestic partnership with the accused, the defence counsel, the prosecutor, the injured party and their legal representatives or attorneys, or if he is related to the aforesaid persons by blood in direct line at any remove or collaterally up to four times removed, or related through marriage up to twice removed; if his relationship with the accused, the defence counsel, the prosecutor or the injured party is that of a custodian or a ward, adopter or adoptee, foster parent or foster child; if any other circumstances exist that give rise to doubts over his impartiality.

cution if mediation has failed, but this option is used rarely because it is unlikely that offenders or victims who disagree with mediation would give their consent to deferment of prosecution.

At the meeting called by the mediator, the mediator helps the parties conduct a tolerant dialogue and guides and mediates them with the intent to put aside their dispute and reach an agreement. The mediator is obliged to encourage the parties to reach an agreement at the first meeting. However, if necessary, the mediator can arrange additional meetings.

The mediation process ends and is considered to have been unsuccessful if an agreement between the parties has not been reached within one month of the first meeting. If an agreement is reached, the mediator compiles a written agreement that is signed by the offender and the victim. The agreement states the agreed obligation that the offender has to fulfil and the time scope in which this has to be performed. This time scale should not exceed three months.

The parties notify the mediator when the obligations defined in the agreement have been fulfilled. The mediator in turn informs the State Prosecutor and sends him/her all paperwork related to the mediation process. Once the State Prosecutor has received this notification he/she drops the case.

If the parties fail to notify the mediator that the obligation stipulated in the agreement has been fulfilled by the end of the deadline, the mediator notifies the state prosecutor as regards this and hands in all relating paperwork. The data and statements given by parties during the mediation cannot be used as evidence in the criminal procedure.

3.1.4 Contents of the agreement

The contents of the agreement are entirely dependent on the parties, however the CCP stipulates that the agreement has to be commensurate with the severity and consequences of the criminal offence. The Instruction on Mediation by the Minister of Justice states a few possible contents of the agreement (an apology by the offender, damage reparation, payment of damages, work in favour of the victim, community service) and allows for the possibility that the parties can also agree on other forms of moral and material satisfaction that the victim is to receive.

3.1.5 Mediation timeline

The mediator is obliged to ensure that the mediation procedure takes place in a swift and efficient manner and without any unnecessary delay. Apart from this the Instruction on Mediation also defines the time scale of individual phases in the mediation process: the entire mediation process (from the date the case is received by the mediator to the finalisation of the agreement) should be con-

cluded within five months. An analysis of the mediators' work has shown that 98% of all cases are brought to an end within less than two months.[20]

3.1.6 Mediation costs

The mediation costs consist of the costs related to the work of the mediator and the costs that the offender and victim experience due to their participation in the mediation process (for instance travel costs).

The mediator's fee is provided by the State Prosecution Office. The payment is defined by the prosecutor for each case individually, once the mediation has been brought to an end. At this he/she takes into account the toughness or complexity of the case, the number of persons involved, the diligence of the mediator and the final outcome of mediation (Art. 16 General Instructions). In 2011, mediators received between 35 and 70 € for an unsuccessful mediation, and between 70 and 350 € for successful mediation processes. The mediation costs (e. g. postal and office costs, the costs of the rent and maintenance of the premises, mediator's travel expenses) are included in the payment and are not paid separately. Incidentally, mediators work on a voluntary basis and receive expense allowances that are higher should the mediation process end positively. The costs incurred by the offender and victim due to their participation in the mediation are not provided for by the State. Each individual covers his own costs, unless otherwise defined in their final agreement.

3.2 Victim-offender mediation as a sanction for juvenile offenders

The judge for juvenile offenders can impose an educational measure called "Instructions and Prohibitions" and in doing so require the juvenile to settle with or apologize to the victim. Both instructions have elements of mediation despite the fact that the consent of the offender is not a precondition for imposing this educational measure and that a meeting between the juvenile and the victim is not necessary. The Centre for Social Work is responsible for its execution. It steps into contact with the victim and has a role of mediator.

If the juvenile is to apologise to the victim and the victim is prepared to accept an oral apology, the Center organises the meeting between the juvenile and the victim. If the victim is not prepared to accept an oral apology, the juvenile apologises in written form. If the victim does not wish to accept a written apology either, the apology is archived at the Centre and with this it is considered that the juvenile has fulfilled his task.

20 *Filipčič et al*. 2008.

For reaching a settlement with the victim, if it is ordered as an educational measure, the Centre contacts the victim who then states under what circumstances he or she would be willing to reach an agreement with the juvenile. A face to face meeting between the juvenile and the victim is not necessary but is possible. Following the discussion with the juvenile the Centre for Social Work organizes the fulfilment of the obligations from the agreement. If the mediation fails the court can replace the imposed educational measure by another one.

3.3 Reparation

As a condition for dropping the case (for the characteristics of deferred prosecution see *Section 2.1.1*) the prosecutor can demand various forms of reparation from the offender:

3.3.1 Damage reparation

Most commonly the offender repays the damages by paying a certain sum to the victim. If the prosecutor is of the opinion that it would be appropriate to repay the damages in the form of working for the victim, he can demand this from the offender, but only if the offender and the victim agree. Apologising to the victim can also be considered reparation of moral damages and is especially important for juvenile offenders. It could be ordered by the prosecutor as a condition for dropping the case (deferred prosecution) or by the juvenile judge as an educational measure (see *Section 2.2.2* and *Section 3.2*).

3.3.2 Paying a certain contribution to a public or charity institution, or to the compensation fund for victims of criminal offences

The Office of the State Prosecutor General runs a list of public institutions and humanitarian organisations that can receive such payments as well as controls the use of means obtained in such a way. The offender and the victim can propose a benefactor from the list. Through the payment of such a contribution the damage experienced by the community with the criminal offence is paid off on a symbolic level. The main criteria for defining the sum to be paid are the financial means of the offender and the value of the damage caused. The sum of the contribution should not be lower that the value of the stolen object or the damage caused and not more than fivefold its value. With other criminal offences the amount should range between 250 and 2.500 €. If the offender is a juvenile, the total payments should as a rule not exceed one third of the amount that the prosecutor would demand from an adult offender.

3.3.3 Settling alimonies

This obligation is given to an offender who has failed to pay alimony. It takes place in a form of payment that is represented by the amount of unpaid alimonies.

3.4 Community service

The Slovenian system permits the use of community service as a measure in various phases of the criminal proceedings. Thus, the scope of such work varies as do the conditions for it to be implemented. It is important to keep in mind that this task can only be demanded if the offender agrees to it. It also needs to be organised in such a fashion that it does not hinder the offender's work or other obligations, such as schoolwork, if the offender is a juvenile (Art. 86 CC). To avoid the stigmatization the person should not be recognizable as an offender when performing the work. When opting for this measure the prosecutor or court cannot define in which organisation and what sort of tasks the offender should perform. The Center for Social Work is responsible for the enforcement of this measure; it defines the type of work so that it corresponds to the expertise and ability of the offender, choose the organisation for which the work shall be conducted, supervise and monitor the execution and report to the prosecutor or court whether the offender has performed his work.

The scope of work and the time scope in which the work must be completed are defined in the following way. If community service is defined as a condition for withdrawing the prosecution (deferment of the prosecution, see *Section 2.1.1*), it can be performed within a period of at least three months and in a scope of a minimum of 40 and a maximum of 120 hours. If the offender is a juvenile the work should not exceed 60 hours. Where the court has replaced a prison sentence of up to two years or a fine with community service (see *Section 2.2.1.2)*, each day of imprisonment is equated to two hours of work and in the case of an imposed fine, one daily amount equals one hour of community service. Community service imposed on a juvenile as an educational measure (see *Section 2.2.2*) can include a maximum of 120 hours within a six month period.

4. Experiences with Restorative Justice

There are no available data and evaluation on community service as an alternative to prison or a fine. Nor are any data available on the frequency to which apologies and settlements with victims as an educational measure are issued. Therefore, in this section only data and research on mediation in general, the deferment of prosecution and community service as an educational measure can be presented.

4.1 Victim-offender mediation

In Slovenia, mediation has been in use since 2000 and statistical data indicate that since 2004 the number of cases that the prosecutors refer to mediation has been declining substantially (see *Table 1*). It is difficult to pinpoint just one factor as the cause for this trend because there are so many that are intertwined with each other. One main reason is likely to have been the introduction of several new forms of simplified procedures for dealing with petty offences in recent years. These new procedures fail to include elements of restorative justice, however they were well received by prosecutors, because they offer opportunities to bring cases to a close swiftly. Due to the advantages that mediation can offer victims, offenders and the community, that trend should be stopped. Prosecutors will need to be additionally educated as regards the advantages of mediation, so that they do not regard bringing cases to a close as soon as possible as their primary goal.[21]

Table 1: Number of cases referred to mediation (2004 – 2013)

Year	Adult offenders		Juvenile offenders	
	Number of cases	Share of cases	Number of cases	Share of cases
2004	1,939	4.4%	344	1.2%
2005	1,476	3.5%	225	6.5%
2006	1,660	4.0%	191	5.5%
2007	1,563	3.8%	194	6.0%
2008	1,450	3.6%	155	4.9%
2009	1,386	3.2%	100	3.2%
2010	1,425	3.0%	155	4.7%
2011	1,532	3.2%	88	2.8%
2012	854	1.8%	52	1.7%
2013	576	1.2%	17	0.6%

Source: Office of the State Prosecutor General, *http://www.dt-rs.si.*

In the last 10 years, the number of cases reffered to mediation has been decreasing due to the introduction of new alternative ways of dealing with cases. However, the main reason for the particularly drastic decline since 2011 has

21 *Filipčič* 2011.

been the lack of financial resources to pay mediators. The analysis of the work performed by state prosecutors shows great differences as regards their decisions to refer a case to mediation. The differences between the 11 district state prosecutor's offices are extreme: with adult offenders the share of cases that were referred to mediation ranged between 0.1% and 11.6% in 2006, while with juvenile offenders it ranged between 0% and 19.4% in 2005.[22] Such practice demonstrates the geographically unequal treatment not only of offenders, but also of victims in Slovenia. The availability of mediation (which is not actually a right, and which may become a privilege) depends above all on whose jurisdiction a criminal act was committed in, and not on the kind and nature of the committed crime or other circumstances related to the offence and the offender.[23] These differences indicate a non-unified penal policy in various geographical areas despite the guidelines adopted by State Prosecutor General that aimed to achieve exactly the opposite.

Mediation is successful when the offender and victim reach an agreement and the offender fulfills the obligations stipulated in this agreement. The rate to which mediation is succesful according to this definition of success is more than 60% in the case of juvenile offenders and about 50% in the case of adult offenders (see *Table 2*).

Table 2: Success rate of mediation (2004 – 2013)

Year	Successfully resolved cases (%) – adult offenders	Successfully resolved cases (%) – juvenile offenders
2004	47	68
2005	47	62
2006	47	63
2007	47	69
2008	50	70
2009	52	61
2010	55	76
2011	44	67
2012	54	52
2013	57	94

Source: Office of the State Prosecutor General, *http://www.dt-rs.si.*

22 *Filipčič et al.* 2008.

23 *Filipčič* 2011.

The Institute of Criminology at the Faculty of Law in Ljubljana analysed 356 cases of mediation (in 2005 and 2006)[24] and found that in almost 80% of unsuccessful mediations, the reasons for the lack of success were twofold: failure to respond to the mediator's invitation,[25] and failure to give one's consent to participate in mediation.[26] In this respect it will be necessary to improve the approach to informing parties and the public about the mediation process and its advantages and pay more attention to the selection of cases appropriate for mediation. The futher training of mediators is also very important. Beside that, dealing with the criminal report more swiftly (by the prosecutor's office) could also contribute greatly to a higher interest to participate in the mediation process, especially amongst victims.[27]

Statistical data[28] show that in over half of all cases the victim and offender agreed for the offender to apologise to the victim, while the second most popular obligation was the payment of damages (see *Table 3*), which is likely due to the rather high share of property offence cases.

24 In the project "Victim-offender mediation in Slovenia" (2008) besides a theoretical analysis of this institute and the assessment of legal grounds for its application in Slovenia, special attention was devoted to the empirical approach: the present research study analysed 73 questionnaires completed by state prosecutors, 64 questionnaires completed by mediators and 356 court files concerning victim-offender mediation. On the basis of this analysis, researchers formulated a number of proposals, which could promote and contribute to a more extensive use of mediation in practice, larger shares of successful settlement agreements and the better organisation of the work of prosecutors and mediators, see *Filipčič et al*. 2008.

25 38.7% of the offenders and 35.5% of the victims failed to respond to the first invitation. 18.7% of the offenders and 17.6% of the victims failed to respond to the second invitation, see *Filipčič et al*. 2008, p. 191.

26 The consent to settlement was not given by 21% of the offenders and 23% of the victims, see *Filipčič et al*. 2008, p. 192.

27 In over half of the cases it took four months or more from the time the criminal offence was committed to referring the case to mediation. This is undoubtedly a period in which the victim's interest to cooperate declines, see *Filipčič et al.* 2008, p. 189.

28 Office of State Prosecutor General RS, Annual reports (*http://www.dt-rs.si/*).

Table 3: Duties deriving from achieved mediation agreements in 2011

Duties	Adult offenders	Juvenile offenders
Apology	51.7%	51.7%
Compensation of damage	29.6%	36.7%
Restitution	4.9%	6.7%
Community service	0.5%	3.4%
Other[29]	13.7%	1.6%

Source: Office of the State Prosecutor General, *http://www.dt-rs.si.*

4.2 Deferment of prosecution

Deferred prosecution was introduced into Slovenian legislation in 1995 and the comparison between the years shows a sharp decrease in the number of cases where the state prosecutor proposed deferred prosecution (see *Tables 4* and *5*). The reasons are the same as for the dropping numbers of cases where the prosecutor decided to solve the case by referring it to mediation (see *Section 4.1.1*).

Table 4: Number of cases in which the prosecutor has proposed deferred prosecution – adult and juvenile offenders (2005 – 2013)

Year	Adult offenders		Juvenile offenders	
	Number of cases	Share of cases	Number of cases	Share of cases
2005	3,423	8.2%	360	10.3%
2006	3,300	7.9%	417	12.1%
2007	2,842	7.0%	332	10.2%
2008	2,442	6.1%	317	10.1%
2009	2,481	5.7%	284	8.9%
2010	2,800	5.8%	286	8.7%

29 For example: work for the victim, returning stolen items.

Year	Adult offenders		Juvenile offenders	
	Number of cases	Share of cases	Number of cases	Share of cases
2011	2,588	5.0%	264	10.6%
2012	2,488	5.2%	235	7.8%
2013	2,148	4.4%	169	5.8%

Source: Office of the State Prosecutor General, *http://www.dt-rs.si.*

Table 5: Success rate of deferred prosecution (2005-2013)

Year	Adult offenders	Juvenile offenders
2005	38.6%	60.5%
2006	41.8%	55.9%
2007	46.2%	70.5%
2008	50.1%	72.6%
2009	46.5%	79.2%
2010	45.8%	63.6%
2011	47.8%	67.8%
2012	46,9%	68.9%
2013	50,0%	62.7%

Source: Office of the State Prosecutor General, *http://www.dt-rs.si.*

In almost 50% of cases in which the prosecutor has proposed deferred prosecution, the offender fullfiled the given task. The success rate of deferred prosecution is higher if the offender is a juvenile (see *Table 5*). The main reason for unsuccessful deferred prosecution is absence of consent from the offenders or the victims (40% in all cases of adult offenders where the prosecutor proposed deferred prosecuton and 20% in the cases of juvenile offenders).[30]

Deferred prosecution was introduced into Slovenian legislation in 1995, however the CCP did not define the scope of tasks, such as maximum hours of community service and maximum sum of the contribution to a public or charitable institution. This was subject to strong criticism in Slovenian theory, which

30 Office of the State Prosecutor General, *http://www.dt-rs.si.*

especially emphasised the varying respect of the principle of lawfulness,[31] which was shown in the wide discretionary power of state prosecutors.[32] This situation is made even more acute by the fact that the legislation does not foresee any court control over the work of the prosecutor.[33] An analysis of the prosecutor's files in this period[34] has shown that in most cases the prosecutors ordered the offender to pay a contribution to a public institution (for the construction of the children's hospital that was being built at the time). Thus there was a danger that the prosecutors will opt for tasks that are similar to a fine and that deferred prosecution will change into a "para-penalty".[35]

Table 6: Tasks given within deferred prosecution cases in 2011[36]

Tasks	Adult offenders	Juvenile offenders
Compensation of damage	33.2%	40.8%
Payment to public institutions or humanitarian organizations	55.9%	7.5%
Community service	9.6%	72.3%
Settling alimonies	1.1%	0.0%
Other[37]	1.1%	5.0%

Source: Office of the State Prosecutor General, *http://www.dt-rs.si.*

In 2004 the State Prosecutor General adopted the instruction in which he precisely defined the scope and other characteristics of the tasks. Even though it would be more appropriate if these questions were to be addressed in the legislation, this instruction unified the work of the prosecutor's offices. Data from 2011 show that the number of ordered contributions to a public or charitable institution has declined but is still very high if the offender is an adult (see *Table 6*).

31 *Fišer* 1997.

32 *Dežman/Erbežnik* 2003.

33 *Fišer* 2000.

34 In the research of the Faculty of Law, University of Ljubljana, 94 cases of deferred prosecution from the year 2000 have been analysed. See *Filipčič* 2004.

35 *Fišer* 2000.

36 The state prosecutor can order the offender to fulfill one or more tasks.

37 For example: attending therapeutic counselling, participation in training of non-violent communication.

4.3 Community service as an educational measure for juvenile offenders

The analysed cases[38] in which the judge for juvenile offenders ordered community service as an educational measure shows that in 75% of all cases the juvenile committed theft. The court most commonly opted for between 20 and 25 hours of work (59% cases). The court most commonly stated the following reasons for opting for community service:

- The juvenile needs an organised activity in his spare time, for this will make him more responsible.
- The court wishes to tell the juvenile that spare time can be spent in a different way than for committing crimes.
- Through work the juvenile will obtain positive experiences which will deter him from repeating criminal offences.
- The instruction will positively influence the juvenile, as it will make him realise that he has to be responsible for his wrongful and inappropriate actions.
- The court wishes for the juvenile to establish an appropriate attitude towards other people and to build trust towards them as well as enable other people to trust him.

During the analysis (2003) the Centre for Social Work rejected the organisation of community service for ten juveniles (out of 27) due to unsolved financial issues linked to the organisation of this measure. Some Centres for Social Work solved this problem by paying the insurance premiums themselves, for some juveniles this cost was covered by the organisation in which they performed their community service, while some Centres for Social Work failed to organise community service due to this reason.[39] Despite the fact that it has been 15 years since community service was included in Slovenian criminal legislation and despite the pressure of researchers, judges, prosecutors, and social workers, competent ministries still have not provided the systemic conditions for implementation. It should be emphasized that this problem is not the case if the offender is an adult.

38 In the period between 2002 and 2005 the Institute of Criminology at the Faculty of Law performed a study entitled "Introducing social training and community service as a type of educational measure". See *Filipčič* 2009b.

39 *Filipčič* 2009b.

5. Summary and outlook

Elements of restorative justice were introduced into Slovenian legislation as late as 1995, and mediation as the most characteristic institution of restorative justice was introduced only in 1999. The reason for this should be sought in our historical experience. In the socialist regime we had a strong State (which was also reflected in the state monopoly over the criminal procedure) and a narrowly recognised autonomy of the individual. A certain amount of time had to pass for the understanding of the role of the State and the individual within to change, and only then were the conditions for a different concept of the criminal procedure established.

As distinct from other countries, Slovenia does not follow the tradition of experimentally introducing new ways of dealing with offenders in order to determine which conditions should be fulfilled for a successful implementation of novelties. This comes primarily as a result of a strict observation of the principle of legality – offenders cannot be dealt in a way that is not provided in statute. In the socialist regime, the principle of legality was an important guarantee preventing the authorities from abusing criminal law for political purposes and fear prevailed that exemptions from the rule might loosen this important guarantee of the protection of human rights. Since 1991, when Slovenia gained independence, such an attitude toward the principle of legality still prevails probably because people have not realized yet that, in a democracy, there are a lot of other possibilities how to control the State.

Rushing the introduction of novelties into the legislation has led to numerous problems for which we were not prepared. So it took a lot of work and personal enthusiasm of many researchers, prosecutors, judges and social workers that enforce the new approach in practice. And some of the infrastructural problems remain unsolved even today. Regardless of the stated problems we can conclude that Slovenia has made great progress in the development and strengthening of restorative justice elements in criminal law.

References:

Bošnjak, M. (2006): Izbirni mehanizmi v kazenskem postopku. Zbornik znanstvenih razprav 66, pp. 43-67.

Bošnjak, M. (2007): Some thoughts on the relationship between restorative justice and the criminal law. In: Mackay, R., Bosnjak, M., Deklerck, J., Pelikan, C., van Stokkom, B., Wright, M. (Eds.): Images of Restorative Justice Theory. Frankfurt, Germany: Verlag fur Polizeiwissenschaft, pp. 94-111.

Dežman, Z., Erbežnik, A. (2003): Kazensko procesno pravo Republike Slovenije. Ljubljana: GV založba.

Filipčič, K. (2004): O odnosu instituta majhnega pomena dejanja z vsebinsko sorodnimi procesnimi instituti. In: Korošec, D., Ambrož, M., Bavcon, L., Filipčič, K., Šelih, A.: Majhen pomen dejanja kot institut materialnega kazenskega prava, (Zbirka Raziskave). Ljubljana: Uradni list Republike Slovenije, pp. 137-160.

Filipčič, K. (2009a): La Slovénie. Deviance soc. 33 (3), pp. 367-382.

Filipčič, K. (2009b): Community service – new method of correction of juvenile offenders in Slovenia. In: Meško, G., Kury, H. (Eds.): Crime policy, crime control and crime prevention – Slovenian perspectives. Ljubljana: Tipografija, pp. 203-230.

Filipčič, K. (2011): Victim offender mediation: promising alternative to criminal procedure in Slovenia. In: Fenyvesi, C., Herke, C. (Eds.): Pleadings: Celebration volume of professor Tremmel Flórián's 70th birthday, (Studia Iuridica Auctoritatae Universitatis Pécs Publicata, 148). Pécs: Universitatis Pécs, pp. 69-77.

Filipčič, K., Završnik, A., Tekavec, P., Rusjan, M., Zupančil, T., Tonić, A., Murgel, S., Recek, P., Mežnar, A. (2008): Poravnavanje v kazenskem postopku, (Raziskava, št. 156). Ljubljana: Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani.

Fišer, Z. (1997): Pogojna odložitev kazenskega pregona (162. člen ZKP). Pravnik 52 (9/10), pp. 471-508.

Fišer, Z. (2000): Pogojna odložitev kazenskega pregona in opustitev ali odstop od pregona. In: Bavcon, L., Bošnjak, M., Fišer, Z., Karakaš, A., Krapac, D., Novoselec, P., Pavlović, Z., Petrovec, D.: Uveljavljanje novih institutov kazenskega materialnega in procesnega prava, (Raziskava, št. 124), Ljubljana: Uradni list Republike Slovenije, pp. 26-38.

Meško, G., Fields, C., Smole, T. (2011): A concise overview of penology and penal practice in Slovenia: the unchanged capacity, new standards, and prison overcrowding. Prison j. (Phila. Pa.) 91 (4), pp. 398-424.

Mežnar, A. (2000): Poravnavanje med storilcem in žrtvijo kaznivega dejanja – nov institut v naši procesni kazenski zakonodaji, Pravnik 55 (6-8), pp. 475-501.

Ministry of the Interior: Annual Reports on the Work of the Police. Available: http://www.policija.si/eng/index.php/statistics.

Office of the State Prosecutor General of the Republic of Slovenia: Annual Reports. Available: www.dt-rs.si/sl/.

Petrovec, D., Meško, G. (2006): Back to the Future: Slovenia's Penological Heritage. In: Varstvoslovje 8 (3, 4), pp. 356-364.

Šugman, K. (2008): Criminal procedure in Slovenia. In: Vogler, R., Huner, B. (Eds.): Criminal procedure in Europe. Berlin, Duncker & Humblot, Freiburg i. Br., Max-Planck-Institut, pp. 483-539.

Završnik, A. (2008): Konceptualne zagate restorativne pravičnosti – nova paradigma modernega odzivanja na kriminaliteto? Revija za kriminalistiko in kriminologijo 59 (2), pp. 125-140.

Spain

Esther Giménez-Salinas, Samantha Salensch, Lara Toro

1. Origins, aims and theoretical background of restorative justice

1.1 Overview on forms of restorative justice in the criminal justice system

The present report shall commence with a reference to the Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) – substituted by the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA –, the reason being that Spain has not fulfilled the mandate included in Article 10 of the former, despite the implementation dates stipulated in Article 17 (in this case, 22 March 2006).

To the contrary, Spain has adopted legislation, such as the *Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género* ("Law of protective measures against gender violence"), that restricts the potential scope of application of the institution of penal mediation. Indeed, mediation is expressly prohibited in cases of gender violence that fall within the scope of the *Ley Orgánica 1/2004*.[1]

1 Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género (BOE No. 313, 29 December 2004), Art. 44.5. This provision introduced Art. 87ter of the Ley Orgánica 6/1985, de 1 de Julio, del Poder Judicial (BOE No. 157, 2 July 1985).

However, Spain had already promulgated certain restorative-oriented legislation. Most importantly, juvenile criminal legislation had already defined and regulated mediation, reparation and conciliation. Accordingly, a team of experts was in charge of the procedure of mediation. A positive outcome from the mediation procedure was to be assessed in light of the principle of opportunity (*principio de oportunidad*), which would enable the public prosecutor to refrain from initiating formal proceedings or the terminate proceedings that had already been initiated.[2]

By contrast, mediation has remained an unknown institution in Spanish adult criminal law. This is explained by the fact that adult criminal law and criminal procedural law are grounded in the principles of legality and officiality (*oficialidad*).[3] Accordingly, upon the knowledge by the judiciary of facts that may have criminal character, the exercise of the public criminal actions must go forward – apart from those types of crimes where the criminal complaint (*denuncia* or *querella*) by the victim is required – and non-prosecution is thus not allowed.[4] In this regard, it has been stated that the introduction of mediation in the Spanish legal order would require a prior amendment of the principles governing the criminal procedure, given that mediation requires broad discretion in the exercise of criminal justice decision-making, namely that the principle of opportunity applies, and, therefore, that there is the possibility to withdraw from prosecution.[5]

The non-recognition of mediation in adult criminal justice does not mean that reparation to the victim does not have any consequence. The *Ley de Enjuiciamiento Criminal* ("Criminal Procedural Law"), which regulates the criminal procedure,[6] prescribes the pursuit of a procedure of conciliation as a precondition for the initiation of criminal proceedings for defamation (*injuria* or *calumnia* against private individuals), which entails a procedure of dispute resolution without judicial character and similar in nature to mediation.[7] In addition, the Penal Code provides certain legal benefits (mainly in the form of mitigation, suspension or substitution of sentences to imprisonment) as a response to actions of the perpetrator directed towards making reparation to the victim. Moreover, certain crimes and misdemeanours are only prosecutable

2 Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores (BOE No. 11, 13 January 2000), Art. 19.

3 *Manzanares Samaniego* 2009, pp. 7-8.

4 *Freire Pérez* 2011, p. 99.

5 *Carrizo González-Castell* 2011a.

6 Real Decreto de 14 de septiembre 1882, Ley de Enjuiciamiento Criminal, Art. 1, 100, 105 and 271.

7 *García-Rostán Calvín* 2008, p. 446.

upon the filing of the criminal complaint by the victim. In those cases, a procedure of mediation may facilitate the achievement of a reparatory agreement and the withdrawal by the victim from the criminal complaint, which would enable the tribunal to drop proceedings. Certain provisions of the Penal Code may also be interpreted broadly, making mediation a useful tool for making effective reparation to the victim, for obtaining penitentiary benefits or probation, for the suspension of the execution of penalties or for the concession of pardons.[8] Finally, the similarities between mediation and plea bargaining (*conformidad*), in those cases where the victim is exercising the private prosecution, shall be stressed, although formally no professional mediator takes part in the negotiations.

The lack of regulation of mediation in adult criminal justice has led to a very fragmented and unregulated system, where local or regional administrations have taken the initiative and established services of mediation that are being offered to specific courts, under the auspices of the *Proyecto de Mediación Penal y Civil* ("Project of penal and civil mediation"), coordinated by the *Servicio de Planificiación* ("Planning service") of the *Consejo General del Poder Judicial* ("General Council of the Judiciary").[9] However, these pilot experiences, more recent and limited than the experiences in juvenile penal mediation,[10] do not have any legal basis to apply the principle of opportunity.[11]

Accordingly, the framework of restorative justice in Spain is defined by the experience of mediation in the field of juvenile criminal justice, the recent pilot experiences carried out in specific courts of some *Comunidades Autónomas* (autonomous or self-governing communities in Spain) and the international regulations, above all, the Framework Decision of 2001.

1.2 Reform history

The *Projecte de conciliació-reparació a la víctima i els serveis en benefici de la comunitat* ("Project of conciliation-reparation to the victim and community work") has its origins in the mid 1980s. Actually, in one of the earliest

8 *Freire Pérez* 2011, p. 98.

9 The courts where pilot experiences within the *Proyecto de Mediación Penal y Civil* coordinated by the *Consejo General del Poder Judicial* are currently taking place are listed in http://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Juzgados_que_of recen_ mediacion/Juzgados_que_ofrecen_mediacion_Penal (accessed: 10 January 2012). Note that the *Consejo General del Poder Judicial* is a body without judicial character for the autonomous regulation of the judiciary. Its main objective is to guarantee the independence of judges in the exercise of their judicial functions. See http://www.poderjudicial.es (accessed: 3 August 2011).

10 *Gordillo Santana* 2007, p. 328.

11 *Manzanares Samaniego* 2008, p. 11.

conferences on criminal law and victims, the young professor *Frieder Dünkel* presented the new trends in Germany, especially the directions that criminal policies were taking with respect to reparation and conciliation between victims and perpetrators.[12] The project, implemented within the juvenile jurisdiction in Catalonia in May 1990, is the first restorative-oriented programme in Spain.[13] This was possible by means of the transfer of power (*competencias*) in matters relating to the protection of minors from the State to the *Generalitat de Catalunya* (the Catalan autonomous region) in 1981. Already in 1989, a commission of professionals of the *Servei de Medi Obert* ("service of open regime or for the implementation of non-custodial measures") of the *Direcció General de Justícia Juvenil* ("General Directorate for Juvenile Justice") of the *Generalitat de Catalunya* started to work on the configuration of that project, with the aim of creating conciliation and reparation programmes (including non-custodial measures (*medio abierto*) and victim-offender mediation), by means of innovating the ways to confront juvenile delinquency and by overcoming the old paternalistic model followed so far. As a consequence of this first initiative, many others followed, in Madrid, the Basque Country, and later in other *Comunidades Autónomas*.[14]

The regulation of the procedure before juvenile courts (*"procedimientos para corregir y proteger a menores"* before the *Tribunales Tutelares*), provided in the *Ley de Tribunales Tutelares de Menores* ("Law of tutelary courts for minors"),[15] was the object of a judgment issued by the Constitutional Court on 14 February 1991. The Constitutional Court decided that its Article 15 violated the 1978 Spanish Constitution and re-interpreted Article 16 to agree with the Constitution. This led to an urgent and partial reform of juvenile justice.[16] The resulting entry into force in 1992 of the *Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores* ("Law that regulates the jurisdiction and proceedure of the courts for minors") meant the introduction of extrajudicial reparation to the victim as a formula to dismiss criminal proceedings and community work as a new measure within the catalogue of measures. Specifically, it stated:

> *"Considering the nature of the offence, the circumstances and conditions of the minor, of whether the offence has been perpetrated with violence and intimidation, or whether the minor has repaired or*

12 *Dünkel* 1987; 1988; 1989.

13 *Equipo de Mediación del Departamento de Justicia* 1999.

14 *Giménez-Salinas Colomer* 1999a; *Giménez-Salinas Colomer* 1999b.

15 Decreto de 11 de junio de 1948 por el que se aprueba el texto refundido de la Legislación sobre Tribunales Tutelares de Menores (BOE No. 201, 19 July 1948).

16 *Giménez-Salinas Colomer* 1999c.

undertakes to repair the damages suffered by the victim, the judge may declare the stay of proceedings, following a proposal submitted by the public prosecutor."[17]

A second formula also envisaged by the aforementioned law was a form of out-of-court reparation in which, after the conclusion of proceedings, the sentence would be suspended.[18] In this regard, reparation became one of the main forms of reaction of justice to juvenile delinquency.[19]

The most important reform in the field of juvenile justice came with the enactment of the *Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores* ("Law that regulates the criminal responsibility of minors").[20] This newly adopted legislation for the regulation of the jurisdiction of juvenile courts aimed to become a sort of test bed for its future application in the adult jurisdiction. Among others, it is to be highlighted the direction of the investigating phase of the criminal proceeding by the public prosecutor, the broad catalogue of sanctions, the search for balance between sanctions and the entity of the investigated fact and personal and family circumstances of the perpetrator. Nevertheless, the introduction of mediation and reparation in criminal proceedings may be regarded as the most important reform, in light of the rigidity of the Spanish legal order.[21] Unfortunately, the *Ley Orgánica 5/2000* has been amended four times within thirteen years, without achieving its initial aim.[22]

17 The authors' translation of Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores, Art. 15.1.6.

18 Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores, Art. 16.3.

19 *Casanovas/Magre/Lauroba* 2010, p. 597.

20 Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores (BOE No. 11, 13 January 2000).

21 See *Aguirre Zamorano et al* 2000.

22 See Ley Orgánica 7/2000, de 22 de diciembre, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, y de la Ley Orgánica 5/2000, de 12 de enero, reguladora de la Responsabilidad Penal de los Menores, en relación con los delitos de terrorismo (BOE No. 307, 23 December 2000); Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (BOE No. 283, 26 November 2003); Ley Orgánica 8/2006, de 4 de diciembre, por la que se modifica la Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores (BOE No. 290, 5 December 2006); Ley Orgánica 8/2012, de 27 de diciembre, de medidas de eficiencia presupuestaria en la Administración de Justicia, por la que se modifica la Ley Orgánica 5/1985, de 1 de julio, del Poder Judicial (BOE No. 312, 28 December 2012).

In terms of adult jurisdiction, the first pilot experience was developed in 1993 in Valencia, as a result of the cooperation between the *Juzgado de Instrucción* ("investigating court") number 2 of Valencia and the *Oficina de Atención a la Víctima* ("office of attention to the victim") of the *Generalitat Valenciana*. The legal basis for the mediation procedures was Article 21.5 of the Penal Code, which provided a mitigating factor for the reparation of the damages to the victim, and Article 88, on the substitution of the penalty of deprivation of liberty because of, among others, the efforts of the perpetrator to repair damages. Despite the lack of regulation of the principle of opportunity, the Office of Attention to the Victim in Valencia stated that the margins of judicial discretion for the individualization of penalties made mediation procedures possible, by means of the compromise of the public prosecution to request the legally mildest penalties and by means of plea bargaining.[23]

The second pilot experience took place in 1998 at the investigating court number 4 of Vitoria, as a result of the proposal of the Office for Attention toVictims of the Basque Government that works in the courts of Vitoria. This pilot programme was implemented only for one year due to difficulties in unifying the criteria between the mediation service, the public prosecution and the judiciary.[24]

The third mediation programme was developed in Catalonia. Since the entry into force in 1996 of the 1995 Penal Code, several initiatives were implemented by the Department of Justice of the *Generalitat de Catalunya* to promote victim-offender mediation within the ordinary or adult jurisdiction. This was the result of the fact that the jurisdiction over the execution of the penal measures to the community provided in the 1995 Penal Code laid in the former General Directorate of Juvenile Justice, which was called anew *Direcció General de Mesures Penals Alternatives i Justícia Juvenil* ("General Directorate for Alternative Penal Measures and Juvenile Justice"). It was also the result of the accumulated experience of its mediators, expert teams and professionals of non-custodial meaures in juvenile penal mediation, family mediation, and execution of penal measures that did not consist of depriving liberty.[25]

In this regard, a pilot programme of penal mediation for adults was introduced in 1998 in Catalonia. In 2000, the General Directorate of Alternative Penal Measures and Juvenile Justice of the *Generalitat de Catalunya* signed an agreement with the *Associació Catalana de Mediació i Arbitratge* ("Catalan association of mediation and arbitration") for the execution of the programme. The experience was consolidated and led to the creation of a permanent service of penal mediation. Since 2004, the programme has been executed by the

23 *De Jorge Mesas* 2007.

24 *Gordillo Santana* 2007, pp. 331-333.

25 *Casanovas/Magre/Lauroba* 2010, p. 601.

Associació per al Benestar i el Desenvolupament ("Association for welfare and development") and supervised by the services of the General Directorate for Penal Execution to the Community and Juvenile Justice, which grants the continuity of the objectives and proceedings of the programme. This programme, known as *Programa Marc de Mediació i Reparació* ("Framework programme for mediation and reparation"), has already more than ten years of experience, is located in the premises of the investigating courts of Barcelona and is compounded of *Equips de Mediació i Reparació* ("mediation and reparation teams") in five different territories of Catalonia.[26]

The Pilot Project of Penal Mediation with adults of the Autonomous Community of La Rioja could be considered as the fourth programme, having been developed in 2000 in the courts of Logroño upon a proposal of the Office of Attention to the Victim of the Government of La Rioja. This programme was paralysed by the same difficulties that affected the programme in Vitoria.[27]

In Madrid an initial experience of victim-offender mediation was also developed by the association *Apoyo*, where mediation procedures would be conducted within the associative and community network.[28]

Waiting for the state legislator to implement the Framework Decision of 2001, other regional and local administrations have created services of mediation that are offering to specific courts the possibility to develop a pilot experience of penal mediation. Within the application of the *Plan de Modernización de la Justicia* ("Plan for the modernization of justice") adopted by the plenary of the General Council of the Judiciary and which referred to mediation as an effective tool of dispute resolutions, the Council coordinates and promotes the development of pilot experiences of penal mediation in those investigating and criminal courts that voluntarily adhere to its Project of Penal and Civil Mediation. The Project has the technical support of the *Servicio de Planificación y Análisis de la Actividad Judicial* ("Service of planning and analysis of judicial activity") of the Council.[29] At the moment, several investigating and criminal courts of sixteen Spanish provinces are participating in the programme.[30]

26 *Equips de Mediació i Reparació* in Barcelona, Girona, Lleida, Tarragona and Terres de l'Ebre. See *Freire Pérez* 2011, p. 92; *Casanovas/Magre/Lauroba* 2010; *Gordillo Santana* 2007, pp. 333-334.

27 *Gordillo Santana* 2007, pp. 335-344.

28 *Ríos Martín* 2007, pp. 155-156.

29 See http://www.poderjudicial.es/cgpj/es/Temas/Mediacion (accessed: 10 January 2012).

30 See http://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Juzgados_que_ofrecen_mediacion/Juzgados_que_ofrecen_mediacion_Penal (accessed: 10 January 2012).

1.3 Contextual factors and aims of the reforms

Most of the literature in Spain identifies the abolitionist theories, the discovery of the victim and the failure of socialization as the factors of the conception of restorative justice.[31]

In Spain, the case of victims of terrorism is also to be noted. Associations for victims of terrorism that were grounded in the 1990s have played an important role in the movement for improving and promoting victims' rights. The State and the *Comunidades Autónomas* have developed legislation in the field of the protection of the rights of victims of terrorism.[32] The first provision was included in the 1992 state budget law, consisting of the concession of pensions to those who suffered injuries or died as a result of acts of terrorism.[33] The most recent provisions in the field are regulated in *Ley 29/2011, de 22 de septiembre, de Reconocimiento y Protección Integral a las Víctimas del Terrorismo* ("Law on the acknowledgment and complete protection of victims of terrorism").[34]

The protection of the rights of victims of family and gender violence has also been dealt with by the State and the *Comunidades Autónomas*. In this sense, the enactment of the above-mentioned 2004 Law of protection measures against gender violence must be stressed.

In terms of juvenile justice and the specific mediation programmes that have been undertaken, reference should be made to the context of the writing of the "Project of conciliation-reparation to the victim and community work", the programme of mediation in juvenile criminal justice implemented in Catalonia in 1990. Catalonia enacted the *Llei 11/1985, de 13 de juny, de protecció de menors* ("Law on the protection of minors"), in the exercise of its exclusive power (*competència exclusiva*) in the field of policy relating to the protection of minors.[35] The *Llei 11/1985*, as its preamble declares, intended to follow a new concept in the field through the introduction of a substantial change to the inadequate and old-fashioned legislation then in force. This was to be achieved by means of "*the enactment of a law on the protection of minors inspired in the modern techniques that inform the most advanced legislation, which could*

31 See eg *Matellanes Rodríguez* 2011, pp. 210-223.

32 For a catalogue of state and regional legislation on victims of terrorism, see http://www.interior.gob.es/ayudas-38/a-victimas-de-actos-terroristas-356/normativa-bas ica-reguladora-357?locale=es (accessed: 17 June 2013).

33 Ley 31/1991, de 30 de diciembre, de Presupuestos Generales del Estado para 1992 (BOE No. 313, 31 December 1991), Disposición Adicional 28.

34 Ley 29/2011, de 22 de septiembre, de Reconocimiento y Protección Integral a las Víctimas del Terrorismo (BOE No. 229, 23 September 2011) and amendments.

35 Llei 11/1985, de 13 de juny, de protección de menors (DOGC No. 556, 28 June 1985).

replace the old regulations on the protection of minors".[36] The mediation programme in Catalonia received the support and supervision of German professors, such as *Frieder Dünkel*, *Dieter Rössner* and *Udo Jesioneck*.[37]

The old protective model that had dominated thus far, without granting procedural guarantees and rights to juveniles, was abandoned at the state level with the adoption of the above-mentioned 1992 Law that regulates the jurisdiction and procedure of the courts for minors. The old legislation served as a basis for implementing a new model, since legislation neither mentioned nor prohibited such a new perspective. This demonstrates the significance that the social impulse had for adopting a new model that went beyond the legislation then in force.

This experience was conceived and initially developed in Catalonia from a position oriented towards the figure of the minor offender, towards the care for his or her education and with the aim of promoting positive procedures of socialization. Victims, although being considered for the first time as an actor within the context of juvenile justice, remained an enigma, given that victims were absolutely excluded from juvenile justice, without any right to information or to be party to the proceeding. In this context, in the first phase of the programme, victims helped in the process of education and acceptance of responsibility by the minor offender.[38] Later, and mainly as a consequence of the rediscovery of the figure of the victim and a better knowledge of his or her circumstances, mediators have evolved towards a more neutral position that accepts the possibility that minor offenders accept liability for their own actions. In this regard, despite the fact that mediation was not regarded as an educative procedure oriented towards the offender, the effects of mediation were clearly educative and therapeutic for both offenders and victims.[39]

The Preamble of the 2000 Law that regulates the criminal responsibility of minors refers to the introduction of reparation, conciliation and mediation in juvenile justice, underlining the effects of the principle of minimum intervention of criminal law and stressing the educative and socializing effects of reparation and conciliation, in the following terms:

> *The reparation of damages and the conciliation between the perpetrator and the victim have a special interest … as situations that, by virtue of the principle of minimum intervention and with the mediation of an expert team, may lead to the non-institution of a proceeding or to the stay of the proceeding, or to the end of the execution of the ordered*

36 Authors' translation of Llei 11/1985, Preamble. See *Giménez Salinas i Colomer* 1996; *Giménez-Salinas i Colomer* 1999a.

37 *Jesionek* 2000; *Rössner* 1999.

38 *Casanovas et al.* 2009, pp. 95-96.

39 *Ibid*. 96.

measure. In these situations there is a clear preponderance, once again, of educative and re-socializing criteria, over those interests of a social defence essentially based on general prevention that could become counterproductive. The reparation of damages and conciliation with the victim have as a common denominator that the offender and the victim reach an agreement whose fulfilment by the minor determines the end of the legal conflict initiated by him or her. Conciliation has as an object the psychological satisfaction of the victim by the minor offender, who must regret the damages caused and be ready to apologize. ... In reparation, the agreement is not obtained only by means of the psychological satisfaction, but additionally demands that the minor complies with the agreement reached with the victim to repair the damages.[40]

Regarding adult criminal justice, the Spanish government justified the lack of implementation of the Framework Decision of 2001 on the fact that the debate on this topic should take place within the future reform of the Criminal Procedural Law, where the convenience of its implementation, the types of crimes that would be affected, the statute of the mediator and the consequences and effects of mediation would be dealt with.[41]

Nevertheless, it can be stated that penal mediation programmes applied in different Spanish regions within adult justice, which have been circumscribed to the sphere of the offices of attention to the victim or promoted by such offices, have taken as their main foundation the concern about the situation and demands of victims in criminal proceedings.[42]

1.4 Influence of international standards

Several international instruments have played an essential role in overcoming the traditional paternalistic model of juvenile criminal justice, as well as the vision of minors and the social reaction to juvenile delinquency, by means of measures of open regime (non-custodial measures) and of victim-offender mediation introduced in Catalonia in 1990.[43] Reference must be made to Recommendation No. R (87) 20 of the Committee of Ministers to Member States on Social Reactions to Juvenile Delinquency, adopted on 17 September 1987, and, particularly, to the recommendation of promoting non-custodial

40 Autors' translation of Ley Orgánica 5/2000, Preamble.

41 *Carrizo González-Castell* 2011a, p. 234, referring to the Parliamentary Written Answer 4/001242/0000, BOCG of 9 July 2004.

42 *Gordillo* 2007, p. 351.

43 *Casanovas/Magre/Lauroba* 2010, p. 599.

measures (measures of open regime) over the deprivation of liberty, and of promoting mediation.[44]

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), adopted by General Assembly resolution 40/33 of 29 November 1985, were also relevant for the "project of conciliation-reparation to the victim and community work" described above. The Beijing Rules recommend, that "*[i]n order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims*."[45] The United Nations Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 of 20 November 1989, had further influence on the development of the project. Particularly relevant are Article 3(1) of the Convention, which provides that "*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*", and Article 40, on the rights of the children accused of having infringed the penal law.

Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters, adopted by the Committee of Ministers on 15 September 1999, and in particular, its definition of mediation, influenced the development of the programme of penal mediation upheld in Catalonia since 1998.

Finally, the "Project of Penal Mediation", coordinated by the Geneal Council of the Judiciary, is founded on the Framework Decision of 2001 and, in particular, on its Articles 10 and 17.[46]

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

The 2000 Law that regulates the criminal responsibility of minors deals adequately with the need to distinguish between before sentencing and after sentencing, providing restorative measures in both phases. However, the penal procedure for adults does not have any formula that could explicitly give entrance to such measures, although this should not be interpreted as meaning that they are prohibited.

---

44 Recommendation No. R (87) 20 of the Committee of Ministers to Member States on Social Reactions to Juvenile Delinquency, adopted on 17 September 1987, Chapter II.

45 See Rule 11.4.

46 See http://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Juzgados_que_ofrecen_mediacion/Juzgados_que_ofrecen_mediacion_Penal/relacionados/LA_MEDIACION_EN_EL_PROCESO_PENAL (accessed: 15 January 2012).

2.1 Pre-court level

2.1.1 Adult criminal justice

In order to address the present section, it is necessary to distinguish between private, semi-public or public criminal offences. In contrast to semi-public or public offences, private criminal offences are types of crime or misdemeanours that may only be prosecuted *ex parte*, upon the submission of a criminal complaint (*querella*) by the private prosecution.[47] The public prosecutor cannot take this decision from the damaged party.[48] Likewise, the criminal action deriving from private criminal offences becomes extinct, therefore concluding their prosecution, when the victim withdraws from the action (Article 106 of the Criminal Procedural Law), abandons the criminal complaint (Articles 275-276 of the Criminal Procedural Law) or forgives the offender. In the light of this, mediation could be considered as a useful method for facilitating that parties reach an agreement that fully repairs the damages to the victim, leading to the possible withdrawal of the criminal complaint by the victim and the following declaration of stay of the proceeding by the judge or tribunal.[49]

Regarding private criminal offences, it is also relevant to mention that the criminal complaint shall not be admitted, without accrediting that the complainant has held or has tried to hold an act of conciliation with the offender.[50] Conciliation takes place before a judge of the civil jurisdiction and has some similarities with mediation. The judge chairs the act of conciliation and must seek an agreement between the parties. Therefore, even if it is not mentioned in the legislation, mediation could be a means for achieving forgiveness or an agreement before the initiation of criminal proceedings,[51] which in turn could lead the victim to drop the complaint and not to seek that the offender be prosecuted further.

---

47 The *querella* is a procedural act that implies the exercise of a criminal action. It may be filed by the victim (private prosecution), a person that was not affected by the crime (popular prosecution) or the public prosecutor, and means that they become parties to the proceeding. This type of criminal complaint is different from the type of criminal complaint known as *denuncia*, which only communicates the *notitia criminis* to the judicial authorities, public prosecutor or police, without the complainant automatically becoming a party to the proceeding. See *Rifà Soler/Richard González/Riaño Brun* 2006, pp. 210-214.

48 *Gordillo Santana* 2007, pp. 99-100.

49 *Freire Pérez* 2011, p. 98.

50 Ley de Enjuiciamiento Criminal, Art. 804.

51 *Manzanares Samaniego* 2009, pp. 5-6.

Within the semi-public criminal offences, different situations may be distinguished. For certain semi-public crimes,[52] the public prosecution may only initiate criminal proceedings when the victim is a minor, disabled or otherwise vulnerable or "in need". Even if the semi-public crimes of sexual aggression, abuse and assault (Articles 178-184 of the Penal Code), the crimes against privacy and certain negligent misdemeanours also require a criminal complaint by the victim or his/her legal representative, the public prosecution may in any case initiate proceedings upon weighing up the interests of justice, without depending on the will of the victim (Article 191 of Penal Code). Thus, if a victim does not wish to press charges, the prosecutor can anyway. The Penal Code also provides that criminal liability arising from certain semi-public criminal offences[53] becomes extinct if the criminal complaint in dropped, the renounce to the exercise of the criminal action, or forgiveness is achieved (Article 130.4, 274.2 and 276 of the Criminal Procedural Law).

In those cases, there is certainly a margin for extrajudicial mediation and reparation before the beginning of any judicial activity, which could lead to the decision of the victim or the public prosecutor not to file any criminal complaint. This would only be possible for the public prosecution in those cases where it legally has the power to weigh up the interests in place, which could include the results of a restorative procedure.[54]

Otherwise, the effects of a restorative procedure to avoid criminal proceedings are little, in accordance with the current Spanish procedural legislation, since the criminal procedure does not recognize the principle of opportunity of prosecution, unlike in juvenile justice, to which we now turn.

---

52 Crime of non-consented assisted reproduction (Art. 162.2 Penal Code); discovering and revealing secrets (Art. 201 Penal Code); defamation against public servants, authority or agent on the exercise of their positions (Art. 215.1 Penal Code); abandon of family and non-payment of family pension (*alimentos*) (Art. 228 Penal Code); damages for grave negligence over 80,000 Euros (Art. 267 Penal Code); crimes against intellectual and industrial property, market and consumers (Art. 287 Penal Code); corporate crimes (Art. 296 Penal Code); misdemeanours of threats, negligent injuries or manslaughter for mild negligence (Art. 620 and 621 Penal Code) and misdemenaours of alteration of boundaries which are not superior to 400 € (Art. 624 Penal Code). See *Gordillo Santana* 2007, p. 102.

53 The crime of discovering and revealing secrets (Art. 201 Penal Code); defamation against public servants, authority or agent on the exercise of their positions (Art. 215.1 Penal Code); misdemeanours of threats, negligent injuries or manslaughter for mild negligence (Art. 620-621 Penal Code) and misdemenaours of alteration of boundaries which are not superior to 400 € (Art. 624 Penal Code). See *Gordillo Santana* 2007, p. 102.

54 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 457.

2.1.2 Juvenile justice

As mentioned above, restorative intervention in juvenile justice already starts with the possibility of the public prosecutor to withdraw from the institution of proceedings, in accordance with Article 18 of the 2000 Law that regulates the criminal responsibility of minors.[55]

Article 18 is based on the principle of opportunity, because it authorizes the public prosecutor to desist from the exercise of the criminal action in certain circumstances, upon the fulfilment of two conditions: from a formal perspective, such course of action is possible in cases of less grave crimes and misdemeanours (Article 13, in relation to Article 33 of the Penal Code). This implies that the application of this decision is based on the severity of the offence in question, excluding more serious forms of delinquency; from a material perspective, the crime must not have been committed with any form of violence or intimidation.

In case of application of Article 18, the public prosecutor shall inform the public body for juvenile protection, so that the possible existence of a situation of vulnerability can be assessed and the adequate protective measures can be adopted where appropriate.[56] In addition, the public prosecutor shall inform victims of the withdrawal, and of their right to exercise the civil actions to which they are entitled. Withdrawal from the institution of proceedings is not allowed in cases of re-offending.[57]

Without being expressly stated in Article 18, victim-offender mediation may serve as grounds for applying Article 18.[58] It has, however, been criticised that mediation, as well as other alternatives, is only accessible for juveniles of a certain level of socialization. It is, for instance, hard to imagine a procedure of mediation with a minor from a migrant background, which is essentially an unacceptable degree of initial distinction. For this reason, it has been criticised that the *Ley Orgánica 5/2000* did not take into account the social changes experienced by the State at the time.[59]

55 *Montero Hernanz* 2011, p. 5.

56 Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores, Art. 3; see *Montero Hernanz* 2011, p. 5.

57 Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores, Art. 18.2.

58 *Montero Hernanz* 2011, p. 6.

59 *Giménez-Salinas i Colomer* 2000; 2004.

2.2 Court level

2.2.1 Adult criminal justice

The Penal Code states that committing a crime or misdemeanour brings with it an obligation to repair damages, in the terms provided by law,[60] and it adds that any person criminally responsible for a crime or misdemeanour is also civilly responsible, if damages arise from the criminal offence.[61] Therefore, criminal offences are a source of pecuniary obligations,[62] which are to be guaranteed with the wealth and assets of perpetrators.[63] The Penal Code regulates the obligation to repair,[64] and a certain order of reparation is prescribed: first, the restitution of goods, with the compensation of any deterioration; secondly, the reparation of damages; and, if it were not possible, the awarding of material and moral damages.[65]

The Penal Code does not regulate reparation to the victim as a possible penalty, nor has it taken steps to introduce mediation in adult criminal justice. Nevertheless, the Penal Code has introduced some restorative-oriented considerations among the requirements for the adoption of alternatives to deprivation of liberty. In this sense, reparation can justify a mitigation of sentence, the application of a substitute sanction or a suspension of penalties.[66]

First of all, the results of a restorative procedure may be taken into account by the prosecution for plea bargaining (*conformidad*), with the acceptance of a milder conviction by the perpetrator. To avoid the unawareness of victims' interests within the plea bargaining process and the risks of re-victimization, mediation or another restorative procedure may increase the chances that the situation is resolved with victimological criteria in mind.[67]

Furthermore, Article 21.5 of the Penal Code provides reparation as a mitigating factor. Accordingly, a mitigating factor may be conceded "*[i]f the perpetrator has repaired the damages to the victim, or diminished their effects, in any moment of the proceedings and before the celebration of the oral trial*."[68]

60 Penal Code, Art. 109.1

61 Penal Code, Art. 116.1.

62 See Civil Code, Art. 1,089.

63 See Civil Code, Art. 1,911.

64 The content of civil liability is described in the Penal Code, Art. 111-115.

65 Penal Code, Art. 110.

66 *Leganés Gómez* 2008, p. 3.

67 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 456.

68 Penal Code, Art. 21.5.

This mitigating factor is generic, namely, it applies to all types of criminal offences. Reparation must also have taken place before the initiation of the oral trial.[69] However, the reparation produced during the celebration of the trial may lead to the application of the analogical mitigating factor provided in Article 21.7 of the Penal Code.[70] On the contents of the reparation, the Supreme Court has stated:

> "*[T]he substantial element of this mitigating factor consists of the reparation of damages caused by the crime or diminishing their effects, in a broad sense of reparation that goes beyond the meaning that is given to this expression in Article 110 of the Penal Code, given that Article 110 refers exclusively to civil liability, which is different from criminal liability that affects the mitigating factor. Any form of reparation of damages or of diminishing their effects, by means of restitution, compensation of damages, moral reparation or even symbolic reparation, may fall within the scope of the mitigating factor.*"[71]

From a subjective perspective, the mitigating factor regards only personal conduct by the offender, excluding:

> "*1.- payments made by insurance companies according to a mandatory insurance; 2.- conceding a guarantee or caution which has been requested by the court; 3.- conducts imposed by the Administration; 4.- the mere information of the existence of goods that are being searched, when these goods would necessarily have been found.*"[72]

In addition, the reparatory acts of the offender must be significant in relation to the type of crime committed, so that it is not possible to apply the mitigating factor in apparent acts or small reparations.[73] The economic capacity of the offender does not determine the level of reparation, even though it is relevant

---

69 See e. g. Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 1006/2006, 20 October.

70 *Manzanares Samaniego* 2009a, p. 3. See Penal Code, Art. 21.7.

71 Authors' translation of Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 2/2007, 16 January. See also e. g. Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 216/2001 of 19 February; Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 794/2002, 30 April.

72 Authors' translation of Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 1006/2006, 20 October.

73 See Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 179/2007, of 7 March. See also e. g. Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 1002/2004 of 16 September; Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 145/2007 of 28 February; Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 179/2007 of 7 March; Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 683/2007 of 17 July.

information to take into account. Moreover, real and true reparation is not equal to complete reparation, as long as the offender has made a real effort, since diminishing the effects of the crime is also accepted. However, this will be relevant for determining the weight attributed to the mitigating factor, since mitigation may be applied in the categories of "ordinary" or "qualified" mitigation.[74]

In light of this, it is common to apply this mitigating factor to the agreements celebrated between the offender and the victim, by which the offender makes a payment for the damages caused to the victim.[75] Jurisprudence requires the payment to have been effective before the oral trial for the application of the mitigating factor.

Interestingly, the Supreme Court has referred to the participation of the offender in a programme of penal mediation for the application of the mitigating factor of reparation. In a case, decided in 2006, the offender had participated together with the victim in a mediation programme coordinated by the *Subdirecció General de Medis Oberts i Mesures Penals Alternatives* of the *Generalitat de Catalunya* ("General Sub-direction of Open Regime and Alternative Criminal Measures" of Catalonia). This public body had filed a report informing that:

> "*[the offender] manifests its repentance for the caused injuries to … [the victim], who never had the intention to cause any damage, and, in addition, he expresses his apologies. … [the victim] accepts the apologies. Both parties, with the signature of this agreement, considered this conflict as finished. … [the victim] considers that he has been repaired after this process of mediation.*"[76]

Given the requirements for the application of the mitigating factor, the Supreme Court considered:

> "*[T]he mere participation of the offender in a voluntary programme of penal mediation, even with a positive outcome, does not imply effective reparation. The victim renounced from the beginning any kind of compensation. Therefore, it is irrelevant that there are no damages to repair or that the existing damages have been renounced, given that in any of the cases the possibility of reparation has not been offered and actually no reparation has taken place.*"[77]

The criteria followed by the Supreme Court in this case, therefore, indicated that reparation in the sense of Article 21.5 of the Penal Code must consist of a

---

74 Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 1006/2006 of 20 October.

75 Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 6/2008 of 23 January.

76 Authors' translation of Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) No. 1006/2006 of 20 October.

77 Authors' translation of Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) of 20 October 2006.

positive action by the offender, being insufficient the mere participation of the offender in a programme of penal mediation, if no reduction of damages has been accredited. In this regard, it considered mere moral satisfaction of the victim as insufficient.[78]

According to the jurisprudence of the Supreme Court, the mere payment of civil liabilities is not sufficient,[79] even more so when it is not accredited that the accused had to make extraordinary effort or sacrifice in order to do so.[80] It is interesting to note that the Supreme Court has applied mitigation in a "qualified" manner in cases where the accused not only paid damages, but also expressed his or her apologies to the victim. According to the Supreme Court, this reflects an attitude of recognition of the legal order and moral reparation, which is more relevant for the Court than mere economic reparation.[81]

On the other hand, the Penal Code also includes forgiveness by victims as grounds for extinguishing criminal liability.[82] In Spain, forgiveness is only relevant and assessed by judges and tribunals as long as it is introduced and accredited in criminal proceedings according to certain legal conditions. This does not exclude, obviously, that forgiveness may actually be the result of a mediation process. In this regard, the legal conditions that must be present in the act of forgiving are the following: (i) it must be given in an express manner and before sentencing; (ii) the judge or tribunal must hear the victim before sentencing; (iii) in cases of minor or disabled victims, the judge or tribunal may reject the forgiveness given by their legal representatives, upon hearing the public prosecutor and their legal representative.[83] The offence types for which extinction of criminal liability can be applied are stated in the special part of the Penal Code, which are: the crime of discovering and revealing secrets,[84] defamation (*calumnia* and *injuria*)[85] and the crime of negligent damages,[86] as

78 The same criteria were followed by the *Audiencia Provincial* of Barcelona in 2001. See *Audiencia Provincial*, Barcelona, Judgment (Sentencia) of 11 December 2001.

79 See Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) of 14 June 2011. See also e. g. Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) of 8 February 2007.

80 Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) of 12 May 2011.

81 Tribunal Supremo, Sala de lo Penal, Judgment (Sentencia) of 29 January 2008.

82 Penal Code, Art. 130.1.5.

83 Penal Code, Art. 130.1.5.

84 Penal Code, Art. 197, 201.3.

85 Penal Code, Art. 215.3.

86 Penal Code, Art. 267.

well as misdemeanours of threat, coercion, insult and humiliation[87] and some misdemeanours of grave negligence with injuries.[88]

Finally, the substitution of penalties of deprivation of liberty, which is a legal mechanism that promotes reparation, is provided by Article 88 of the Penal Code. Accordingly, the sentencing tribunal may impose, in the same sentence or later before the execution of penalties, a milder penalty than legally provided for the criminal offence committed. For applying this mechanism, the tribunal must assess, among other circumstances, the efforts made by the perpetrator to repair damages, and whether the execution of the penalty of deprivation of liberty could hinder or jeopardize the aims of prevention and socialization.[89] With Article 88, reparation to the victim becomes a way of avoiding the execution of penalties of imprisonment in favour of alternative penalties.[90] It provides the possibility of replacing imprisonment with community work, which can be of a restorative nature, since according to the law community service can consist of the reparation of damages or of support or assistance to victims of crimes similar to the one perpetrated in the given case (though no provision is made for work to be performed for the actual direct victim of the offender performing the community service).[91] Therefore, this provision may become a formula for giving punishing character to the agreements that may have been adopted in the reparatory procedure.[92]

2.2.2 Juvenile justice

Within juvenile criminal justice, the broadest expression of the principle of opportunity and of restorative justice was formally introduced by Article 19 of the 2000 Law that regulates the criminal responsibility of minors, in the form of the possibility of staying proceedings in case of conciliation or reparation between the minor offender and the victim.[93]

The public prosecutor may withdraw from continuing the procedure, in the light of the gravity and circumstances of the crime and of the personal circumstances of the minor. In particular, the circumstances considered are the lack of violence or serious intimidation in the commission of the offence, whether the minor and the victim have reconciled and the minor has agreed to repair

87 Penal Code, Art. 620.

88 Penal Code, Art. 621.

89 Penal Code, Art. 88.

90 Freire Pérez 2011, p. 101.

91 Penal Code, Art. 49.

92 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 457.

93 *Gordillo Santana* 2007, p. 326; *Montero Hernanz* 2011, p. 6.

damages to the victim or to fulfil an educative activity proposed by the expert team in its report.[94] This possibility is limited to minor crimes (*delito menos grave*) or misdemeanours.[95]

Paragraph 2 of Article 19 defines the concepts of conciliation and reparation. Paragraph 3 formally introduces mediation, providing that the functions of mediation between the minor offender and the victim will be conducted by expert teams that support the judge or public prosecutor and that shall inform them about the reparatory agreement and the degree of fulfilment.

Once the conciliation has taken place or the reparatory agreement has been fulfilled, or when both could not be fulfilled by reasons for which the minor is not to blame, the public prosecutor considers the investigating or pre-trial phase of the proceeding as concluded and requests that the judge close the proceedings.[96] The judge shall do so once he or she has checked that the legal requirements have been fulfilled.[97] When the minor offender does not repair or fulfil the prescribed educational activity, the public prosecutor shall continue the proceedings.[98]

In addition, Article 27 provides that the expert team may inform the public prosecutor, if adequate for the minor's interest, on the possibility of conducting a reparatory activity or conciliation with the victim, according to Article 19.

It is relevant to take into account that the implementation of the 2000 Law that regulates the criminal responsibility of minors is developed by *the Reglamento de Responsabilidad Penal de los Menores* ("Regulation of the criminal responsibility of minors") (Real Decreto 1774/2000, de 30 de Julio).[99]

2.3 Restorative Justice elements while serving sentences

2.3.1 Adult criminal justice

Despite the lack of legislation on mediation and similar formulas, restorative justice conducted after sentencing may be considered to have a space within the system of execution of penalties of deprivation of liberty, since the promulgation of the *Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria* ("Penitentiary Law"), which introduced flexibility in the execution of penalties,

94 Ley Orgánica 5/2000, Art. 19.1.

95 *Ibid*.

96 Ley Orgánica 5/2000, Art. 19.4.

97 *Montero Hernanz* 2011, p. 6.

98 Ley Orgánica 5/2000, Art. 19.5.

99 Reglamento de Responsabilidad Penal de los Menores (Real Decreto 1774/2000, de 30 de Julio) (BOE No. 209, 30 August 2004).

and the principle of penitentiary individualization of penalties.[100] In this regard, restorative justice may have effects on the execution of penalties in different ways.

In the first place, once the sentence is definite,[101] the sentencing judges or tribunals have the possibility, provided by Articles 80-87 of the Penal Code, to order the suspension of the execution of the penalty of deprivation of liberty, as long as the sentence in question is not longer than two years.[102] This order depends on the fulfilment of the following legal conditions:

(i) that it was the first time that the perpetrator committed a criminal offence;
(ii) that the penalties, in total, do not amount to more than two years; and, more importantly for the present study,
(iii) that the perpetrator has satisfied the civil liability *ex delicto*, unless the sentencing judge or tribunal declares that doing so would be partly or entirely impossible for the offender to bear economically.[103] The possibility to suspend the execution of the penalty, despite the non-payment of the civil liabilities, was introduced to avoid imprisonment for debts (*prisión por deudas*).[104]

In addition, the sentencing judge or tribunal may impose certain conditions for ordering the suspension of the execution of the penalty of deprivation of liberty.[105] Although not expressly provided, the judge or tribunal may impose the fulfilment of restorative-oriented duties as a condition. Such duties could consist of implementing the agreements achieved in a mediation or restorative procedure.[106] This is based on Article 83.1.6 of the Penal Code, which deals with duties for the social rehabilitation of the convicted, with his or her prior consent.[107]

In the context of imprisonment, reparation can play a role in entitlements to be placed in the "third penitentiary degree" (open regime) and in the context of granting parole (in Spain: "probation") decisions. The following three provisions

100 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 459.

101 Penal Code, Art. 82.

102 Penal Code, Art. 80.1.

103 Penal Code, Art. 81.

104 *Leganés Gómez* 2008, p. 5.

105 Penal Code, Art. 83.1.

106 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 459; *Freire Pérez* 2011, p. 101; *Leganés Gómez* 2008, p. 5.

107 Penal Code, Art. 83.1.6.

on "penitentiary reparation" essentially aim at promoting reparation by attributing a rewarding character to it.[108]

In order to progress in the degrees of penitentiary treatment in the execution of penalties of imprisonment, *Ley Orgánica 7/2003, de 23 de junio* introduced a new condition for eligibility for the "third degree", which implies placement in an open regime.[109] This new condition regards the conduct of the convicted offender in terms of whether he/she has paid for civil liability *ex delicto* (restitution, reparation or award of damages).[110] This condition is limited to a catalogue of crimes: serious crimes against property and against the social-economic order; crimes against the rights of workers; tax and social security crimes, and; crimes against the public administration.[111] In spite of the limitation of the scope of application of this provision, it has nonetheless been considered that it defines a new direction of criminal policy towards considering reparation as a condition that must be part of the socialization that characterizes the execution of penalties.[112]

Also since the above-mentioned reform of 2003, a new condition has been introduced in the context of parole, or "probation", namely that the report on the personal and favourable prognosis of socialization assesses the satisfaction by the offender of the civil liability *ex delicto*. This condition is only applicable in the same circumstances and for the same crimes as the provision governing access to the third degree of penitentiary treatment (open regime) described just above.[113] Regarding crimes of terrorism or organized crime, it is required that the socialization-prognosis-report refers to the fact of having apologized to victims.[114]

The legislative reform of 2003 also introduced a provision in Article 91.2 of the Penal Code that brings restoration into the context of early release. The penitentiary judge may bring forward eligibility for parole (in Spain: probation) once half of the penalty has been fulfilled, when the convicted has favourably participated in programmes that seek to effect the making of reparation to victims. This provision is excluded for certain crimes of terrorism and organized crime.[115]

---

108 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 460.

109 Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria (BOE No. 239, 5 October 1979), Art. 72.2.

110 Ley Orgánica 1/1979, Art. 72.5.

111 Ley Orgánica 1/1979, Art. 72.5.2.

112 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 459.

113 Penal Code, Art. 90.1.

114 Penal Code, Art. 90.1.3.

115 Penal Code, Art. 91.2.

Finally, it is to be taken into account that the Penal Code includes the concession of a pardon (*indulto*) among the extinctive causes of criminal liability.[116] This option is open to all types of crimes,[117] once the sentence is final.[118] It is suggested that the authority of the Government to exercise its right of mercy by means of the concession of pardons may be administered by restorative criteria, since the victims' interests and the reparation of damages may be taken into consideration for conceding pardons.[119]

The concession of a pardon shall not include the civil liability.[120] Both the "*causation of no damage to a third person or to his or her rights*" – which may include damages to the victim – and "*the hearing of the victim, when the crime committed may only be prosecuted ex parte*" are necessary conditions for the concession of pardons.[121] Their concession may be complemented with "*other conditions that justice, equity or public utility dictate*."[122] These provisions may bring the government to examine the need of imposing some restorative measures. In these cases, restorative procedures may take into account the victims' needs and may institute procedures of mediation or processes that are favourable to achieving the making of reparation. It is suggested that the concession of pardons may be considered essential for facilitating peace processes regarding situations of civil violence.[123]

2.3.2 Juvenile justice

The manifstations of reparation and restoration in the context of prison sentences and their execution (described in *Section 2.3.1* above) do not apply to juveniles. The rules for the execution of sentences concerning juveniles are regulated in Articles 43-60 of the 2000 Law on the Criminal Responsibility of Minors. Generally, within juvenile criminal justice, conciliation between the minor offender and the victim may render the prescribed measure ineffective at any time during the execution of the measure, when the judge so decides, upon the proposal of the public prosecutor or the defence counsel of the minor, and

116 Penal Code, Art. 130.1.4.

117 Ley de 18 de junio de 1870, del Indulto, Art. 1.

118 Ley de 18 de junio de 1870, Art. 2.1.

119 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 460.

120 Ley de 18 de junio de 1870, Art. 6.

121 Authors' translation of Ley de 18 de junio de 1870, Art. 15, 17.

122 Authors' translation of Ley de 18 de junio de 1870, Art. 16.

123 *Baca Baldomero/Echebarría Odriozola/Tamarit Sumalla* 2006, p. 461.

after hearing the expert teams and the public body of protection or reform of minors.[124]

3. Organisational structures, restorative procedures and delivery

As preliminary considerations, it is to be noted that the lack of specific legislation on restorative justice in Spain and the territorial organization of the State in *Comunidades Autónomas* has led to the inexistence of a common and specific policy regarding the organization and configuration of structures of managing restorative procedures. In the 1980s, certain powers (*competencias*) in the area of justice were transferred to the *Comunidades Autónomas*. Consequently, the *Comunidades* have developed with different intensity the implementation of restorative justice in their own territory, although always behind the standards of some European countries.

Even though mediation or reparation procedures have been introduced in Spain since 1990, the biggest stimulus of restorative justice took place after the Framework Decision of 2001. Indeed, from that moment, some *Comunidades* started to introduce institutions of penal mediation, with the aim of promoting restorative justice, in both juvenile and adult criminal jurisdictions. The systems developed in the Basque Country and Catalonia, which have worked very exhaustively so that restorative justice becomes a good alternative to criminal proceedings, are commented in the present section.

The list of current penal mediation services in Spain presented in *Table 1* below is the result of the consultations made with several institutions, such as the General Council of the Judiciary or the *Centre d'Estudis Jurídics i Formació Especialitzada* ("Centre of Legal Studies and Specialized Education") of the *Generalitat de Catalunya*. There may be other mediations teams unknown to us.

124 Ley Orgánica 5/2000, Art. 51.3.

Table 1: Overview of the service providers in the individual autonomous communities

Autonomous community	Involved courts	Involved voluntary services
Andalucía	Six *Juzgados de lo Penal* ("criminal courts")	*Enlace* Association *Mediamos* *Solucion@* *AFIMA*
Aragón	Six *Juzgados de Primera Instancia y/o Instrucción* ("investigating courts")	*¿Hablamos?* Association
Castilla y León	Four *Juzgados de Primera Instancia y/o Instrucción* Three *Juzgados de lo Penal*	*Promedia* Association *AMEPAX*
Catalunya	Thirty-Four *Juzgados de Primera Instancia y/o Instrucción* One *Juzgado de lo Penal*	*Equips de Mediació i Reparació Penal* ("penal mediation and reparation teams")
Comunidad Valenciana	One *Juzgado de lo Penal* *Sección Primera de la Audiencia Provincial* ("first section of the province court")	-
La Rioja	Three *Juzgados de Primera Instancia y/o Instrucción*	-
Madrid	Two *Juzgados de Instrucción* ("investigating court")	*Asociación para la Pacificación de Conflictos en Madrid* ("association for the peaceful resolution of conflict in Madrid")
Navarra	Two *Juzgados de Instrucción* One *Juzgado de lo Penal*	*ANAME* Association
País Vasco	Thirty *Juzgados de Primera Instancia y/o Instrucción* Nine *Juzgados de lo Penal* *Sección primera de la Audiencia Provincial*	*Servicio de Mediación Intrajudicial del País Vasco* ("intrajudicial mediation service of the Basque Country")

As mentioned above, the mediation and reparation programme for juvenile justice applied in Catalonia, which had been in force since 1990, is offered by the General Directorate of Alternative Penal Measures and Juvenile Justice of the *Generalitat de Catalunya*. In this programme, the perpetrator and the victim voluntarily take part by means of a confidential procedure based on dialogue and

communication and led by an impartial mediator. Its main objective is the adequate reparation of damages and a solution to the conflict from a fair and balanced perspective between the interests of both parties.

The "Teams of Penal Mediation and Reparation", which are territorially distributed in Catalonia in five areas (Barcelona, Girona, Lleida, Tarragona and Terres de l'Ebre) are composed of professionals from the fields of psychology, social work, anthropology, law and other disciplines of humanistic and social sciences, with specific training in penal mediation and reparation. They deal with the demands of participation in programmes on penal mediation by the parties and with the orders of mediation that are issued by the criminal courts in Catalonia. Two types of teams may be distinguished: governmental and the non-governmental. The governmental teams are the five territorially distributed Teams of Criminal Mediation and Reparation, which depend on the General Directorate of Penal Execution to the Community and Juvenile Justice. The non-governmental entities that offer this service are *APIP Associació per a la Promoció i la Inserció Professional* ("association for professional promotion and insertion"), *Associació Social Andròmines* ("social association Andròmines"), *Fundació l'Heura Tarragona* ("L'Heura foundation of Tarragona"), *INTRESS, DINCAT Discapacitats Intellectuals de Catalunya* ("Intellectually disabled in Catalonia"), and *Fundació Privada ARED* ("ARED private foundation"). The volunteer entities that offer the service are *Red Cross*, *Associació CEDRE per a la Promoció Social* ("CEDRE Association for social promotion") and *Fundació Autònoma Solidària (*"Autonomous Foundation Solidària").

Different types of penal mediation are applied (collective mediation, indirect mediation, extensive mediation and group mediation) with a specific methodology and procedure. The system is focused on the victim and the perpetrator and it may be applied before the court level, and during the court level, before and after sentencing. The initiation of a mediation procedure may be required by victims (excluding the victims of gender violence) with the need of reparation, as well as the legal counsels of both parties, the public prosecutor, the judiciary, security forces and the expert teams of penitentiary institutions (for preventive detainees and convicts, as long as it is penal and not penitentiary mediation), as well as other services.

The procedure for juvenile justice is described in the following paragraphs. First, the expert technical team issues a report where it may propose to carry out a penal mediation procedure. Experts never exclude the possibility to recommend some type of reparation programme, since it is considered as an important source of fostering accountability in the juvenile perpetrator. In some cases, such as sexual offences and homicide, these programmes never end the procedure, but may mitigate the measure that may be eventually imposed. The recognition by the juvenile that there has been an offence does not make him or her automatically guilty of it. When the mediation procedure has a negative

result and the offence reaches the trial phase, the public prosecutor does not take the mediation procedure into account.

The principle of "desjudicialization" is the policy followed in the area of juvenile justice. The public prosecutor and the judge act as advisors and try to prevent that the offender and the victim go before court.

Spain has not implemented conferencing yet. Nevertheless, some mediators are working on the development of a pilot programme of conferencing in the area of juvenile justice. In all cases, we talk about procedures of Victim-Offender Mediation (VOM).

Upon the recommendation of the judge or the public prosecutor, the mediator receives the file of the accused and organizes meetings with the juvenile and his or her family. If the mediator sees that there is willingness to accept responsibility and the consequences of the crime committed, he or she contacts the victim for the possibility to arrange a meeting between the victim and the offender. However, direct victim-offender contact (face-to-face) is not compulsory. Once an agreement has been reached, the mediator monitors its implementation. He or she writes a report to the public prosecutor, so that the prosecutor decides whether to continue the criminal proceeding or not.

Regarding now the situation of penal mediation in the Basque Country, the focus is on the penal mediation service of Barakaldo, which was introduced in 2007 and became the first penal mediation service in that region, as an initiative of the *Dirección de Ejecución Penal* ("Directorate of Penal Execution") of the Department of Justice, Employment and Social Security of the Basque Government. That programme comprised the organizations of coordination and cooperation of justice.

The aim of the creation of the service of penal mediation was to facilitate reparation and conciliation. Before the beginning of any mediation procedure, the personal capacity and situation of the parties and the facts are assessed. The service is not open to any kind of criminal offence. Even if crimes of terrorism play a relevant role in the context of the Basque Country, the service of penal mediation has so far offered its services only to cases of reiterate or crossed complaints; offences against property; injuries, mistreatment and threats; defamation; crimes against traffic security with victims; family violence; crimes against family rights and duties; and crimes against sexual liberty.

The mediation procedure follows different phases, starting with the referral by the judge or judicial secretary *ex officio*, or by the public prosecutor, or by the services of cooperation with justice. The mediation procedure follows *a posteriori* the phases of reception, dialogue, agreement and follow-up.[125]

Finally, it is to be noted that the service is currently being offered, in cooperation with the judiciary in the Basque Country, by the *Servicio de Asistencia a la Víctima* ("Service of victim assistance"), the *Servicio de Asistencia y Atención*

125 *Varona Martínez* 2009.

Social al Detenido ("Service of Social Assistance and attention to the detainee") and the *Servicio de Asistencia a la Reinserción* ("Service of assistance for reintegration").

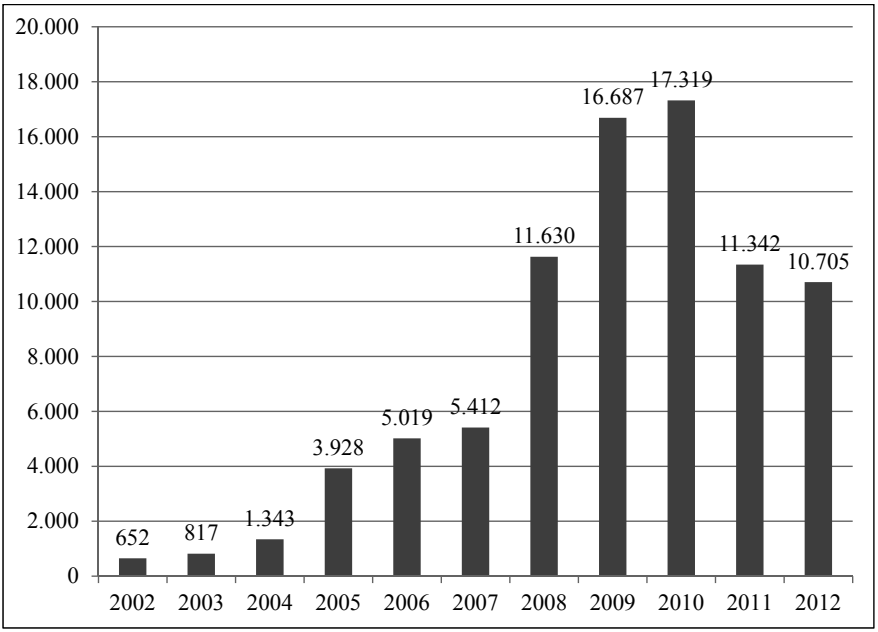
4. Research, evaluation and experiences with Restorative Justice

The statistics on restorative justice are fragmented and it is difficult to compare between *Comunidades Autónomas*. There are only official statistics for the case of juvenile justice in Catalonia. The remaining data that have been included in this report has been obtained thanks to the work of non-governmental organizations specialized in penal mediation. It is not possible to provide data on the role of restorative justice in the context of sentence mitigation as such mitigating factors are not recorded statistically (as there can be so many different factors), and sentence mitigation *per se* is also not recorded.

4.1 Data on alternative measures in Catalonia[126]

4.1.1 Data for 2011-2012

Figure 1: Evolution of alternative penal measures in Catalonia



In 2012, the courts in Catalonia issued 10,705 judgments with alternative penal measures – 8,523 cases of community service; 1,867 obligations of suspension or substitution; 315 security measures. During 2012, a total of 308,194 days of community service were rendered, which equates to 1,205,774 working hours. 1,573 persons participated in an education programme on gender violence, road safety or other related to committed crimes.

Alternative measures were ordered for the following offence categories in 2011:

- Offences against collective security: 43.4%
- Injuries: 21.3%
- Offences against property: 10.8%
- Offences against freedom: 9.2%

126 Data from the Centre d'Estudis Jurídics i Formació Especialitzada ("Centre of Legal Studies and Specialized Education"), Department of Justice, Generalitat de Catalunya.

- Offences against the administration of justice: 4.9%
- Offences against the public order: 2.7%
- Offences against honour: 2%
- Other categories of offences: 5.7%.

The alternative penal measures were issued against a total of 14,852 individuals – 13,560 men (91.3%) and 1,292 women (8.7%); 10,819 individuals with Spanish nationality (85.5%) and 4,033 individuals with other nationalities (14.5%).

4.1.2 Data on penal mediation in juvenile justice in Catalonia

Nowadays, in Catalonia around 25% of cases of juvenile justice end up in mediation. Every year a mediator takes part in an average of one hundred cases. They have three months to conclude the procedure of mediation. Probation services also monitor the mediation if that measure is imposed by the judge.

Key-practitioners agree that the recent *Llei 14/2010, del 27 de maig, dels drets i les oportunitats en la infància i l'adolescència* ("2010 Law of children and juvenile rights and opportunities"), enacted by the Parliament of Catalonia on the rights and opportunities of childhood and adolescence, has meant a positive change, since it offers a more open and educational regulation.[127]

Mediation in Catalonia usually happens for less serious offences and it nearly always occurs prior to sentencing. In some other *Comunidades Autónomas*, such as Aragón and País Valencià, mediation is practiced after sentencing. The remaining *Comunidades Autónomas* almost do not carry out juvenile mediation at all, and the Basque Country is more specialized on adults.

In 2012, a total of 6,422 minors were assisted, and criminal proceedings were instituted in 4,333 cases. Of these 4,333 cases, a total of 1,995 young offenders had access to penal mediation, with an average age of 16 years. On 31 December 2012, there were 276 individual offenders taking part in ongoing procedures of mediation. In 2012, 79.8% of mediation procedures in Catalonia were successful.

The *Programa de Mediació i Reparació Penal* ("programme of penal mediation and reparation") provides data on the development of the use of different programmes (expert counselling, mediation, open regime (non-custodial measures) and internment in an educational centre). *Table 2* shows that, in 2002, mediation only accounted for a percentage of 16% of all alternative penal measures issued againt minors in that year. This share rose to roughly 20% in 2010, followed by a slight decrease up until 2012, where the share stood at around 18%.

127 Llei 14/2010, del 27 de maig, dels drets i les oportunitats en la infància i l'adolescència (DOGC No. 5641, 2 June 2010).

Table 2: Breakdown of alternative penal measures issues against juveniles in Catalonia, 2002-2012

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Expert counselling	7,394	6,367	5,812	5,825	6,161	6,342	6,447	5,627	5,892	5,406	5,210
Mediation	2,042	1,931	1,824	2,285	2,487	2,795	2,643	2,560	2,373	2,359	2,135
"open regime"	2,182	3,172	3,931	4,213	4,404	4,201	3,967	3,917	4,008	3,872	3,601
Internment in an educational centre	889	979	940	1,036	1,007	972	957	972	947	950	874
% expert counselling	59.1	51.1	46.5	43.6	43.8	44.3	46.0	43.0	43.2	42.9	44.1
% mediation	16.3	15.5	14.6	17.1	17.7	19.5	18.9	19.6	20.4	18.7	18.1
% "open regime"	17.4	25.5	31.4	31.5	31.3	29.4	28.3	30.0	29.4	30.8	30.5
% Internment in an educational centre	7.1	7.9	7.5	7.8	7.2	6.8	6.8	7.4	6.9	7.5	7.4

Table 3: Data on penal mediation with juveniles in Catalonia, 2002-2012, based on mediations ongoing on 31 December of the year

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Active mediations on 31 December	352	329	312	461	543	434	477	436	410	381	340
Offender characteristics:											
Average age	16.6	16.3	16.1	16.4	16.2	16.3	16.1	16.1	16.3	16.1	16.0
Males	312	287	280	402	436	348	409	345	332	312	276
Females	40	42	35	59	107	86	68	91	78	69	64
Spanish nationals	322	300	257	396	462	345	371	325	272	278	235
Foreign nationals	30	29	58	65	81	89	106	111	138	103	105
% offences:											
… vs. property	58.6	57.1	50.1	54.8	51.2	50.2	47.8	43.9	47.6	42.7	49.9
… injury	21.0	20.0	24.6	23.3	23.7	24.1	21.3	27.1	29.6	32.0	23.9
… vs. collective security	7.0	3.4	8.6	4.4	5.1	4.1	14.1	12.9	5.8	8.5	7.8
… vs. liberty	4.5	7.5	5.5	5.4	4.8	8.6	4.2	7.4	5.8	6.1	8.4
… vs. honour	0.3	3.4	1.8	2.0	1.5	2.5	2.0	2.6	2.3	3.5	2.6

In terms of re-offending, a study by the *Centre d'Estudis Jurídics i Formació Especialitzada* ("Centre of Legal Studies and Specialized Education") of 2011 concluded that there is no statistical relation between minor offenders who participated in a programme of mediation and reparation for minors and made financial reparations and the quota of re-offending. According to the study, "*[t]he young offenders who have been involved in a process of MRM [Mediation and Reparation for Minors] in which there have been financial reparations relapse in the same proportion as those young offenders who have not made reparations.*"[128]

Table 4: Share of juvenile penal mediations completed successfully in Catalonia, 2002-2012

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Barcelona	84.7	84.4	79.3	83.5	79.6	83.3	80.0	77.0	77.1	83.1	78.6
Girona	93.8	95.7	92.9	95.7	92.9	93.2	86.3	86.0	80.6	83.0	84.8
Lleida	90.0	91.1	86.5	81.9	93.2	93.6	83.9	77.8	78.9	73.8	79.6
Tarragona	91.1	81.4	88.0	85.6	86.2	83.3	83.6	77.9	75.8	83.0	77.8
Terres de l'Ebre	-	-	-	95.0	100.0	75.0	90.9	84.6	96.3	88.9	93.3
Overall	86.0	85.7	82.2	85.0	83.0	85.7	81.8	78.6	77.9	82.3	79.8

4.2 Projects related to Penal Mediation in the *Comunidad Autónoma* of Andalucía[129]

This section refers to two projects that started in March 2011. The first is promoted by the *Asociación Malagueña de Mediación para la Solución de Conflictos, Solucion@* ("Malaga association for conflict resolution"), together with the *Junta de Andalucía* (the government of the *Comunidad Autónoma* of Andalucía). The second project is run by *AMFIMA*, *Asociación para el Fomento Integral de la Mediación en Andalucía* ("association for the promotion of mediation in Andalucía"). They work with the *Juzgado de Instrucción* ("investigating court") Number 14 and *Juzgado de lo Penal* ("penal court") Number 10 of

128 *Area of Social and Criminological Research and Training* 2012, p. 33.

129 For data on mediation processes conducted in other regions, we ran a survey to several NGOs. The Community of Andalusia was taken as reference because Solucion@ and AMFIMA Associations responded to this demand. Other experiences are available on the website of the General Council of the Judiciary (http://www.poderjudicial.es/cgpj/es/Servicios) serach for "criminal Mediation".

Málaga (in the case of Solucion@), and with the *Juzgado de Instrucción* Number 7 and *Juzgado de lo Penal* Number 8 of Málaga in the case of AMFIMA.

In the case of Solucion@, the project has a *Coordinadora del Servicio* (coordinator) and a team of approximately 20 mediators that work the cases according to their availability and the type of offence in question. In both projects, the team of mediators comprises professionals from different fields (law, psychology, social work, work relations, etc.) with post-degrees or other university education in mediation. They all work voluntarily, and are only supported by the public administration in that they may use rooms in the *Ciudad de la Justicia* ("the headquarters of courts"), where they are provided with computer equipment and telephones.

4.2.1 Data from Solucion@

Solucion@ performs around 50 mediations per year. Mediation latches onto the procedure during the investigation-phase of the proceedings in cases of misdemeanours, as well as crimes related to injury, fraud, coercion and the non-fulfillment of the regime of family visits. Offenders are usually between 30 and 50 years old, male, and either first-time offenders (*primarios*) or first-time recidivists (*reincidentes primaries*). In 2011, the first year of operation of the programme, 70% of mediation procedures ended successfully. One year later, that share could be improved to 76%. Solucion@ usually completes the procedure of mediation within a single session, which includes interviews with each party individually and one common meeting. Overall, mediation processes conducted by Solucion@ last for approximately 3.5 hours. Mediation is free of charge to the parties, and bears no costs for the Administration of Justice apart from providing facilities and equipment. They greatest costs arise for the mediators, as they are volunteers, whose time and transit costs are not remunerated. Solucion@ does not gather data from mediation participants in terms of their satisfaction with the process and the outcome, whether they would participate in mediation again or whether they would recommend others to do so. However, the overall climate has been one of high satisfaction, even when an agreement could not be reached.

4.2.2 Data facilitated by AMFIMA

AMFIMA also conducts about 50 mediations per year, mostly in less serious cases of injury, criminal damage, threats, fraud, coercion and thefts. The project caters in practice for first-time offenders aged 18 and over. Of the 50 cases handled in 2012, only 52% ended in an agreement between victim and offender. The mediation process lasts for 22 days on average, and costs between 250 and 300 Euros. Participants have stated that they were highly satisfied with the process and that they would participate in mediation again, although these data

need to be set against the backdrop of a high rate of non-agreement, and are not necessarily corrected to take into account whether the respondents on whose opinions these satisfaction rates are based reached an agreement or not.

5. Summary and outlook

Spain has not yet adapted its legislation to the *Framework Decision of 15 March 2001,* nor to the *Directive of 25 October 2012,* which replaced the former. This results in a wide disparity in the regularization and resources that the different regions devote to restorative justice. For example, Catalonia has developed a good system of penal mediation with a lot of support from the citizens, but only for minors. In the rest of Spain, the non-profit entities dedicated to juvenile justice have personnel prepared but lack the resources to expand further. The reality in most of Spain is that restorative justice remains a "voluntary" measure that can work as an alternative to a traditional penalty. Furthermore, the fact that it is developed and implemented by NGOs (except in the case of Catalonia) undermines the credibility of professionals practicing mediation in the eyes of criminal justice practitioners and lawyers and fosters scepticism on their part.

At the same time, it is necessary to promote its dissemination. Disseminating the objectives of penal mediation by the administration would undoubtedly promote the creation of a culture of peace. There is no doubt that a philosophy of punishment is much more established than a philosophy of reparation (and punitive populism does not contribute to changing these values). It is preferred that problems are resolved by third parties. It is a cultural question – the idea that the offender must pay for his/her actions with his/her liberty without the need to make reparation or to in fact do anything at all for the victim or the community. The victim is the most overlooked individual in the traditional system, and restorative justice is an excellent means for changing that.

In conclusion, we can say that, in Spain, provision is made to provide restorative justice approaches for juveniles, while such initiatives are greatly lacking in the field of the criminal jurisdiction for adult offenders. In our opinion, in Spain restorative justice still has a very long way to go. Legislative difficulties such as the principle of legality, the presumption of innocence or the criticism of a "return to private justice" have impeded its growth and expansion. To our knowledge, and following the European and international recommendations, restorative justice appears as one of the best formulas for resolving criminal disputes, yet plays a minor role in that field in practice.

References

Abel Souto, M. (2003): Los menores, el principio acusatorio y la proporcionalidad penal en la Ley Orgánica 5/2000. Actualidad Penal 43, pp. 1-36.

Aguirre Zamorano, P., Parés Gallés, R., Calatayud Pérez, E., Giménez-Salinas Colomer, E. (2000): Justicia de menores: una justicia mayor. Madrid: Consejo General del Poder Judicial.

Area of Social and Criminological Research and Training (2012): Recividism in the Programme of Mediation and Reparation for Minors (Executory Report). Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada. Available: http://justicia.gencat.cat/web/.content/home/ambits/formacio__recerca_i_docum/recerca/cataleg_d_investigacions/per_ordre_cronologic/2011/reincidencia_programa_mediacio/reincidencia_program_mediacio_inform_executiu_ang.pdf (accessed: 1 July 2013).

Arribas Cos, M. I., Robles, J. I. (2005): La Ley de Responsabilidad Penal del Menor y el papel del psicólogo y la mediación en la Ley 5/2000. Psicopatologíca Clínica, Legal y Forense 5, pp. 31-55.

Belloso Martín, N. (2010): El paradigma conflictivo de la penalidad la respuesta restaurativa para la delincuencia. Cuadernos Electrónicos de Filosofía del Derecho 20, pp. 1-20.

Belloso Martín, N.: Una propuesta de código ético de los mediadores. Universidad de Burgos. Available: http://www.uv.es/CEFD/15/ belloso.pdf (accessed: 11 October 2011).

Beristain Ipiña, A. (2000): Protagonismo de las víctimas en la ejecución penal (hacia un sistema penitenciario europeo). Actualidad Penal 37.

Carrizo González-Castell, A. (2011): La mediación penal en España. In: Martín Diz, F. (Ed.): La mediación en materia de familia y derecho penal: estudios y análisis. Santiago de Compostela: Andavira, pp. 233-255.

Casanovas, P., Díaz, L., Magre, J., Poblet, M. (Eds.) (2009): Materials del Llibre Blanc de la Mediació a Catalunya. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Casanovas, P., Magre, J., Lauroba, M. E. (2010): Llibre Blanc de la Mediación a Catalunya. Barcelona: Generalitat de Catalunya. Departament de Justícia.

Contreras Román, M. (2010): L'eficàcia rehabilitadora de la pena de treballs en benefici de la comunitat: Avaluació del model d'execució a la província de Barcelona. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Cruz Márquez, B. (2005): La mediación en la Ley Orgánica 5/2000, Reguladora de la Responsabilidad Penal de los Menores: Conciliación y reparación del daño. Revista Electrónica de Ciencia Penal y Criminología 7-14, pp. 1-34.

Del Pozo Pérez, M. (2011): ¿Es adecuada la prohibición de mediación del art. 44.5 de la Ley Orgánica 1/2004? In: Martín Diz, F. (Ed.): La mediación en materia de familia y derecho penal: estudios y análisis. Santiago de Compostela: Andavira, pp. 283-324.

Dünkel, F. (1987): Alternativas a la pena privativa de libertad. Problemas metodológicos de la evaluación y resultados de la investigación comparadas sobre sanciones. Papers d'Estudis i Formació (Departament de Justícia, Generalitat de Catalunya) 2, pp. 55-73.

Dünkel, F. (1988): Tendencias del desarrollo de la investigación criminológica en la República Federal Alemana. Papers d'Estudis i Formació (Departament de Justícia, Generalitat de Catalunya) 4, pp. 165-183.

Dünkel, F. (1989): La víctima en el derecho penal – hacia una orientación del autor a la víctima? In: Generalitat de Catalunya, Departament de Justícia (Ed.): El derecho penal y la víctima – hacia una privatización del sistema? Barcelona: Generalitat de Catalunya, Departament de Justícia, pp. 1-17.

Equipo de Mediación del Departamento de Justicia (1999): 'La mediación penal juvenil en Cataluña'. In: Rössner, E., Giménez-Salinas i Colomer, E., Equipo de Mediación del Departamento de Justicia, López Barja de Quiroga, J., Beristain Ipiña, A. (Eds.): La mediación penal. Barcelona: Centre d'Estudis Jurídics i Formació Especialitzada; Generalitat de Catalunya, Departament de Justícia, pp. 31-68.

Escaler Bascompte, R. (2003): L'atenció a la víctima després de les últimes reformes processals. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Estudis i Formació de l'Administració de Justícia (2011): Documents sobre Execució Penal. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Ferreiro Baamonde, X. (2005): La víctima en el proceso penal. Madrid: La Ley.

Freire Pérez, R. M. (2011): Experiencias de mediación penal en el ámbito de la justicia penal de adultos. Amparo normativo e institucional. In: Martín Diz, F. (Ed.): La mediación en materia de familia y derecho penal: estudios y análisis. Santiago de Compostela: Andavira, pp. 257-282.

Galain Palermo, P. (2009): Mediación penal como forma alternativa de resolución de conflictos: la construcción de un sistema penal sin jueces, Revista Penal 24, pp. 71-89.

Galain Palermo, P. (2010): La reparación del daño a la víctima el delito. Valencia: Tirant Lo Blanch.

García-Rostán Calvín, G. (2008): Víctima y mediación penal, Anales de Derecho 26, pp. 445-456.

Giménez-Salinas Colomer, E. (1995): Autonomía del Derecho Penitenciario: principios informadores de la Ley General Penitenciaria. Madrid: Cuadernos de Derecho Judicial.

Giménez-Salinas Colomer, E. (1996): La mediación en el sistema de justicia juvenil: una visión desde el derecho comparado. In: Martínez-Pereda Rodríguez, J. M. (Ed.): Menores privados de libertad. Cuadernos de derecho judicial 15, pp. 53-81.

Giménez-Salinas i Colomer, E. (1999): La mediación y la reparación. Aproximación a un modelo. In: Rössner, E., Giménez-Salinas i Colomer, E., Equipo de Mediación del Departamento de Justicia, López Barja de Quiroga, J., Beristain Ipiña, A. (Eds.): La mediación penal. Barcelona: Centre d'Estudis Jurídics i Formació Especialitzada; Generalitat de Catalunya, Departament de Justícia, pp. 15-30.

Giménez-Salinas i Colomer, E. (1999): La conciliación víctima-delincuente: hacia un derecho penal reparador. In: Rössner, E., Giménez-Salinas i Colomer, E., Equipo de Mediación del Departamento de Justicia, López Barja de Quiroga, J., Beristain Ipiña, A. (Eds.): La mediación penal. Barcelona: Centre d'Estudis Jurídics i Formació Especialitzada; Generalitat de Catalunya, Departament de Justícia, pp. 69-85.

Giménez-Salinas i Colomer, E. (1999): La nueva ley de justicia juvenil en España: un reto para el 2000. In: Giménez-Salinas i Colomer, E. (Ed.): Legislación de menores en el siglo XXI: análisis de derecho comparado. Estudios de Derecho Judicial 18, pp. 99-244.

Giménez-Salinas i Colomer, E. (2000): La Ley 5/2000 de 12 de enero, reguladora de la responsabilidad penal de los menores. Manuales de formación continuada 9, pp. 27-44.

Giménez-Salinas i Colomer, E. (2004): Criminología e inmigración en una sociedad pluralista. Eguskilore: Cuaderno del Instituto Vasco de Criminología 8, pp. 145-158.

Giménez-Salinas Colomer, E., de la Cuesta, J. L., Castany, B., Blanco, I. (2010): Spain. In: Dunkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe. Germany: Forum Verlag Godesberg, pp. 1,287-1,327.

Gordillo Santana, L. (2006): Los principios constitucionales y las garantías penales en el marco del proceso de mediación penal, Redur 4, pp. 87-124.

Gordillo Santana, L. F. (2007): La justicia restaurativa y la mediación penal. Madrid: Iustel.

Guardiola Lago, M. J. (2009): La víctima de violencia de género en el sistema de justicia y la prohibición de la mediación penal, Revista General de Derecho Penal 12, pp. 1-41.

Guimerà i Galiana, A. (2005): La Mediación-Reparación en el derecho penal de adultos: un estudio sobre la experiencia piloto de Catalunya, Revista Española de Investigación Criminológica, pp. 1-22.

Heredia Puente, M. (2009): Perspectivas de futuro en la mediación penal de adultos. Una visión desde el Ministerio Fiscal. Diario La Ley 7257, pp. 1-17.

Hernández Ramos, C., Cuellar Otón, P. (2010): Mediación penal: Una introducción metodológica, Revista de l'Institut Universitari d'Investigació en Criminologia i Ciències Penals de la UV 1, pp. 58-96.

Invesbreu (1994): La mediación en la justícia juvenil (Catalunya, 1 de maig de 1990 – 30 d'abril de 1991). Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Invesbreu (2003): La mediació penal. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Invesbreu (2008): Mediació i resolución de conflictos en entorns penitenciaris. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Jesionek, U. (1999): Jurisdicción de menores en Austria. In: Giménez-Salinas i Colomer, E. (Ed.): Legislación de menores en el siglo XXI: análisis de derecho comparado. Estudios de Derecho Judicial 18, pp. 51-71.

Leganés Gómez, S. (2008): La reparación penitenciaria del delito. La Ley Penal, Vol. 45, pp. 1-24.

Leganés, S. (2010): Clasificación en tercer grado y medio abierto. La Ley Penal, Vol. 67, pp. 1-62.

Leganés, S. (2010): Clasificación en tercer grado y medio abierto (y II) (1). La Ley Penal 68, pp. 1-51.

Losada Durán, R., Herrero Alonso, C., Garrido Martín, E. (2005): La psicología social de la justicia restauradora: revisión y propuesta de un nuevo planteamiento de investigación. In: Tamarit Sumalla, J. M. (Ed.): Estudios de victimología: actas I Congreso español de victimología. Valencia: Tirant Lo Blanch, Diputació de Lleida and Sociedad Española de Victimología, pp. 245-257.

Macías i Prieto, C., Hompanera i González, M. J. (2004): La mediació penal en l'àmbit del menor i la seva incidència a Catalunya. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Manzanares Samaniego, J. L. (2007): Mediación, reparación y conciliación en el derecho penal. Granada: Editorial Comares.

Manzanares Samaniego, J. L. (2008): La mediación penal. Diario La Ley 6900, pp. 1-12.

Manzanares Samaniego, J. L. (2009): La mediación, la reparación y la conciliación en el derecho penal español. Diario La Ley 7232, pp. 1-8.

Martín Diz, F. (2010): La mediación: sistema complementario de administración de justicia. Madrid: Consejo General del Poder Judicial.

Martín Diz, F. (2011): La mediación: marco general para su implantación como sistema complementario de administración de justicia. In: Martín Diz, F. (Ed.): La mediación en materia de familia y derecho penal: estudios y análisis. Santiago de Compostela: Andavira, pp. 21-65.

Martínez Soto, T. (2011): Mediación penal y su implantación en España: Ámbito de la responsabilidad del menor. Estudio comparativo con Reino Unido, Revista Internacional de Estudios de Derecho Procesal y Arbitraje, Vol. 1, pp. 1-44.

Matellanes Rodríguez, N. (2011): La justicia restaurativa en el sistema penal. Reflexiones sobre la mediación. In: Martín Diz, F. (Ed.): La mediación en materia de familia y derecho penal: estudios y análisis. Santiago de Compostela: Andavira, pp. 207-231.

Montero Hernanz, T. (2010): El principio de intervención mínima en la legislación reguladora de la responsabilidad penal de los menores. Diario La Ley 7473, pp. 1-18.

Montero Hernanz, T. (2011): La Justicia restaurativa en la legislación reguladora de la responsabilidad penal de los menores. Diario La Ley 7655, pp. 1-12.

Moreno Catena, V., Cortés Domínguez, V. (2010): Derecho Procesal Penal. Valencia: Tirant Lo Blanch.

Muñoz Conde, F., Arán García, M. (2010): Derecho Penal Parte General. Valencia: Tirant Lo Blanch.

Pérez Sanzberro, G. (1999): Reparación y conciliación en el sistema penal: ¿Apertura de una nueva vía? Granada: Comares.

Pérez-Cruz Martín, A. J., Ferreiro Baamonde, X. X., Piñol Rodríguez, J. R., Seoane Spiegelberg, J. L. (2010): Derecho Procesal Penal. Pamplona: Thomson Reuters.

Quintero Olivares, G. (2005): La víctima y el Derecho penal. In: Tamarit Sumalla, J. M. (Ed.): Estudios de victimología: actas I Congreso español de victimología. Valencia: Tirant Lo Blanch, Diputació de Lleida and Sociedad Española de Victimología, pp. 15-26.

Quintero Olivares, G., Morales Prats, F. (Eds.) (2011): Comentarios al Código Penal Español. Pamplona: Thomson Reuters.

Rifá Soler, J. M., Richard González, M., Riaño Brun, I. (2006): Derecho Procesal Penal. Pamplona: Gobierno de Navarra; Instituto Navarro de Administración Pública.

Robles, R., Pastor, N. (2007): El perdó de l'ofés: la via adecuada per alleugerir les càrregues de la justícia. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Rodríguez Laínz, J. L. (2011): Mediación penal y violencia de género. Diario La Ley 7557, pp. 1-15.

Rössner, D. (1999): El derecho penal de menores en Alemania con especial consideración de los adolescentes. In: Giménez-Salinas i Colomer, E. (Ed.): Legislación de menores en el siglo XXI: análisis de derecho comparado. Estudios de Derecho Judicial 18, pp. 305-328.

Sáez Valcárcel, R., Ortuño Muñoz, P. (Eds.) (2007): Alternativas a la judicialización de los conflictos: la mediación. Madrid: Consejo General del Poder Judicial.

Sánchez Prieto, S. (2010): La superación del rol de "víctima pasiva": I Congreso Internacional sobre Justicia Restaurativa y Mediación Penal, Lex Nova 60, pp. 22-25.

Santos Martínez, A. M. (2011): La "desjudicialización" de las faltas. Diario La Ley 7688, pp. 1-12.

Solar Calvo, M. P. (2009): Consecuencias de la Ley Orgánica 7/2003 en el ámbito penitenciario. Diario La Ley 7238, pp. 1-16.

Soria Verde, M. A., Guillamat Rubio, A., Armadans Tremolosa, I., Sendra Montes, J., Llenas Herbera, M., Casado Coronas, C., Martínez Camps, M., Fons Jiménez, G. (2007): Mediación penal adulta i reincidència: El grau de satisfacció dels infractors i les víctimes. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Tamarit Sumalla, J. M. (1993): La reparación a la víctima en el dret penal: Estudi i crítica de les noves tendències político-criminals. Barcelona: Generalitat de Catalunya. Departament de Justícia. Centre d'Estudis Jurídics i Formació Especialitzada.

Tamarit Sumalla, J. M. (1998): La víctima en el Derecho penal: de la víctimodogmática a una dogmática de la víctima. Pamplona: Aranzadi.

Tamarit Sumalla, J. M. (2004): La introducción de la justicia reparadora en la ejecución penal: una respuesta al rearme punitivo? Revista General de Derecho Procesal 1, pp. 1-30.

Tamarit Sumalla, J. M. (2005): ¿Hasta qué punto cabe pensar victimológicamente el sistema penal? In: Tamarit Sumalla, J. M. (Ed.): Estudios de victimología: actas I Congreso español de victimología. Valencia: Tirant

Lo Blanch, Diputació de Lleida and Sociedad Española de Victimología, pp. 27-45.

Tamarit Sumalla, J. M. (2006): La justicia reparadora: ¿una justicia para la víctima? In: Baca Baldomero, E., Echebarría Odriozola, E., Tamarit Sumalla, J. M. (Eds.): Manual de victimología. Valencia: Tirant Lo Blanch, pp. 441-461.

Tamarit Sumalla, J. M. (2007): La difícil asunción de la reparación penal por parte de la jurisprudencia española. Revista General de Derecho Procesal 7, pp. 1-18.

Vall Rius, A. (2006): El desarrollo de la Justicia restaurativa en Europa: Estudio comparado con la legislación española. Diario La Ley 6528, pp. 1-25.

Sweden[1]

Linda Marklund

Restorative justice (RJ) has been around in Sweden since the beginning of the 1980s. Mediation, as a form of conflict resolution, can in fact be found throughout our history in one way or another.

1. Origins, aims and theoretical background of restorative justice

1.1 Overview of forms of restorative justice in the criminal justice system

In Sweden, the only practice that is officially regarded as RJ is victim-offender mediation. Police cautioning, community service, the different forms of youth sentences and some ancillary interventions could fall under the definition of restorative justice that is used in this project. However, since only victim-offender mediation is officially recognized as a restorative intervention, this report focuses on that.

1.2 Reform history

In the Nordic countries, modern mediation began as something of an idealistic utopia in *Christie's* article "Conflict as property",[2] this in contrast to mediation

1 This report is built of two main sources: a doctoral thesis (*Marklund* 2011) investigating restorative justice and the legal system in Sweden, and the 2012 report by the Swedish Social Board (*Swedish Social Board* 2012) into how local authorities work with mediation and what action is needed to support them in their efforts.

2 See *Christie* 1977.

in the United States that was developed for pragmatic reasons, or in China as a form of social control.

Mediation in criminal cases emerged in Sweden in the late 1980s. The mediation movement came to Sweden from Norway. Initially the mediation was conducted only on a very limited scale and only in individual places. The first mediation projects in Sweden were founded in 1987 in Hudiksvall and in Solna/ Sundbyberg.

In 1998, the National Crime Prevention Council (National Council) launched a one-year pilot project with mediation for young offenders. Parallel, to that the legislative work on a new mediation law began, which resulted in the coming into force of the Framework Act for Mediation in 2002. In 2003, the Swedish government commissioned a new project for the National Crime Prevention Council. The purpose of the project was to help with the development of mediation services to make them available throughout the country.

In 2008 it became mandatory for the municipalities to offer mediation to young offenders under the age of 21. The mandatoriness is specified in the Social Service Act. Mediation is voluntary for both parties, but the offender has to admit to the crime or at least to certain aspects relating to it.

1.2.1 General history of mediation in the Swedish legal system

The old Vikings in Scandinavia held court were they settled conflicts, a court where the king or any of his agents could mediate between parties involved in a conflict.

The condition of society during the Viking era was reflected very clearly in the legal conditions at hand. Security was found in the family – the clan – and reputation, not in an external squire or the individual person's strength. The family and the clan were important: if there was a violation of the person, the family would be called for help to avenge the injury. The personal security depended on the dynasty actually collecting and exacting this right – if the rest of the family took a neutral standpoint, you risked losing all personal rights.

Medieval courts served two purposes: to convict, and to create new law. The court judges would say law, which meant that he made the law orally before courts congregation. The judge would rule law which was the judicial function. Moreover, the court would adjudge law which meant that he could interpret, organize, and summarize the legal norms prevailing in society to a current legal conception. To help, the judge had a board that, depending on the seriousness of the offence, would determine whether the accused was guilty or not. The court judged crimes on the principle that anyone who was accused was guilty, as opposed to what it is today.

The court subsequently lost this mediatory activity, which led to the perception that the crime was also a crime against the entire society. This prompted the government to require obedience of fine, restriction of blood revenge and the re-

formed criminal. Such criminal justice system has been described as a propitiatory system where crime victim and perpetrators were relevant as part of a social unit: the family. The criminal regulation is seen as a result of the need to make amends to both offences against the family, and to atone for blood revenge.

Mediation for civil cases, which is regulated in 42:17, 2 Code of Judicial Procedure (RB), has existed in some form since the 19th century. The judge's obligation to allow the parties to find a settlement even existed in earlier proceedings-related law from 1734, RB 20:2.

The idea that the parties themselves will agree with the help of a neutral third person has thus been around since the Viking Age, as shown by the examples given above. It may therefore seem surprising that it took until modern time before the idea started to spread to the criminal justice context and become a natural part of the legal system.

The Swedish penal system has over time rested on different ideological foundations. Since the late 1980s, however, ideas of crime prevention have given way to the principle of fair proportionality as the predominant basis for the determination of the penalty. The main function of the penal system is to prevent the occurrence of undesired actions. This function is thought best achieved by the threat of punishment. The court has then to effectuate the penalty for cases where an offence occurs, and then the sentence shall be realized.

The mediation that took place in the medieval courts probably differed greatly to that which occurs today. The interesting thing is that the mediation phenomenon recurs. The trend has rather been spiral than linear. One of the differences that occur in mediation today compared with that in historical times is that the mediator's role is different. The mediator now has a more withdrawn, passive role. Mediation is also increasingly a voluntary form of dispute resolution that takes place behind closed doors. Mediation of the courts happened in front of society (in open view) and was not always voluntary.

1.2.2 The first mediation activities in Hudiksvall and Solna/Sundbyberg

The projects in Solna/Sundbyberg and Hudiksvall are seen as the first real mediation services. What makes these two mediation services especially interesting is that the purpose behind the mediation process and their activities are relatively different. This discrepancy reflects the ambivalence that runs throughout the entire reparative movement in Sweden. The restorative justice philosophy is not a homogeneous theory.

The project in Hudiksvall was started by police in 1987, as part of their police work. The aim was to prevent young people from reoffending. The target group was young people aged 12 to 18 years and the mediation was conducted by a police officer.

The mediation service in Solna/Sundbyberg also started in 1987, on the initiative of “Skyddsvärnet”, but later was reorganized into an independent non-

profit organization. Here, the aim was to bring about conciliation between the perpetrator and the victim. Mediators worked voluntarily and were compassionate and impartial people.

Other mediation activities started at this time that are worth mentioning are the mediation services in Västerås, Uppsala, Växjö and Lund.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

In Sweden, the legislative basis for RJ is quite simple. There is the Framework Act for Mediation that enables mediation throughout the criminal procedure. The mediation act makes no restrictions in terms of eligible age-groups or crimes, with only one exception: if one of the parties is under the age of 12, extraordinary reasons should exist.

The basis for mediation is that a crime has been reported and that the offender has admitted guilt for all or part of the offence. According to the act, mediation can occur before, during or after the criminal procedure. If mediation is to take place before the criminal procedure, the mediator and the criminal investigator shall have a consultation so that mediation does not interfere with the investigation.

The police have been issued a practice recommendation[3] that states that they should ask the offender if he/she is interested in mediation. If yes, the police refer the case to mediation. But it is also possible for the prosecutor, the judge, the social service and the victim support agencies to refer cases to mediation. The victim and the offender can also themselves directly contact the mediation service. It is up to the mediator and the parties themselves to decide whether and when mediation should take place.

The restorative measures are applicable to all offenders and victims as long as the two basic preconditions (reported crime and admission of guilt) are met. The target group is young offenders, since the obligation for the municipalities to offer mediation only applies to young offenders up to age 21, while the Mediation Act itself makes no such restrictions. Nor does it restrict the types of crimes that are eligible for referral to the mediation service. The preparatory work to the Mediation Act, however, warned to be cautious in cases of sexual assault, rape and domestic violence.

Victim-offender mediation requires that both parties freely consent to participate in the process. The mediator can, together with the primary parties (the victim and the offender), decide to include other parties as well.

3 RPSFS 2008:5, FAP 483-1 (“Rikspolisstyrelsens föreskrifter och allmänna råd om Polisens rutiner för medling med anledning avbrott”).

Mediation in Sweden is considered to be a supplement to the criminal proceedings. It is possible for a mediation agreement to become part of a court ruling if the agreement is included in a youth contract (a contract between the offender and the social service that states what the offender has to do instead of an ordinary sentence) that the court orders. Another way that a mediation agreement can come into play is if the parties agree to present it to the judges during trial. Then the judge can take the agreement into consideration in the judgement.

In terms of the effects of mediation on the criminal process, one of the most clearly regulated[4] provisions is the possibility for the prosecutor to take the offender's positive attitude towards mediation into account when deciding to prosecute or not.[5] Thus, it is the will of the offender that provides the basis for the prosecutor's decision. The legislator designed this provision in this fashion so as to ensure that no pressure is put on the victim to participate.

Mediation can end in an oral or written agreement or in no agreement at all. The agreement can include an apology, economic compensation or an agreement concerning the delivery of work, or a combination. The mediator's responsibility when it comes to the agreement is that the agreement is just and fair. If it comes to the mediator's attention that the agreement has not been fulfilled, the mediator can, if he deems doing so unavoidable, report back to the prosecutor who can revoke the decision not to prosecute.[6]

Mediation has no direct effect on criminal records or statutes of limitations, but could be something that is taken into account when making decisions on early release, for example.

The criminal investigator has a time limit of six weeks with youth offenders. Since mediation can take place before the criminal proceedings the legislator has made provisions for this six week time limit to be extended so that mediation can take place.[7]

There are not really any provisions in place in terms of procedural safeguards, since mediation is a voluntary complement to the legal process. There are no special rights to appeal mediation, as mediation is voluntary for all involved, as is any agreement stemming from the process. A party that feels to have been treated unfairly or believes that mediation was handled in the wrong way can report this to the social board that is responsible for the mediation ser-

4 17 § Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare ("with special arrangements for young offenders").

5 16 § Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare ("with special arrangements for young offenders").

6 So far I have never heard of a prosecutor that has revoked a decision not to prosecute on the basis of an unfulfilled mediation agreement.

7 4 § Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare ("with special arrangements for young offenders").

vice. The parties can have a legal representative or another support person with them during the restorative process.

3. Organizational structures, restorative procedures and delivery

As stated above, the only official restorative measure in Sweden is victim-offender mediation. The Mediation Act is the same for young offenders as for adults, although there is some additional legislation that secures the municipalities' obligation to offer mediation to young offenders. The mediation process as provided in the Mediation Act is the same for everyone.

3.1 The victim-offender mediation process

The primary stakeholders in mediation are the mediator, the victim and the offender. They can have legal representation (although it is very uncommon) or a support person (it can be at victim support person, family member, friend or some other) with them during the process. The mediator can, together with the offender and the victim, decide that they want to include other stakeholders into the mediation. Since the legal provisions in the Mediation Act are quite open and merely guide the process, the mediator and the primary stakeholders have a lot of freedom to decide how the process should look for them.

What follows is a brief descriptive account of victim-offender mediation. The process starts when the police[8] (it is usually the police) ask an offender who has admitted his/her guilt, either fully or partially, whether he/she is interested in mediation. Generally, the mediator first calls the offender to a pre-meeting where the process is described and the offender gets a chance to tell his/her side of the story. Offenders get a chance to reflect on the consequences their behaviour has had for them, the victim and others around them. The offender gets the possibility to ponder if they want to offer some sort of apology or other reimbursements (work or economical). If the mediator and the offender are positive to continue the process, the mediator contacts the victim and offers a pre-meeting on the same basis as the one for the offender. During the pre-meeting, it is up to the parties to decide if they want to have someone with them or not. The mediator just makes sure that the parties are comfortable with the constellation of participants before they enter into the mediation.

If one of the parties is underage the guardian should be consulted. The guardian can be present and participate in the mediation or just be a silent supporter or not take part at all. It is up to the underage party and the guardian to decide.

8 Referrals can also come from the parties themselves, the prosecutor, social workers, the judge, family members and so on.

During the pre-meetings the parties also discuss who should start the telling of their story during the mediation.

In the actual mediation meeting, the parties get to share their story with each other. They tell each other about the consequences the offence has had for them and their close ones, and what they need in order to move on from the conflict. They get to ask questions and listen to each other. Mediation is in place for both parties.

Mediation can end in an agreement (oral or written) containing what the parties have decided. The mediator's roll during mediation is to guide the parties through the process and to ensure that the mediation takes place in a secure environment as well as to ensure that no transgressions occur. The mediator is also responsible for ensuring that any agreement is not in violation of either of the parties' rights and that the activities it envisages are legal.

The process can consist of two pre-meetings and a mediation meeting, but that depends on the parties. If they need several pre-meetings or several mediation meetings they can have it.

3.2 Organization and cooperation

As stated above, the local municipalities are obliged to offer mediation to and for young offenders. Approximately 60% of municipalities organize mediation as part of the social services. Approximately 20% purchase services from another municipalities and approximately 14% have made other arrangements.

It is up to the municipalities to fund their own mediation services, although they do receive some state funding towards it. Some of the mediation services try to offer mediation to adult offenders as well. However, the problem with mediation for adults is that there is no formal organization in place. There is no referral system and there are no special legal provisions.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

Over the years, since the first spontaneous initiatives for mediation in connection with crimes, the National Crime Prevention Council (Brå) has played a very important role, both in terms of methodology and organizational development, but also as an agent for consolidating mediation in the general consciousness.

The first initiatives by Brå with mediation for young offenders were established in 1998 on behalf of the government. The initiative included various types of mediation services, i.e. projects run by the social services, the police and victim shelters. Mediation itself would, like today, take place throughout the legal process. Brå's assignment was to coordinate, monitor and evaluate these activi-

ties. An important aspect for the government was that the existing mediation services continued to develop and expand their services, and that their experiences were positively taken advantage of.

There were no specific requirements for activities other than that it would mainly include young offenders, preferably between 15 and 17 years, and is optional for both the victim and the perpetrator. The safety and integrity of the parties was (and still is) an important aspect. It was especially pointed out that the projects would be conducted in an ethical and morally correct way.

These pilot projects came to include 32 different projects, which were evaluated after more than a year. The results from this evaluation have been presented in four reports:

- Report 1999/12: Mediation in Criminal Cases. Report of an Experiment;[9]
- Report 1999/14: Mediation in Criminal Cases. Offenders speak;[10]
- Report 2000/2: Mediation in Criminal Cases. Victims speak;[11]
- Report 2000/8: Mediation in Criminal Cases. Final Report of an Experiment.[12]

The final report made the following assessments:

- The development of mediation services will continue in the country regardless of legislation;
- the mediation efforts should be detached from other activities within the social services;
- the police (to some extent) and prosecutors are in need of clearer legislation on their approach to mediation;
- the clarification of these provisions would provide mediation services with increased legitimacy and effectiveness;
- to reduce recidivism and to reduce victim suffering are the primary objectives;
- the guardians of young perpetrators should as a rule attend mediation,
- it is important to highlight the victims in the mediation efforts;
- the work with mediation has been rooted in common sense rather than knowledge, and the projects have come a long way with this approach;
- there is an increased need for exchange of experiences between projects;
- there is a need for more evaluations of individual projects.

These reports form the basis for the state investigation that was published later that year and the subsequent draft bill. This in turn led to the law on me-

9 *Brå* 1999.

10 *Brå* 1999a.

11 *Brå* 2000.

12 *Brå* 2000a.

diation in connection with crimes (Framework Act on Mediation) that came into effect on 1 July 2002.

In 2003, the Government gave Brå a new undertaking: to develop mediation services in Sweden with a view to nationwide coverage with high quality mediation services. The assignment was renewed each year up until 2007, when a new organization was launched. Brå's task was to distribute financial assistance to municipalities to start new or strengthen existing mediation activities, to provide training in mediation, and to be responsible for the methodology and quality.

Offering mediation to young offenders became mandatory for municipalities on 1 January 2008, thus ending Brå's responsibility to develop and educate the mediation activities in Sweden. Since then, no one has had the overall responsibility for the mediation sevices as it is now up to the individual municipalities.

A report in 2008 by Brå[13] surveyed the mediation situation in Sweden prior to 2008. It showed that mediation occurred in 254 of the country's 290 municipalities. The remaining municipalities indicated that they would probably be able to offer mediation at the end of the decade, and that they are currently taking steps to ensure this.

According to the survey, at the end of 2007, there were 397 active mediators – 272 were employed by the mediation service and 125 were lay mediators. How it looks today is difficult to compare since the overview provided by the National Social Board in 2012[14] differed methodologically from the 2007 report. Of Sweden's 290[15] municipalities 135 have there own mediation service. They have approximately 240 mediators, of whom 9-15% are lay mediators. 79 mediation services have some other form of organization – they either collaborate across municipalities or they purchase services from private providers or NGOs.

The statistics regarding the matters that come to mediation can be misleading in many ways. It is the mediation services themselves who determine which of the cases that come to mediation service actually go through with mediation, which means that the figures do not reflect the crime rate in the country. For example, some mediation services mainly mediate cases of shoplifting, while other services do not mediate in shoplifting cases at all.

The statistics available from Brås previous assignments are limited to cases of mediation that were initiated by services funded by Brå. The data show that of the criminal cases that went to mediation, two-thirds involved young male of-

13 *Brå* 2008.

14 *Brå* 2012.

15 Responses were provided by 224 municipalities. It was predominantly the smaller (less than 10,000 inhabitants) municipalities that failed to respond. My experience of working with mediation in Sweden is that it is the smaller towns that have the most difficulties to maintain a good mediation service or to even provide a mediation service at all.

fenders, compared to one-third girls. The relatively large proportion of girls who had shoplifted was the single largest group of offences in the statistics, a form of crime that is dominated by girls in general.

The vast majority are young offenders who have usually committed some form of acquisitive crime. The most common types of crime that are mediated are shoplifting, assault, vandalism and other types of theft crimes. The Mediation Act gives no guidance as to what crimes are eligible or appropriate for mediation. The Act's preparatory works noted, however, that certain crimes can be difficult or even inappropriate to mediate, such as domestic violence.

Mediated cases involved only one victim in 88% of cases. The age of victims ranged between 4 and 91 years, with an average age of 28 years. Perpetrators were younger by comparison (15 years), ranging from 6 to 54 years of age. In 55% of cases the victim was some form of public facility, shops, department stores and the like. The remaining 45% were natural persons and thus individual, identifiable victims (68% male, 32% female).

In 2008 it became mandatory for municipalities to offer mediation for young people less than 21 years of age. This, coupled with other legislative changes concerning young offenders that have been undertaken in recent years, make it likely that a change will occur with respect to both age range and crime types.

According to Brå, mediation is designed in such a fashion that both the offender and the crime victim benefit from it. Brå argues, however, that following the aim of reducing recidivism would require a more offender-focused approach. Shoplifting is the most widespread form of youth crime. If mediation efforts aimed at the entire group, it is likely that most of them would never commit a new crime or commence a criminal court. The three strategic crimes identified as indicating a high risk for a continued criminal career are theft of vehicles, robbery and theft.

4.2 Findings from implementation research and evaluation

Besides the Brå-reports and the report by the Social Board described above, three more studies have been published that shall each in turn be highlighted here.

4.2.1 Staffan Shelin's licentiate thesis in sociology – "Does mediation prevent recidivism in young offenders?"[16]

The purpose of his study was to investigate the preventive effects of mediation. The central question was: what crime prevention effects has mediation had on young criminals who have participated in mediation programmes? The investigation was conducted using a comparable control group and included a multi-

16 See *Shelin* 2009.

variate reoffending analysis. The reoffence study mainly focuses on the notion that mediation prevents crime by instilling a sense of shame in young perpetrators by making clear and reinforcing the crime and its consequences at the mediation meeting. The following hypothesis is addressed in the study: Mediation involves trust between the young perpetrator and his/her parents and has a conflict-solving and crime-preventing effect. By committing a crime, the youth has broken the trust between him/her and his/her parents, who have condemned the action. The parents feel shame in the face of those around them, and because of this resume their position against the youth. The main conclusion is that youths who had participated in mediation programmes subsequently relapsed into crime to a lesser extent than youths who had not participated in mediation. Reoffending risk was twice as high for the control group. The significant effect of relapse for respective gender showed that girls relapsed to a lesser extent than boys. It was not possible to statistically determine any significant correlations between reoffending and whether or not the offender had a migrant background. Regarding age, there was no statistically significant relationship as to whether youths relapsed to a greater or lesser extent depending on whether they were under or over fifteen years of age. Furthermore, it has not been possible to statistically determine whether group mediation has had a different outcome in relapse frequency as compared to individual mediation, and it has not been possible to distinguish whether compensation at mediation has had any effect. Significant relationships emerged between mediation and relapse for the crime categories 'crime against life and health', 'crime against freedom and peace', 'burglary, robbery and other theft crimes' and 'vandalism'.

4.2.2 Anna Rypi and Veronika Burcar[17] *– "Mediation morality, emotion and diversity. Meaningful meetings between offenders and crime victims"*

This report builds on a study of two mediation services, one from a smaller town and one from a lager town in Sweden. The services are organized by the Social Service and use professional mediators. Over the course of a year, observations and interviews were conducted. In the study, mediation is studied and analyzed with an emotional-sociological and "symbolic interactions" perspective as a tool for conflict and emotional management. The discussion focuses on the victim's re-integrative process as well as on the effects of mediation on offenders. Rather than narrowing in on the parties' stories they have focused the discussion on the different ways mediation can provide positive consequences. They have also looked into the process itself, how the mediators handle it. Some of their results show the importance of the pre-meeting and how often those are overlooked. The pre-meetings can in fact become "indirect mediations" that can help the

17 *Rypi/Burcar* 2012.

parties to see and understand the other side and balance the shame. Mainly through observations, they have been able to see that the victims and the offenders are contented and relieved, even in cases in which no actual mediation meeting (beyond the pre-meetings) took place. Such shuttle approaches have nonetheless helped to provide stakeholders with answers and to get over the negative feelings that the crime had caused. Just by talking about the events has provided opportunities to increase understanding and to clarify misunderstandings.

The mediator's roll and his/her task in mediation are also analyzed in this study. Restorative justice in practice – to interpret and maintain balance in the mediation process – turns out to have many dimensions. According to the authors, this may mean working with (what mediators call) "balance in the room". Both parties (offender and victim) will have to take active part and speak up for themselves during the mediation. Another example revolves around the imbalance that can exist because of the parties' power and influence. The mediator strives to create balance in and during the mediation "by words" – empowerment, increased influence, participation and accountability. The mediation is there for both parties.

The final conclusions that the authors present are that, through their study, they have gained insight into mediation as a process and into the roll of the mediator. A continued and continuous evaluation of offenders' and the victims' experiences and perceptions could lead to increased knowledge of the reassuring, crime preventing effects of meditation.

4.2.3 Doctoral thesis in law by Linda Marklund – "One crime – two processes; VOM and youth offenders in the legal system"[18]

A crime and the two processes meeting the young offender is the core of this work. The effect is like ripples on the water, they move further and further away. The aim has been to analyze the areas that seem problematic when mediation (restorative justice) and criminal procedure for young people have to interact. The main questions:

- What restorative process is used and what is its purpose?
- What is the legal status of restorative justice/mediation?
- What are the roles of the parties and the mediator?

The method used in this work has been a traditional legal method in combination with participant observation. Additionally, a case study of mediation has been used to illuminate the mediation process.

The restorative process that is used is victim-offender mediation organized as a semi-independent service. The purposes as the Mediation Act states are for the offender to gain further insight into the impact of the crime, and that victims

18 *Marklund* 2011.

should have the opportunity to process their experiences and get some answers. Mediation can provide all the parties with a chance for closure and give them an opportunity to move on. Mediation is a complement as well as an alternative to the legal process.

The results show that the Swedish mediation service needs more explicit support and education at all levels, and that there is a need of more distinct rules and guidelines. However, these cannot impede what is unique about the mediation process – voluntariness, confidentiality, peaceful equality, reconciliation and facilitation. Otherwise, mediation will be a pale copy of the law and the mediators the new professionals who steal the conflict from those who really own it. The final recommendation is that either the Justice Department or Brå (Swedish National Council for Crime Prevention) must assume responsibility for restorative justice/mediation.

A restorative intervention is really successful when the parties themselves feel that it has been a positive experience. For the mediation services more often than not success is measured in the number of mediations completed. That is what is reported upwards in the organization.

In the Social Board's survey they identified areas that are problematic and that are vital for success. The following points are crucial one way or another.

If the mediation service is supposed to function properly, the most crucial points are that the parties are even asked the question "would you be interested in mediation?" and that the cases are referred to the mediation services in the first place. And this is one of the main problems for mediation in Sweden. Despite the fact that the municipalities are obliged to offer mediation to all young offenders, not all young offenders are actually asked in practice or are provided with information about mediation and restorative justice. A requirement for success is a consistent referral system and that the parties are informed by a well-informed person. Having greater knowledge in the police, social service, prosecutor, penal and in prison organization is imperative.

Elaborate collaboration system of communication, information-sharing and feedback are also crucial. There is a problem in getting relevant information to the relevant party in time as well as that the means and routes for supplying this information are different all over the country. Collaboration and information-sharing strategies on the ground do not follow one clear or uniform model, and are up to each individual mediation service. Unfortunately, the courts seldom receive information that mediation has taken place and can therefore not take the result (or the offenders' intention) into account when sentencing. That the different collaborating agencies have different geographical subdivisions also creates problems when it comes to this question. An important requirement here would be more and better collaboration, communication, information-sharing and feedback. There is a need to establish homogenous routines and informational channels. The collaborating parties have also expressed a need for regional collaboration groups where they can develop routines and conform

referral/informational processes. Another important issue is mutual trust. It is said that one of the most important factors for success is that the prosecutor gets information in a structured way so that he/she can take mediation into account during the penal process. I personally do not fully agree with this. Of course it is important to have good communication with the prosecutor, but the mediation is not about the prosecutor. Mediation is there for the victim and the offender. If the prosecutor can have a positive impact on securing the process then it becomes a success factor.

Regarding knowledge, specialization and attitudes – several stakeholders have the perception that there is no knowledge about mediation, even though such knowledge is important for the system of mediation to function. Police, prosecutors and judges are mentioned in this context, as well as defence lawyers. The lack of knowledge concerns several aspects of mediation: how it is done, the purpose of it, and its impact. It has been noted that without knowledge e. g. the police cannot provide information about mediation to the offence parties in a fair and consistent manner. Another aspect that was pointed out by several practitioners is that they feel that, within the judicial system, there are negative attitudes towards and a lack of confidence in the mediation process, partly based on ignorance. This can be reflected for example in the how offenders are asked whether the mediation service should be contacted (i. e. suggestively, directly, encouragingly). Something that is also recognized as a problem in a more general sense seems to be that judicial thinking collides with mediation, to the extent that mediation is perceived as undesirable in the context of the legal process. Some respondents also state that there appears to be a fear among police and prosecutors that mediation is something that can interfere with the judicial process. Thus, it is important to raise awareness of mediation and its benefits among the professions. It can be argued that improved knowledge of what mediation entails could contribute to increasing motivation among the police to offer it, among prosecutors to take it into account in decisions on whether or not to prosecute, and among courts to have regard to mediation in its decision-making during sentencing. A success factor that some of the surveyed participants in the Social Board survey highlighted as important was to increase the knowledge of concerned professionals in the justice system. In this context it should be mentioned that there are special juvenile prosecutors in most public prosecution offices of the country. Municipalities are obliged by law to provide mediation for young offenders, but as stated earlier there are no uniform or detailed standards and it is not clear how it should be organized and implemented in practice. Most respondents believe that the mediators be full-time professionals; some think more than one mediator should be assigned to each case. This implies that the geographical area must be large enough to provide sufficient case loads. One success factor that is mentioned is that mediation works better when someone offers mediation as a specific service, compared to when it just one of many tasks of a local authority service institution.

Control and management – As mentioned earlier, there are norms etc. for mediation with young offenders. One problem is that, despite the existing norms, several stakeholders describe that they experience an ambiguity about what applies to each agency and that the issue of mediation sometimes seems to fall between two stools. It is mentioned that the lack of clear guidelines, but even more the lack of information from the central authorities to the local level, is a big problem. The guidelines and the like are not known to all, and there is widespread ignorance of what mediation actually is. In light of the above, several players say that there is a need more information and greater clarity from the top, i. e. from the respective central authority. The information called for by stakeholders should be about what mediation is, the purpose of mediation and the effects of mediation. It is noted also that there is a need for clearer guidelines concerning each agency and their respective responsibilities.

There are aso problems concerning responsibility and the lack of a central guiding authority. Several participants expressed that there is a big problem that there is no central body that has the overall responsibility for mediation. This is a/may be the reason for the large differences between municipalities. The fact that there is no centrally arranged training in mediation is perceived as problematic, as a likely result is that the skill and knowledge levels of mediators differ between municipalities. There are many actors asking for and stating the need of a central authority that has overall responsibility for issues such as quality assurance, training and methodology development. It is believed that this would increase the consistency and quality and thus enhance legal certainty. There is also a need for a structure for training – for its content and scope.

The principle of equality is a problem when it comes to the aspect of Rule of Law, since all victims and offenders are not treated equally. We have the example of the differences in its organization and mediators' education, a lack of procedures for feedback and the agreements made as a result of mediation are different. Lack of knowledge about mediation among judicial actors and agencies and the fact that attitudes towards mediation vary from prosecutor and prosecutor are also problematic issues. One prosecutor can allow mediation to take place before trial in a case of assault, while another might not let mediation take place until after the trial (in equal or even in lesser charges). A great problem, as mentioned earlier, is that not all young offenders and their victims are provided with information that is necessary to make a decision for or against mediation. Many are not even given that decision at all. According to the surveyed participants the absence of a nationally coordinated mediation system is perceived as a legal problem.

Problems related to the Mediation Act can be that it is sometimes formulated obscurely, for instance the provisions relating to mediators: "he should be competent, equitable and impartial". However, these important eligibility criteria are not defined further. According to the law, participation in mediation shall be voluntary by both parties. Some believe, though, that willingness to participate

may be due to and influenced by how the mediator or the police present mediation as an option. Whether a case is deemed appropriate for mediation by the mediator is also not determined along uniform lines and criteria. A party that has been denied the possibility to mediate should have the right to appeal that decision, however no such safeguards are in place. The wording in Chapter 5, 1 § SoL is open to considerable room for interpretation. The municipality has to ensure that the mediation "can be offered", something that could explain some of the disparities between municipalities. Some municipalities offer mediation if a case comes in, but aren't working actively, while others municipalities develop a full scale mediation service that is responsible for everything from safeguarding the procedure to the last little detail. In light of the above comments on the Mediation Act, according to some players there is a certain need for clarification.

5. Summary and outlook

The mediation act itself has potential to be both a beneficial factor and a hindrance. The fact that the act is a framework law, and does not specify what should be done and how, gives the restorative community all the possibilities it needs to further restorative justice. However, this lack of specificity can cause problems in securing funding, getting other key actors to take it seriously and getting the right information out to the right people. The lack of quality assurance, specified education and demands on the mediation services from the government make it difficult to show that it is working and to make demands. There is quite widespread frustration in the mediation service over the state of affairs that is exacerbated further when one sees how well it can work in both Norway and Finland.

Restorative justice is far from being used to its full potential. The Mediation Act already offers possibilities to do more. But the organization, the education, the economy and (unfortunately) some of the mediators themselves are barriers for the development. There is so much more that can and should be done.

When it comes to pure restorative justice, there is no visible reform development or debate. Public debates are centered on harsher punishment and on the rights of certain groups of victims. There are some scholars and practitioners who try to lift mediation/restorative justice up on the agenda, but so far they have had difficulties to be heard.

The future of restorative justice in Sweden is today a big question mark. There does not seem to be anyone in a high position who wants to promote restorative justice and to take the responsibility for doing so. There is some hope that the social board, with its pending report, will stir enough noise around how the mediation service is working so something will happen. Another thing that might work for further development of restorative justice is the directive from the EU concerning the minimum rights of victims of crime. Sweden was (and is)

one of the proponents of the directive and, since the victims' rights include restorative justice to some extent, it will be interesting to see what happens.

References:

Brå (1999): Medling vid brott. Rapport från en försöksverksamhet ("Mediation in Criminal Cases. Report of an experiment"). Report 1999/12. Stockholm: Brå.

Brå (1999a): Medling vid brott. Gärningsmännen berättar ("Mediation in Criminal Cases. Perpetrators speak"). Report 1999/14. Stockholm: Brå.

Brå (2000): Medling vid brott. Brottsoffren berättar ("Mediation in Criminal Cases. Victims speak"). Report 2000/2. Stockholm: Brå.

Brå (2000a): Medling vid brott. Slutrapport från en försöksverksamhet ("Mediation in Criminal Cases. Final Report of an Experiment"). Report 2000/8. Stockholm: Brå.

Brå (2008): Medling vid brott. En sammanfattning av Brå: s femåriga regeringsuppdrap ("Mediation in Criminal Cases. A summary of the National Council's five-year mission"). Stockholm: Brå.

Brå (2011): Strategiska brott bland unga på 00-talet ("Youth Crime Strategy in the 2000s"). Report 2011/21. Stockholm: Brå.

Christie, N. (1977): Conflicts as Property. British Journal of Criminology 17 (1), pp. 1-15.

Marklund, L. (2011): One crime – two processes; VOM and youth offenders in the legal system. Uppsala: Uppsala University Press.

Rypi, A., Burcar, V. (2012): Medlingens moral, emotion och mångfald. Meningsfyllda möten mellan gärningspersoner och brottsutsatta ("Mediation morality, emotion and diversity. Meaningful meeting between offenders and crime victims"). Research Report. Lund: Institute of Sociology, Lund University. Available: http://www.lansforsakringar.se/globalassets/aa-global/dokument/ovrigt/aa-om-oss/forskning/00000-rapport-medlingens-moral.pdf.

Shelin, S. (2009): Förebygger medling återfall I brott bland unga gärningsmän? ("Does mediation prevent recidivism in young offenders?"). Licentiate thesis. Umeå: Umeå University.

Swedish Social Board (2012): Mediation in criminal cases for young offenders; Follow-up of how local authorities work with mediation, and analysis of the need for action to support the mediation efforts. Stockholm: Social Board.

Switzerland

Claudio Domenig

1. Origins, aims and theoretical background of restorative justice

A preliminary remark to be made about the presentation of restorative justice in Switzerland refers to the specific organizational constitution of this federal state. The federal structure of Switzerland, consisting of 26 cantons (as the states of the Swiss Confederation are called) with important decentralized power, has to be considered as a formative element of the RJ "landscape" in this country. Remarkably, while substantial criminal law was unified at the federal level long ago (with the Criminal Code coming into force in 1942), criminal procedural law – both for adults and juveniles – had been in the competence of the cantons until very recently (namely, until 1 January 2011). Even now the cantons retain substantial autonomy in the organisation of their jurisdictions and competence for legislation regarding policing. Therefore, certain developments of RJ (particularly victim-offender mediation) have been primarily initiated in a number of cantons – in varying forms. Even after the commencement of the federal legislation, some of those pre-existing cantonal models have remained applicable, many of them providing more sophisticated regulations than their federal equivalent. An in-depth presentation of the cantonal legislations and practices would go beyond the scope of this report. Instead, exemplary reference to cantonal models shall be made where deemed appropriate, while making no claim to be exhaustive.

1.1 Overview on forms of restorative justice in the criminal justice system

The following overview shall be structured according to the common classification of RJ in terms of restorative processes and restorative outcomes.[1] Following an "encounter-based process definition" of RJ, victim-offender mediation *(Mediation)* in juvenile justice is the most significant RJ intervention available (or explicitly provided) in the Swiss criminal justice system. Other interventions containing an encounter between victims and offenders, available both in adult and juvenile criminal justice, are conciliation hearings or "hearings with the aim of reaching mutual agreement" *(Vergleich)*, which are led by the prosecution. Here, the fact that the 'facilitator' is not a neutral or impartial third party (like the mediator) but the counterpart of the offender in the criminal justice process, clearly changes the content and limits the potential of the encounter. Yet as the hearing is aimed at reaching consensus regarding the consequences of an offence, or at achieving reparation, it can – at least partly – be deemed a restorative instrument. Furthermore, Swiss criminal procedural law contains specific participatory elements for victims in the 'regular' criminal justice process with a potentially restorative dimension;[2] however, as restoration is not the primary aim of such instruments, they shall not be further explicated in this report in order not to excessively blur the definition of RJ. Lastly, restorative encounters involving further members of the community, such as group conferencing or circles, are not (yet) available in Swiss criminal justice.

In terms of restorative outcomes, reparation *(Wiedergutmachung)* is the primary concept provided both in adult and juvenile criminal justice and both as stand-alone or ancillary interventions. As a stand-alone instrument, restoration leads to a discontinuation of proceedings or exemption from punishment – or at least to a mitigation of the sentence. In this regard, apart from the option of conciliation hearings with the aim of reaching mutual agreement (led by the prosecution), the Swiss law does not stipulate specific processes that may lead to reparation. As an ancillary intervention, reparation is ruled by the judging authority in the form of a 'conduct order'. (Reparation in the sense of these provisions shall be distinguished from the obligation for restitution by the court's approval

1 In the understanding of the author, both these elements – the procedural dimension of including affected stakeholders and the outcome dimension of restoring "integrity" on a personal, interpersonal and community level – are the characteristics of RJ as an integrative approach to dealing with crime. Cf. *Domenig* 2008, pp. 138 ff.

2 E. g. victims can assert civil legal claims stemming from the criminal offence and – as part of their right to be heard – can take part in procedural activities such as examination hearings of the offender. Such rights and "encounters" may allow the victim to receive compensation or to ask questions and get answers from the offender.

of a civil claim stemming from the offence.[3]) In terms of RJ in prisons, reparation is a mandatory element of sentence management planning. Furthermore, as a stand-alone (partly[4]) restorative sanction, community service *(Gemeinnützige Arbeit)* is a common instrument in adult criminal justice and even the predominant type of sanction in juvenile criminal justice.

1.2 Reform history

In recent years, a major criminal justice reform (coming into force on 1 January 2007) signified a landmark in the development of a legal basis for RJ on a federal level, introducing victim-offender mediation in the new Juvenile Criminal Law Act *(Jugendstrafgesetz,* hereinafter: JCLA) and reparation as a substantial alternative to prosecution and punishment as well as the codification of community service as a stand-alone sanction in the Criminal Code *(Strafgesetzbuch,* hereinafter: CC). More recently however, the federal legislator missed the chance of a comprehensive implementation of RJ with the reform of criminal procedure law coming into force on 1 January 2011. While the new Juvenile Criminal Procedure Code *(Jugendstrafprozessordnung,* hereinafter: JCPC) now hosts the legal basis of VOM (transferred from the JCLA, albeit now in a less elaborate form), the Criminal Procedure Code for adults *(Strafprozessordnung,* hereinafter: CPC) does not contain any regulations on mediation. As the new federal legislation on criminal procedure derogates the corresponding competence of the cantons, regulations on VOM formerly adopted by some cantons have gone out of force. Thus, the federal parliament's decision not to introduce mediation into the CPC entails that cantonal institutions of VOM for adults have lost their legal basis, signifying a substantial drawback for the RJ movement in Switzerland.[5]

While a large-scale implementation of RJ in the sense of a binding 'top-down' reform cannot (yet) be identified in Switzerland, a 'bottom-up' approach has led to a progressive spreading of RJ elements in the last decade. Based on cantonal legislation fostering RJ or conceived as localized pilot projects, initial pioneer VOM projects notably in the cantons of Geneva and Zurich were soon

3 Being merely an element of a civil lawsuit transferred into criminal proceedings, this instrument rather marginally overlaps with RJ and shall therefore not be further elaborated on in this report.

4 While community service implies an active contribution of the offender towards righting the wrong and thus constitutes a form of (symbolic) reparation, it does not entail a direct benefit for the personal victim. The "restorativeness" of this sanction thus notably depends on its alternative focus on reparation in contrast to established punitive aims.

5 Generally, the comprehensive regulation of the CPC does not allow the cantons to provide additional procedures. Exceptions and appropriate loopholes to this state shall be presented in *Section 3.2* and *Section 5* below.

followed by a successive introduction of such encounter-based RJ instruments in other cantons.[6] However, while those cantonal initiatives could selectively stimulate further development of RJ, a corresponding regulation on federal level has remained largely missing.[7] Here, reparation and VOM have become a relevant topic of criminal policy and legislation about 20 years after the beginning of the discussion in neighbouring countries, particularly Germany and Austria.[8]

This does not mean that Switzerland was a 'wasteland' in terms of RJ up to then. Notably, select provisions on reparative measures could be found in federal law. Since a reform of the Criminal Code in 1971 a form of community service as a sanction was provided for juveniles (former Art. 87.1 and 95.1 CC). Furthermore, with the coming into force of the Federal Law on Victim Support *(Opferhilfegesetz,* OHG) in 1993, the former Art. 37 para. 1 CC regulating the purpose of custodial sentences was extended to the perspective of reparation. In terms of such RJ in prison, pioneer work has been provided by the penal institution "Saxerriet" which introduced reparation as a (mandatory) instrument in the early nineties.[9] Traditionally reparation has been a considerable element in sentencing, stipulating a mitigation of the sentence if the offender has shown genuine remorse, and in particular has made reparation (cf. former Art. 64 CC, now Art. 48 CC). In terms of encounter-based procedures, several cantons' criminal procedural laws contained regulations on a (mandatory) "conciliation hearing" *(Sühneverfahren)* for certain offences (mainly offences against personal honour such as defamation and insult), led by an independent Justice of the Peace *(Friedensrichter)*.

6 VOM was first introduced into cantonal legislation in Geneva in 2001, fostered by the mediation association "Groupement Pro Médiation" and supported by scholars of the faculty of law; in Zurich, after a first model experiment in 1991-1993, a pilot project led by the mediation association "Verein Strafmediation Zürich" from 2003-2005 and its scientific evaluation by members of the faculty of law of Zurich University, legislation followed in 2007 (cf. *Perrier* 2011, pp. 189 ff.; *Faller* 2009, p. 21; *Schwarzenegger/Thalmann/Zanolini* 2006). In Fribourg, a regulation in the cantonal juvenile procedure code allowing mediation came into force in 2002; then, the (exemplary) ordinance on mediation in juvenile penal patters came into force in 2004: cf. *Vezzoni* 2009, pp. 9 ff.

7 According to *Knoepfler* 2002, p. 4, the fact that VOM was then so poorly regulated did not result from the specific political system of the country. Cf. also *Aebersold* 2004, p. 438.

8 Cf. *Kanyar* 2008, p. 1.

9 Cf. *Spindler* 2011, p. 12. A large-scale project on reparation was also led in penal institutions in the canton of Bern in 1999-2003, cf. *Imhof/Michel/Stettler* 2003. See *Section 3.4* below.

1.3 Contextual factors and aims of the reforms

The seminal introduction of RJ measures at the federal level in 2007 (VOM in the JCLA, reparation and community service in the CC) formed part of a larger legal reform. For adults, the entire sanctioning system was altered, a central aim being the substantial reduction of the use of short custodial sentences (up to 6 months) and their replacement by monetary penalties and community service (cf. Art. 34 ff. CC). For juveniles, a specific code of law was made, extracting and revising the corresponding provisions formerly embodied in the CC and, with its separation from the adult codification, underscoring the peculiarity of an approach towards juvenile delinquency oriented toward protection and education (cf. Art. 2 JCLA).

This comprehensive legal reform was the result of many years of expert preparatory work, dating back to the 1980s and thus to a time of a relatively moderate climate of criminal justice policy, reflected by the aims of resocialisation and alternative sanctions instead of retribution and imprisonment.[10] Thus the large-scale introduction of community service could serve both as a superior means for sustainable crime reduction by maintaining social integration and as a cost-saving measure by offenders' performances for the benefit of the community. Complementary to these offender-oriented strategies, increased attention towards the needs of victims (partially) influenced the penal reform, leading to the introduction of reparation as a fully-fledged alternative to prosecution and punishment (Art. 53 CC).[11]

As for VOM, its introduction in juvenile justice (Art. 8 JCLA) was in alignment with this particular law's focus on education and special prevention, emphasizing the educative potential of mediation in terms of developing empathy and accountability.[12] Both at the federal and – preceding – the cantonal level, reference to positive and promising experiences with VOM in neighbouring countries stimulated its domestic introduction. On the part of experts, VOM was also championed for adult criminal procedures, and the draft of the CPC discussed in parliament effectively contained a detailed regulation on VOM. However, at the time of parliamentary debate, a more conservative and retributive "tough on

10 These aims were already partially taken into account in the penal reform of 1971, introducing instruments such as semi-detention (allowing the prison inmate to continue his work or education and training outside the institution while spending his rest and leisure time in the institution) for adults and community service for juveniles. Cf. *Botschaft* 1998, pp. 1983 ff.

11 Deliberations on better protection of victims took into consideration research findings that victims (particularly victims of property crime) often are primarily interested in reparation of the damage and less in punishment. Cf. *Riklin* 2007, p. 996.

12 Cf. *Gürber/Hug/Schläfli* 2007, p. 39.

crime" attitude was prevailing, which (amongst other factors) finally led to the rejection of the integration of VOM into the CPC.[13]

1.4 Influence of international standards

Regarding the introduction of RJ measures at the federal level, international instruments did not play a prominent role in the initiation and shaping of the reforms. In terms of the regulation of VOM, the invitation to the federal legislator to stick as closely as possible to Recommendation R (99) 19 of the Council of Europe on Mediation in Criminal Matters remained, in spite of its widely recognized quality, a wish at the academic level.[14] In the parliamentary debates on the introduction of VOM into the CPC, Recommendation R (99) 19 was never mentioned, which is surprising in view of the fact that Switzerland is a member of the Council of Europe.[15] However, at the cantonal level, Recommendation R (99) 19 had a substantial influence on the provisions introducing VOM; this is notably apparent in the corresponding ordinance on mediation in juvenile penal patters of the canton of Fribourg.[16]

Even without specific reference to international standards, RJ instruments currently provided in federal legislation are in accordance with established human rights guarantees. For instance, the provision of VOM in juvenile criminal law (Art. 8 JCLA, now Art. 17 JCPC) as a voluntary procedure not requiring formal admission of guilt accommodates with the guarantees of a fair trial according to Art. 6 of the European Convention on Human Rights (ECHR), notably the right to a tribunal established by law and the presumption of innocence. Or, regarding community service in adult criminal law (Art. 37 CC), the requirement of consent of the offender is motivated by Switzerland's commitment to international standards prohibiting the imposition of forced or compulsory labour, namely Art. 4 para. 2 ECHR.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

2.1 Pre-court level (police and prosecution service)

Regarding the police, federal law (both for adults and juveniles) does not provide a legal basis for the police to order or conduct RJ measures. Primarily, this

13 Cf. *Faller* 2009, with a detailed account of the parliamentary debate on pp. 30 ff.

14 Cf. *Knoepfler* 2002, p. 6.

15 *Faller* 2009, p. 38.

16 Cf. *Vezzoni* 2009, p. 3.

emanates from the principle of legality that guides Swiss criminal law.[17] Where federal procedural law, by way of exception, allows for a moderate application of the principle of opportunity, Art. 8 CPC and Art. 5 JCPC reserve the decision not to prosecute to the prosecution authorities and to the courts, (implicitly) excluding the police.

2.1.1 Adult criminal justice

The central provision on reparation in adult criminal law, Art. 53 CC, states that the competent authority – which at the pre-court level is the prosecution service – shall refrain from prosecuting the offender or bringing him to court if the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused. Further preconditions are that the requirements for a suspended sentence (regulated in Art. 42 CC)[18] are fulfilled (lit. a), and that the interests of the general public and of the persons harmed in prosecution are negligible (lit. b). Thus, while reparation according to Art. 53 CC is (presently[19]) not restricted to a specific offence type, certain constraints exist in terms of offence severity and criminal history. In terms of procedure, Art. 316 para. 2 CPC states that if an exemption from punishment falls to be considered in accordance with Art. 53 CC, the prosecutor shall invite the aggrieved person and the accused to a (conciliation) hearing with the aim of reaching agreement with regard to the reparation. Therefore, if all preconditions are fulfilled, the initiation of this RJ measure by the prosecution service is mandatory.

As another application area of conciliation, Art. 316 para. 1 CPC states that in proceedings involving offences 'on complaint' (criminal offences which are only prosecutable if a criminal complaint has been submitted), the prosecution may summon the person who submitted the complaint and the accused to a hearing with the aim of reaching mutual agreement.[20] As opposed to the provision in Art. 316 para. 2 CPC on reparation, the application of this measure is

17 Cf. Art. 7 CPC stipulating the principle of mandatory prosecution.

18 According to Art. 42 CC, a suspended sentence is applicable for a sentence of no more than two years if an unsuspended sentence does not appear to be necessary in order to deter the offender from committing further felonies or misdemeanours (para. 1). If the offender received a suspended or unsuspended custodial sentence of at least six months or a monetary penalty of at least 180 daily penalty units within the five years prior to the offence, the sentence may only be suspended where the circumstances are especially favourable (para. 2).

19 The Swiss parliament is currently debating on constricting the range of application of this provision (reserving it to crimes against public objects of legal protection).

20 This regulation is an alteration of "conciliation hearings" led by the Justice of the Peace as formerly provided by several cantons' criminal procedural law (see *Section 1.2* above).

discretionary and restricted to a specific category of offences (offences "on complaint"), while in principle no constraints apply in terms of criminal history.

Participation in a conciliation hearing is basically voluntary for both parties. Indeed, if the person who submitted the complaint fails to appear, the criminal complaint shall be deemed to have been revoked (Art. 316 para. 1 CPC). However, the (declared) omission or denial of the victim to appear shall be equated with a failure to reach a mutual agreement.[21] In that case or if the accused person fails to attend the conciliation hearings (pursuant para. 1 or para. 2), the prosecution shall resume the investigation (Art. 316 para. 4 CPC). In this sense participation is voluntary for the offender as well. In particular, an admission of guilt is not required, nor are there further evidential requirements for the initiation of the conciliation procedure.[22] Besides, reparation can also be reached in a voluntary process initiated by the parties themselves, not being led by the prosecution.[23]

As a consequence of a successful conciliation hearing and/or reparation, the relevant legislation (Art. 53 CC, Art. 8 para. 4 CPC, Art. 316 para. 3 CPC) states that criminal proceedings are not to be initiated or that a current prosecution is to be discontinued. In case of an unsuccessful conciliation hearing, as mentioned above, the prosecution shall resume the investigation (Art. 316 para. 4 CPC), leading to a continuation of the regular criminal proceedings. The failure of the RJ intervention shall not have negative effects on the procedure and the sentence. In particular, acknowledgements made in the course of a failed conciliation hearing shall, according to doctrine, not be used as evidence in further proceedings.[24] Furthermore, only partially successful reparation can still result in a mitigation of the sentence at the court level (see *Section 2.2.1* below).

In terms of due process safeguards, namely the parties' rights to be heard (Art. 107 CPC),[25] their applicability is – in principle – undisputable, as conciliation hearings are a part of the criminal procedure and thus bound to the rule of law. As for legal remedies, the parties may submit a complaint against the di-

21 A declaration of the victim not to appear at the hearing for lack of interest in conciliation shall be accepted without impairment of the legal position; cf. *Landshut* 2010, p. 1579, with further references.

22 However, Art. 314 para. 3 CPC states that before imposing the suspension of the investigation (as mutual agreement proceedings are pending) the prosecution shall take all evidence which could be lost.

23 cf. *Aebersold* 2004, pp. 440 f., 450. See also *Section 3.2* below for corresponding possibilities of a mediation process.

24 cf. *Landshut* 2010, p. 1579.

25 Such as the right to have access to the files, to comment on the facts and the proceedings, to submit a claim that evidence be heard or to appoint a legal adviser.

rective discontinuing the proceedings to the complaints authority (Art. 322 para. 2 CPC), e. g. the court of appeal.

2.1.2 Juvenile justice

In Swiss juvenile criminal law – applicable to offenders between 10 and 18 years of age (Art. 3 para. 1 JCLA, Art. 1 JCPC) – the investigative authority[26] is responsible for ordering or conducting RJ measures at the pre-court level. Similar to the provisions in the CPC discussed above (*Section 2.1.1.*), juvenile criminal procedural law provides a regulation on conciliation hearings led by the investigative authority (Art. 16 JCPC), both for offences "on complaint" (lit. a) and for cases of reparation (lit. b). However, as opposed to the provision for adults, the scope of application of conciliation in cases of reparation (according to Art. 21 para. 1 lit. c JCLA) is limited to clearly minor offences, for which a reprimand would be the only punishment to be considered.[27] Furthermore, the provisions of the CPC – namely regarding the consequences of successful or unsuccessful conciliation hearings and/or reparation as well as legal safeguards – are applicable in juvenile procedures alike (cf. Art. 3 para. 1 JCPC).

As opposed to the legislation on adults, juvenile criminal procedural law moreover provides regulations on mediation. The current provisions on mediation in Art. 17 JCPC (in force since 01 January 2011) are an adapted – that is, reduced – version of the former regulations of Art. 8 JCLA (which came into force on 01 January 2007).[28] According to Art. 17 para. 1 JCPC, the investigative authority may suspend the procedure at any time and entrust a person or organisation suitable in the field of mediation to conduct a mediation process, if protective measures are not necessary or if the authority of civil law has already

26 In juvenile justice, the federal structure of Switzerland with its particular characteristics (see *Section 1.1* above) is yet more prominent than in the adult system, with federal legislation allowing the cantons to establish as investigative authority either a "juvenile prosecution" (traditionally found in the German-speaking cantons, as a division of the public prosecution office or as a separate service) or a "juvenile court" (in the French- and Italian-speaking cantons of Switzerland, to be distinguished from the first instance court for juvenile cases).

27 According to Art. 22 JCLA, a reprimand, consisting of a formal disapproval of the act, shall be issued if this sanction presumably suffices to deter the youth from further criminal offences. Apart from this restriction, the further preconditions for reparation according to Art. 21 para. 1 lit. c JCLA, are comparable to the ones in Art. 53 CC (see *Section 2.1.1* above).

28 As some principles set up in the former Art. 8 JCLA presumably still govern the practice of mediation in juvenile justice, these provisions shall also be presented in this report.

ordered appropriate measures (lit. a),[29] and if the requirements for an exemption from punishment due to reparation (Art. 21 para. 1 JCLA) are not fulfilled (lit. b).[30] Apart from these conditions, the current provisions on mediation in Art. 17 JCPC stipulate no restrictions in terms of offence type or offence severity.[31] However, in practice, it is due that mediation will keep being used only rarely for serious offences, as the (mandatory) discontinuation of the prosecution may seem inappropriate in terms of the potential need for protective measures and/or the – presumed – public interest in punishment. While Art. 17 JCPC also contains no restrictions in terms of criminal history, a pre-existing criminal record may be viewed as an indicator for the necessity of protective measures, excluding the applicability of mediation.

The succinct provision of Art. 17 JCPC states no further preconditions, be it on evidential requirements, admission of guilt or consent of the parties to mediation. In contrast, the former Art. 8 JCLA stipulated in terms of evidential requirements that the circumstances of the offence shall basically be clarified (which does not require a formal admission of guilt). In practice this criterion has remained significant as an intrinsic precondition for the restorative process.[32] The same is true for the precondition stated in former Art. 8 JCLA that all parties and their legal representatives agree to the mediation process. Even if it is no longer explicitly stipulated in Art. 17 JCPC, there is no doubt that this precondition – being a constitutive element of mediation as a voluntary process – has remained binding in practice.

In terms of effects, as indicated above, successful mediation leads to the mandatory legal consequence that the prosecution is to be discontinued (Art. 17 para. 2 JCPC) or, previously, that proceedings are not to be initiated (Art. 5 JCPC).

---

29 The reservation of protective measures emanates from the mandatory legal consequence that a successful mediation leads to a discontinuation of the prosecution, which would make it impossible for the judging authority to order protective measures even if they were clearly needed in the interest of the juvenile offender. As the law states, an alternative is that the authority of civil law (the tutelage/guardianship authority) orders such measures.

30 The reservation of exemption from punishment due to reparation (lit. b) embodies a policy giving priority to restrained intervention, eliminating trifle cases from mediation.

31 In contrast, the former Art. 8 JCLA had stated that no felony that was to be assumed to result in the imposition of an unconditional custodial sentence shall be the matter of the procedure.

32 Cf. *Aebersold* 2011, p. 254.

2.2 Court level (*restorative sanctions*)

Apart from restorative sanctions as part of sentencing (which shall be discussed below), federal law provides that some RJ measures usually arranged at the pre-court level are also available as (pre-sentencing) interventions to be imposed by the judging authorities once the procedure has reached court level. In adult criminal justice, this applies to reparation in virtue of Art. 53 CC, stating that the competent authority (in this case, the court) shall refrain from punishing the offender who has made reparation according to the preconditions set in this provision (see *Section 2.1.1* above). As the case may be, the court shall issue an order that the current prosecution is to be discontinued (Art. 8 para. 4 CPC). In juvenile justice, the same applies for reparation (Art. 21 para. 1 lit. c JCLA),[33] and moreover for mediation, as Art. 17 JCPC also allows the courts to suspend the procedure and entrust a person or organisation to conduct a mediation process, discontinuing the prosecution in cases of success (see *Section 2.1.2* above).

2.2.1 Adult criminal justice

As a general principle of sentencing, an offender's efforts to deliver reparation can have a mitigating effect in sentencing. In this regard, Art. 48 lit. d CC states that the court shall reduce the sentence if the offender has shown genuine remorse, and if he in particular has made reparation for the injury, damage or loss caused, insofar as this may reasonably be expected of him. This mandatory provision is of particular relevance in cases where preconditions of Art. 53 CC are not fulfilled (e. g. in serious cases where the interests of the general public and of the persons harmed are significant) and therefore reparation cannot lead to a discontinuation of the prosecution. Efforts towards reparation can also affect the court's decision of suspending the execution of a sentence – in the negative sense that suspension may be refused if the offender has failed to make a reasonable effort of compensation (Art. 42 para. 3 CC). In contrast, reparation – unless it leads to a discontinuation of prosecution – has no effect on the listing of the convicted person in the register of criminal convictions.

As an ancillary court-ordered sanction, the court can impose reparation in the form of a conduct order. Such conduct orders may be imposed when the court suspends the execution of a sentence in full or in part and accordingly makes the offender subject to a probationary period (Art. 44 CC). Along with other elements such as medical and psychological therapy, conduct orders can

33 In this case, Art. 5 JCPC additionally requires that protective measures shall not be necessary or the authority of civil law has already ordered appropriate measures.

relate to reparation (Art. 94 CC). Unlike independent sanctions, conduct orders cannot be enforced by compulsory measures.[34]

As an independent sanction with a restorative orientation, the court may, with the consent of the offender, impose community service. According to Art. 37 para. 1 CC, this sanction is provided as an alternative to a custodial sentence of less than six months or a monetary penalty not exceeding 180 daily penalty units and is limited to a maximum of 720 hours (corresponding to 180 days at 4 hours of work). Community service shall be performed for the benefit of welfare institutions, projects in the public interest or persons in need, and is not remunerated (Art. 37 para. 2 CC). If the offender fails to perform the community service, the court shall convert the community service order into a monetary penalty or a custodial sentence (Art. 39 CC). On the other hand, an offender who (through no fault of his own) is unable to pay a monetary penalty may request the court to order community service instead (Art. 36 para. 3 CC).

Regarding due process safeguards, all forms of restorative sanctions described in this section form part of the court's judgement against which every party that has a legally protected interest has recourse to a legal remedy (Art. 382 CPC).[35] The same applies for the sanctions for juveniles that are presented in the next section.

2.2.2 Juvenile justice

While the Swiss Juvenile Criminal Law establishes a specific sanctioning regime, certain provisions of the Criminal Code regarding sanctioning are declared applicable as well, among them Art. 48 CC on the mitigation of the sentence (cf. Art. 1 para. 2 lit. b JCLA; for details see *Section 2.2.1* above). Like in adult criminal justice, along with a (mandatory) reduction of the sentence, the offender's efforts towards reparation can have effects on the granting of a suspended sentence.[36] Likewise, as an ancillary court-ordered sanction comparable to the provision for adults mentioned above (*Section 2.2.1*), conduct orders relating to reparation may be imposed on juvenile offenders (Art. 29 para. 2 JCLA). Apart from that, as opposed to the adult system, reparation that meets all preconditions of the law (Art. 21 para. 1 lit. c JCLA) does not coercively entail a discontinuation of the proceedings but can also lead to a conviction and an ex-

34 If the offender disregards the conduct order, the court may extend the probationary period by one half (Art. 95 para. 3 CC). A revocation of the suspended sentence is only allowed if, additionally, it is seriously expected that the offender will commit further offences (Art. 95 para. 4 CC).

35 Namely a right to complaint (Art. 393 ff. CPC) and appeal (Art. 398 ff. CPC).

36 Indeed, Art. 35 para. 1 JCLA does not explicitly mention efforts towards reparation as a precondition for the suspension of a sentence; however, such efforts can significantly affect the corresponding court's decision in practice.

emption from punishment. However, as has already been indicated (see *Section 2.1.2* above), the scope of this provision is restricted to minor offences for which a reprimand (Art. 22 JCLA) would be the only punishment to be considered.

Regarding community service (called "personal work order" in Art. 23 JCLA), two differences to the regulations for adults shall be highlighted. Firstly (and potentially precariously[37]), to order this sanction, the consent of the juvenile offender is not required. In contrast to this lack of voluntariness, the fact that the service entails meaningful work, ordered in a non-stigmatizing manner and with the aim of fostering a sense of responsibility, maintains the restorative character of this intervention. Furthermore, juvenile offenders can apply to the sentencing authority for a conversion of a fine (Art. 24 para. 3 JCLA) or a custodial sentence up to three months (Art. 26 JCLA) into community service, in which case the sanction is based on the motivation of the offender. Secondly (and beneficial in terms of RJ), a personal work order in juvenile justice can also be ordered for the benefit of the victim. However, in practice, community service is in most cases performed for the benefit of welfare institutions or projects in the public interest.

2.3 Restorative Justice elements while serving prison sentences

2.3.1 Adult criminal justice

Art. 75 CC specifies reparation as a mandatory element of sentence management planning.[38] Art. 75 para. 3 CC states that the institution rules shall provide that a sentence management plan be drawn up in consultation with the prison inmate. This plan shall – among other elements[39] – contain details on making reparation. Beyond that, this federal provision does not state any preconditions for implementing reparation in prison settings. The prison inmate is obliged to actively cooperate in resocialization efforts as determined in the sentence management plan (cf. Art. 75 para. 4 CC). A refusal of the inmate to cooperate can result in the denial of regime benefits or easing, such as the granting of prison leave and

37 Both regarding international standards prohibiting forced labour, cf. *Aebersold* 2011, p. 170, and considering the relevance of voluntariness for a "fully" restorative intervention in general.

38 The former Art. 37 para. 1 CC denominated the reparation of the wrong inflicted on the victim as a general aim guiding the execution of custodial sentences. This provision came into force in 1993 with the Federal Law on Victim Support (cf. *Section 1.2* above).

39 Such as supervision, opportunities to work, basic or advanced training, relations with the outside world and preparations for release.

parole.[40] Thus making reparation can – both as an element of eligible conduct in terms of active cooperation and as an indication of positive prospects in terms of recidivism – influence the granting of parole.[41]

A person released on parole shall be made subject to a probationary period of a duration that corresponds to the remainder of his sentence, respectively amounting to at least one year and no more than five years (Art. 87 para. 1 CC). For this duration, the executive authority may impose conduct orders, which can relate to reparation (Art. 87 para. 2 CC referring to Art. 94 CC).[42] If the offender disregards a (reparative) conduct order, the executive authority may extend the probationary period by one half (Art. 95 para. 3 CC). The court may order the recall to custody for the execution of the sentence or measure only if it is in addition seriously to be expected that the offender will commit further offences (para. 4).

2.3.2 Juvenile justice

The provisions on prison regime for adults mentioned above are not applicable for juveniles (cf. Art. 1 para. 2 JCLA). There is no regulation in juvenile criminal law which provides the making of a sentence management plan with elements of reparation as stated in Art. 75 para. 3 CC. What remains similar to the provisions for adults is the executive authority's entitlement to impose conduct orders – relating e. g. to the reparation of the damage – on the juvenile that has been granted parole (Art. 29 para. 2 JCLA).

40 As forms of easing the regime of deprivation of liberty, Art. 75a para. 2 CC lists: the transfer of the inmate to an open institution, the granting of release on temporary licence, the authorisation of day release employment or of external accommodation and the granting of parole. Regarding parole, Art. 86 para. 1 CC states that this easing shall be granted if the prison inmate has served two thirds of his sentence, if this is justified by his conduct while in custody and if it is not expected that he will commit further felonies or misdemeanours.

41 Critical towards this connection: *Baechtold* 2007, p. 1584.

42 Such conduct orders may also be issued on offenders released on parole from undergoing an in-patient measure (Art. 62 para. 3 CC).

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

3.1.1 Adult criminal justice

As there are no provisions on mediation in the new federal CPC, there is currently and officially no mediation offered for adults in the criminal procedure. Before the CPC came into force, the former provisions on mediation at the cantonal level (to be found in Zurich and Geneva) corresponded to the ones used in juvenile justice. Potential future use of VOM may be implemented under the umbrella of the provisions guiding conciliation (Art. 316 CPC), offering mediation as a voluntary alternative (see *Section 3.2* below).

3.1.2 Juvenile justice

The frame set by federal legislation (Art. 17 JCPC) gives, generally speaking, little lead to the practice of mediation. Meanwhile (and yet before the federal provision had come into force), the cantons had elaborated various regulations and models of mediation. A full coverage of these practices would go beyond the scope of this report.[43] Instead, exemplary reference shall be made to two cantons, one from Switzerland's German-speaking part (Zurich) and one from the French-speaking part (Fribourg, which indeed is bilingual), both having been pioneers and leaders in the implementation of victim-offender mediation and offering quite sophisticated legal provisions on this matter.

Hence, while federal law does not provide any requirements in terms of the mediation process, some cantonal legislation contains specific regulations on the different stages of this procedure. In the canton of Zurich, the Ordinance on Mediation in Juvenile Penal Matters (*Verordnung über die Mediation in Jugendstrafsachen*, OM-ZH), in its §§ 5 to 11, establishes rules on: the mandate for mediation (e. g. responsibility for referrals); preliminary examinations on the suitability of cases; introductory talks with the parties; the mediation sessions and their confidentiality; the outcome to be retained in a written agreement or the determination of the failure of the process; the notification of the result to the mandating authority; and execution of the agreement. A similar density of regulation can be found in the Ordinance on Mediation in (Civil, Penal and) Juvenile Penal Matters of the canton of Fribourg (*Verordnung über die Mediation in Zivil-, Straf- und Jugendstrafsachen*, OM-FR), in its respective Art. 23 to 28 and 34 to 36.

43 For a detailed account cf. *Perrier* 2011, pp. 329 ff.

As for the participants in the mediation process, the federal regulation (Art. 17 JCPC) again provides no specifications. However, other federal procedural provisions regarding participatory rights may be deemed to be applicable in mediation as well. Firstly this concerns the legal representatives (normally the parents) of the accused which are a legal party in the juvenile criminal procedure (Art. 18 JCPC).[44] Likewise the right of the accused juvenile to be accompanied by a confidant (Art. 13 JCPC) shall apply to mediation procedures as well.[45] This should equally be valid for the victim which, according to Art. 152 para. 2 CPC, may also be accompanied by a confidant during all procedural activities (and, by analogy, in mediation procedures as well). Regarding the participation of defence lawyers and victim advocates, the corresponding procedural rights of the parties (Art. 129 ff. CPC) shall, in principle, also be effective in mediation.[46] In practice, lawyers normally do not participate in the mediation process itself; however, they may be contacted or invited e. g. before signing an agreement. As for the participation of other professionals, Art. 36 para. 3 OM-FR mentions the possibility to involve a member of the youth welfare office. In contrast, further involvement of the "community" – like for instance in sentencing circles and conferencing – is not yet common in this country and not provided for in legislation.

In Switzerland there is no central coordinating and funding agency in terms of RJ and victim offender mediation. However, some cantons have established specific agencies for conducting mediation with public funding. In Zurich, the office for mediation in juvenile criminal proceedings is affiliated to the chief public prosecution for juveniles (§ 1 OM-ZH). In Fribourg, mediation in juvenile criminal proceedings is carried out by the office for mediation which administratively is allocated to the department of justice (Art. 30 para. 1 OM-FR). While federal legislation does not explicitly require that the mediation person or organisation is independent of the criminal justice authorities,[47] this is safeguarded by the mediation offices in Zurich and Fribourg both in terms of institutional autonomy and local separation. The offices for mediation have no exclusive right to carry out this process; the cantonal legislations provide that the competent authority may also mandate another qualified mediator. Doubtlessly however, inter-agency collaboration and communication is more intense

44 Their inclusion is therefore allowed for in cantonal provisions, cf. § 7 para. 2 OM-ZH; Art. 36 para. 2 OM-FR.

45 Cf. the according reference in § 7 para. 2 OM-ZH and Art. 36 para. 3 OM-FR.

46 Cf. Art. 36 para. 3 OM-FR, giving the parties the discretion of calling in a legal advisor.

47 This leads the juvenile prosecution agencies in certain cantons, e. g. Basel-Country, to provide an internal victim-offender mediation model, cf. *Domenig* 2011. In doctrine there is disaccord whether such a model shall instead be termed "conciliation", cf. *Domenig* 2011, p. 142; *Perrier* 2011, pp. 278 ff.

with established mediation services, thus keeping referrals within this relationship in most instances.

Regarding time limits, the federal law states that the prosecution may order the suspension of the criminal proceedings if mutual agreement (and, by analogy, mediation) proceedings are pending and it appears reasonable to await the outcome of those proceedings (Art. 314 para. 1 CPC); the suspension shall be limited to a period of 3 months and may be renewed once for a further period of 3 months (para. 2).[48]

Regarding the qualifications required for persons responsible for mediation, current federal legislation is limited to the statement that 'a person or organisation suitable in the field of mediation' shall be entrusted (Art. 17 JCPC).[49] Thus current federal law requires expert qualifications without further specification; the mediator does not need to be accredited or licensed by the state. In principle, it is therefore at the discretion of the assigning authority to decide on a suitable mediator, e. g. taking into consideration specifics of the case and the persons involved.[50] However, doctrine[51] suggest that in practice a person is to be deemed "suitable" if he or she has completed acknowledged training in mediation and is accredited by the Swiss Federation of Mediation Associations (*Schweizerischer Dachverband Mediation*, SDM). For this accreditation the SDM requires 200 hours of training (including supervision), adherence to the rules of professional conduct and continuous further training.[52] In their respective legislations, some cantons do establish these – and further – requirements.[53] These structures refer to – and correspond with – a generally high level of professionalism of the mediation movement in Switzerland. However, in contrast to an abundance of educational institutions offering (general) mediation trainings, few training oppor-

48 Cf. also § 5 para. 1 OM-ZH. The corresponding provision in the canton of Fribourg is more flexible, stating an 'appropriate' time limit which allows the criminal justice authority to take into consideration the particularities of the case, the nature of the offence and the personal situation of the parties (Art. 35 para. 2 OM-FR).

49 The former Art. 8 JCLA additionally required the person or organisation to be recognized (accredited) for this purpose.

50 Cf. *Jositsch et al* 2010, p. 59.

51 Notably *Aebersold* 2011, p. 253; cf. also *Perrier* 2011, pp. 224, 291.

52 Cf. *www.infomediation.ch*.

53 In this spirit, § 2 OM-ZH states that mediators conducting mediation in penal matters shall have completed a mediation training recognized among the experts, feature knowledge in substantial and procedural criminal law, notably in juvenile matters, and be of good record. Similar requirements are stated in Art. 7 OM-FR, which additionally stipulates that mediators shall have a minimum age of 30, possess a university degree or training deemed equivalent, can report skills in mediation and have sufficient experience and knowledge in this specific field of mediation.

tunities specific in the field of RJ have been available in Switzerland up to now.[54]

As for the costs of the mediation process, federal law does not provide specific regulations. Some progressive cantons, such as Zurich and Fribourg, state that the mediation process is free of charge for the parties.[55] However, according to the general provisions on the liability for costs, the offender may still have to pay the expenses of the criminal proceedings: Even if the proceedings are discontinued, the costs may be wholly or partially imposed on the accused person if he or she unlawfully or culpably brought about the instigation of the proceedings (Art. 426 para. 2 CPC).[56] This can be particularly tenuous if the costs of mediation – which may be a substantial amount if a case is referred to a self-employed professional mediator – are regarded as costs of the proceedings.[57] On the other hand, the favourable provisions on conciliation (see *Section 3.2* below) may be deemed applicable to mediation as well, namely in cases of offences "on complaint". As Art. 427 para. 3 CPC states, the state shall – as a general rule – bear the costs of the proceedings in case of a withdrawal of the criminal complaint in the context of a mutual agreement mediated by the prosecution. Consistently, the same should be valid if the agreement is negotiated with a mediator.[58]

54 One of them is provided by the competence centre for mediation and conflict management of the Bern University of Applied Sciences (*Berner Fachhochschule*, BFH), which has offered specific training in victim-offender mediation since 2005. This training is embedded in the (general) mediation training (leading to the recognition of the SDM) and lasts up to 8 days. The specific knowledge is brought in by trainers from Austria's "Neustart" association. In the French-speaking part of Switzerland, a new in-depth 18-day programme of further training in mediation in penal matters, offered by the "Groupement Pro Médiation" in Geneva, is about to commence.

55 Art. 38 OM-FR; § 156 para. 2 GOG-ZH (Law on the Organization of the Judiciary, *Gerichtsorganisationsgesetz*). In the former mediation regulation in Zurich, a lump sum of 400 Swiss francs was imposed on the offender.

56 This "procedural fault" is a form of accountability approximated to civil law principles. The person submitting a complaint faces a similar risk of liability if he or she wilfully or through gross negligence brought about the instigation of the proceedings (Art. 427 para. 2 CPC).

57 The cost-saving aspect is thus a major argument of an internal victim-offender mediation model in juvenile prosecution agencies; cf. *Domenig* 2011, pp. 142 ff.

58 In this sense, Art. 42 OM-FR refers to Art. 427 para. 3 CPC as it states that the mediation process (for adults – see *Section 3.2* below) is free of charge if it leads to a withdrawal of the criminal complaint.

3.2 "Conciliation" (hearings with the aim of reaching mutual agreement)

Both for juveniles (Art. 16 JCPC) and for adults (Art. 316 CPC), the federal law regulates conciliation hearings led by the investigative authority, the juvenile court and the (juvenile or adult) prosecution respectively, without setting further requirements in terms of the process. Regarding adults, the lack of a federal provision on mediation has led some cantons to introduce means to provide (discretionary) mediation processes in the field – or rather, instead – of prosecutorial conciliation. In this spirit, Art. 41 OM-FR states that in case of offences on complaint, penal mediation can be arranged in the frame of a conciliation hearing according to Art. 316 CPC (para. 1). In penal matters to be prosecuted *ex officio*, the parties can call for mediation with regard to the civil claims or with regard to reparation according to Art. 53 CC, if the competent judicial authority so agrees (para. 2). In the Italian-speaking canton of Ticino, a similar provision can be found regarding the involvement of the Justice of the Peace, who has traditionally been in charge of conciliation hearings for all offences on complaint, assuming a role and function comparable to a mediator.[59]

As for the participants in conciliation hearings and for time limits, reference can be made to the remarks on mediation (see *Section 3.1.2* above). Since aspects of material reparation and civil claims often prevail in conciliation hearings – in contrast to the usual preponderance of personal and emotional aspects in mediation – the participation of legal advisors is more common in the former. The time limitation corresponds with the primary purpose of conciliation on procedural economy. In spite of the peculiarity of this procedure, there are no legal requirements in terms of specific qualifications (such as mediation skills) for prosecutors leading conciliation hearings. All the more it is desirable that those persons responsible for the delivery of this restorative measure either acquire these skills through optional mediation training (see *Section 3.1.2* above) or – as legally provided for in the cantons of Fribourg and Ticino – authorise a qualified mediator to conduct the process.

Regarding costs, as has been mentioned before, Art. 427 para. 3 CPC provides that in case of a withdrawal of the criminal complaint in the context of a mutual agreement mediated by the prosecution, the state shall, as a general rule, bear the costs of the proceedings.

---

59 Ticino's Law on the Organization of the Judiciary (*Gerichtsorganisationsgesetz*, LOJ) states in its Art. 31 para. 3 that in case of offences on complaint, the Justice of the Peace may, on proposal of the prosecution and with consent of the parties, conduct the conciliation hearing. See in detail *Zanolini/Zanolini* 2011, pp. 86 ff., 104.

3.3 Reparation and restitution orders

As a rule, reparation shall result from a conciliation hearing at the pre-court level, led by the prosecution or – exceptionally – by a mediator; in this regard see *Section 3.2* above. In addition to this, reparation can also be arranged as a (pre-sentencing) intervention at the court level (see *Section 2.2* above). In that case, however, the law does not regulate how reparation shall be reached. An encounter between the parties or any participation of the victim is not required. Indeed, if an encounter seems suitable, a respective meeting, conciliation or mediation process is feasible on a voluntary basis.

On the other hand, reparation as a conduct order is part of the regular administration of justice, imposed by the court as an ancillary sanction in cases of suspension of the execution of a sentence (see *Sections 2.2.1/2.2.2* above), or by the executive authority during the probationary period for offenders released on parole (see *Sections 2.3.1/2.3.2* above). Here again, no specific requirements exist in terms of processes, as encounters between the parties are not intended. For offenders released on parole, probation assistance (Art. 93 CC) is the primary institution to attend and support reparation efforts.

3.4 Restorative measures in prison

While penal institutions have a legal obligation – according to Art. 75 para. 3 CC – to include elements of reparation into sentence management planning, a consistent and comprehensive implementation of restorative measures in prison is scarcely to be found in Switzerland. A remarkable exception, which will be portrayed here as exemplary, is the penal institution "Saxerriet", an open institution in the canton of St. Gallen, which already introduced a "making amends" model in the nineties and promotes it as a mandatory instrument for all its inmates.[60] By comparison, the Bernese "TaWi" model will be presented, a project of coming to terms with the offence and making amends (*Tataufarbeitung und Wiedergutmachung*, hence the abbreviation "TaWi")' which was run from 1999 to 2003 in several penal institutions in the canton of Bern, before – regrettably – being abandoned for lack of further funding.[61] In contrast to these extensive concepts for adults, reparation in penal institutions has little significance in juvenile justice, where such measures are occasionally arranged on an individual basis, following educative aims in the execution of measures.[62]

60 *Spindler* 2011, pp. 12 ff.

61 The "TaWi" project was initiated and led by the Office of Detention and Probation of the canton of Bern and funded by the Federal Office of Justice as a pilot scheme: *Imhof/Michel/Stettler* 2003, p. iv. Cf. also *Perrier* 2011, p. 195.

62 *Aebersold* 2004, p. 450; *Aebersold* 2011, p. 256.

In terms of procedures and outcomes, the "Saxerriet" model distinguishes between inmates with a length of stay of less than half a year, in which case reparation is limited to the material aspect, and inmates staying longer in the institution, where reparation moreover takes an immaterial form. In those cases regular dialogues on reparation, coming to terms with the offence, insight and empathy for the victim are held with the offender. These topics are worked through with skilled staff members, figuring as consultants of reparation.[63] As for material reparation, a specific account – into which inmates pay ten per cent of their remuneration – can serve to fulfil obligations towards victims and debt amortization. For the material part of reparation, a social worker works with the inmate in collaboration with other institutions such as victim support agencies. Furthermore, making amends can take the form of an apology towards the victim, e. g. in a letter; however, it is not the aim of the institution that contacts are established to the victim unless the victim or its family expressly wish so. In victimless cases or cases lacking any form of (physical) damage, the reparation sum is transferred to a charitable institution.[64]

The Bernese "TaWi" model is addressed to offenders serving a prison sentence or (in modified form) undergoing an in-patient measure as well as probationers, offering a systematic process of coming to terms with their offence, victim offender mediation and compensation.[65] In contrast to the "Saxerriet" model, where the inmate's participation in the reparation process can have effects on the easing of the prison regime, participation in the Bernese "TaWi" model was strictly voluntary (without positive or negative reinforcement), thus encouraging the offender's intrinsic motivation to make amends. Mediation could also be pursued if the victim wished so; otherwise, substitutive forms of reparation were feasible. The process of coming to terms with the offence was attended by the competent social advisor, who could additionally call in external consultants or prison chaplains; in cases of in-patient measures, the process was part of the therapy. Contacting victims could be carried out by victim support agencies; mediation was arranged by neutral experts.[66]

The "Saxerriet" model initially worked with external consultants, mainly psychologists or social education workers; since 2008, the consultants for reparation are recruited from staff members of the penal institution working in care or in occupation (work masters). This redevelopment takes into consideration that the staff members are close to the inmates in everyday life in the institution

63 *Spindler* 2011, pp. 12, 14.

64 *Spindler* 2011, p. 14.

65 The project set up a broad network involving – along with penal institutions – forensic psychiatric services, prison chaplaincies, probation assistance, victim support agencies and external mediators, cf. *Imhof/Michel/Stettler* 2003, pp. 4 ff.

66 *Imhof/Michel/Stettler* 2003, p. iv, 6.

and know them well, which can strengthen the basis of trust and make conversation on coming to terms with the offence easier than in a therapeutic setting with its focus on the psychological aspects of the criminal behaviour. The consultants for reparation receive training in communication and negotiation skills and participate in supervision on a regular basis.[67] Similarly, in the Bernese "TaWi" model, most of the counselling was carried out by specially trained prison staff.[68]

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

To this point very little statistical data are available on the use of RJ interventions in Swiss criminal law. On a national level, the only data on RJ measures – provided by the Swiss Federal Statistical Office – relates to community service. As recent data collections show, this sanction is widespread in juvenile justice, while its use in adult criminal law is rather marginal. Regarding adult criminal justice, recent data[69] show that in 2010, 4,222 community service orders were imposed (1,997 of which as suspended and 99 as partially suspended sentences). This accounted for 4.3% of all sentences ordered by the prosecution service or the courts (compared to 86.1% monetary penalties and 9.6% custodial sentences)[70]. On the other hand, in juvenile justice, in 2010, 7,280 personal work orders were issued (1,160 of which as suspended sentences). With a respective share of 46.5% among all juvenile cases dealt with by prosecution or courts (compared to 22.5% reprimands, 19.4% fines and 7% custodial sentences), community work was the most common sanction in juvenile criminal law in 2010.

Regarding victim-offender mediation (as a pre-trial instrument of diversion), only selective (and no recent) records are available. The majority of the data originate from the mediation projects and programmes in the cantons of Zurich and Fribourg (see *Section 3.1.2* above) and the respective evaluations. So far, the

67 *Spindler* 2011, pp. 14, 15. Meanwhile, specific advanced training for staff members of penal institutions in offenders' coming to terms with the offence and making amends – based on the Saxerriet model – is provided nationwide by the Swiss Prison Staff Training Centre (*Ausbildungszentrum für Strafvollzug* SAZ) in Fribourg.

68 In that project, training was provided by experienced mediators of the "Waage Institut" from Hannover, Germany. Cf. *Imhof/Michel/Stettler* 2003, pp. 14, 47.

69 Data retrieved from the website of the Swiss Federal Statistical Office, *www.bfs.admin.ch*.

70 Only sentences listed in the register of criminal convictions, in which not all sentences for minor offences (contraventions) are recorded, cf. Art. 366 CC.

most detailed research study on the use of VOM results from the evaluation of the pilot project on mediation in criminal law in the canton of Zurich in 2006[71] (key findings of which shall be presented in *Section 4.2* below). Apart from that, a quantification of the use of VOM in Switzerland remains fragmentary. Existing data show that even in the well-established models in Zurich and Fribourg, the numbers of case referrals are merely moderate, reaching less than 100 cases per year.[72] However, as such, the use of VOM was by far higher than in most other cantons of Switzerland, where referrals are often limited to a handful of cases. Since the coming into force of the regulation of mediation in the Juvenile Criminal Law Act in 2007, in several cantons no more than a dozen cases have been referred to mediation.[73]

No official statistical data are available on the use of conciliation hearings, nor of reparation, be it as a pre-sentencing instrument leading to the discontinuation of proceedings, as a conduct order imposed by the court or as an element of the sentencing management plan in prison. In any case, regarding restorative measures in prison, a scientific evaluation of the Bernese "TaWi" project run from 1999-2003 (see *Section 3.4* above) offers some records; the findings shall be presented in the next Section.

4.2 Findings from implementation research and evaluation

In the criminological evaluation of the pilot project on mediation in criminal law in the canton of Zurich, a central scientific objective was to assess the costs of the mediation project. This economic aspect was considered significant in times of scarce financial resources and the economizing of public administration.[74] However, financial motives shall not be the only assessment criteria; in fact, the quality of the service rendered through VOM should be evaluated, as this is

71 *Schwarzenegger/Thalmann/Zanolini* 2006.

72 In the Zurich pilot project, in the period of 2003 to 2006, 171 criminal cases – both for adults and juveniles – were referred to the mediation service, *Zanolini* 2007, p. 401. Then, in the period of 2006 to 2008, after raising penal mediation from the former pilot project onto an institutional basis in the canton of Zurich, 126 cases were referred to mediation, *Zanolini* 2009, p. 3. In the canton of Fribourg, between 2004 and 2008, 284 mediations were initiated, including 495 juvenile offenders and more than 350 victims: *Perrier* 2011, p. 241.

73 Cf. *Perrier* 2011, p. 240.

74 *Schwarzenegger/Thalmann/Zanolini* 2006, p. 7. In this context, the practice of VOM ideally shall not only be competitive with criminal proceedings in terms of efficiency, but coevally lead to a reduction of workload for the judicial authorities: *ibid*., p. 8. As a matter of fact, cost-related arguments had considerable weight in the Swiss Parliament's decision to discard the introduction of mediation in the new Criminal Procedure Code. Cf. *Faller* 2009, pp. 30 ff.

equally recognized by theories of new public management which attach specific importance to the satisfaction of customers.[75]

As indicators for a successful restorative intervention, the Zurich project evaluation specifically related to the amount of agreements reached in mediation (as an external aim) and the satisfaction levels of the participants (as an internal element). In this sense, the evaluated mediation procedures were very successful. In 90% of the cases deemed suitable for mediation, an agreement between victim and offender could be reached; both victims and offenders reacted very positively to the possibility of mediation, and after completion of the mediation process, both victims and offenders valued their personal experiences as very positive and meaningful.[76] Thus, the rate of mediation agreements in the Zurich VOM project was higher than in the programme in Fribourg, where about 80% of the mediation processes led to an agreement in the reported period.[77] Apart from indicating the quality of the mediation process itself; these results allow a conclusion to be drawn about the screening of cases for referral – and, in this regard, the caution or courage of the allocating criminal justice authorities.

In terms of an economic cost-benefit analysis, the expenditures and the duration of the mediation processes were surveyed. According to the pilot project evaluation, the duration of the mediation process corresponded to the duration of a regular criminal proceeding.[78] However, as a subsequent survey has shown, in the later phase of the pilot project, progress could be observed in terms of work expended: Finally, an average of no more than 1.5 mediation sessions was needed per case.[79] Continuing this trend, in 2008, the average duration of the overall mediation process in Zurich was 64 calendar days in adult cases and 30 days in juvenile cases; this meant a significant reduction compared to the duration in the pilot phase, which was 143.2 days on average.[80] These data point to an increased professionalization of the mediation service, as more cases could be completed with equal success and less expenditure.[81] On the other hand, the re-

75 *Schwarzenegger/Thalmann/Zanolini* 2006, p. 8.

76 *Schwarzenegger/Thalmann/Zanolini* 2006, pp. 26 ff., 45 ff., 48. A subsequent survey showed an even higher rate – of the 171 criminal cases referred to the mediation service in the period of 2003 to 2006 in the canton of Zurich, 93% were successfully completed with a mediation agreement, *Zanolini* 2007, p. 401.

77 In Fribourg, out of 284 mediation processes between 2004 and 2008, 187 were successfully completed with an agreement, 60 did not lead to an agreement, and 37 were still ongoing by the time of the reporting, *Perrier* 2011, p. 241.

78 *Schwarzenegger/Thalmann/Zanolini* 2006, pp. 34, 48.

79 *Zanolini* 2007, p. 401.

80 *Zanolini* 2009, p. 5.

81 *Zanolini* 2007, p. 401, appreciating that this way the costs of the mediation procedure could be kept at a level that is competitive to the costs of formal criminal proceedings.

duction of mediation sessions per case may be interpreted as a cutback under the pressure of efficiency – at the expense of quality. Thus, educing the notion of "success" to the result of, and duration for, reaching an agreement may distort and obscure tendencies of an efficiency-driven approach to reduce mediation to a "quick fix" instead of an in-depth – and probably more sustainable – conflict transformation.

A critical element of the Zurich pilot project evaluation was the finding that the handling of criminal cases with the mediation service caused significantly higher costs compared to the formal judicial process.[82] This finding persisted in a subsequent survey after the institutionalization of the project.[83] However, this comparison of costs remains inaccurate in many respects. Firstly, the evaluations based the costs of the judicial process on regular proceedings leading to a summary punishment order issued by the prosecution. If the costs of mediation procedure were compared to those of criminal proceedings with court hearings (which take place in more serious cases, or when the summary punishment order is appealed), the results would be different.[84] While it can be expected that after settling a case with a successful mediation, no further costs are generated, in formal judicial processes unresolved conflicts can lead to further (appeal) proceedings. Furthermore, a successful mediation procedure concluding a criminal procedure can significantly reduce follow-up costs not only in courts, but also in other areas of the administration of justice, both on victims and offenders.[85] In this regard, the scope of tasks and functions assumed by the mediation services have to be taken into consideration – and questioned – as well.[86]

Moreover, a remarkable indicator for a successful restorative intervention and an important element of a cost-benefit analysis could be found in (reduced)

82 *Schwarzenegger/Thalmann/Zanolini* 2006, pp. 34, 48.

83 Even though the staff of the mediation service was reduced from three mediators (in the pilot phase) to one mediator and a secretary, the average costs per case remain considerably higher than those of comparable criminal proceedings, *Zanolini* 2009, p. 6.

84 *Zanolini* 2007, p. 416, thus admitting that the results of the evaluation do not present a complete identification of costs. However, it also has to be considered that before a case is referred to the mediation service, the investigative authority (i. e. prosecution) has expenditures in determining the relevant facts of the case; these first operating processes are always carried out by the criminal justice authorities, *Schwarzenegger/Thalmann/Zanolini* 2006, p. 33; *Zanolini* 2007, p. 411.

85 Cf. *Perrier* 2011, pp. 276 ff.

86 In the Zurich pilot project, the mediation service often assumed the function of a counselling and information centre, which increased its time investment per case. Furthermore, the mediation service undertook tasks of administration and controlling regarding the adherence and completion of the agreements, *Schwarzenegger/Thalmann/Zanolini* 2006, pp. 35 ff., 48, criticizing this scope.

rates of recidivism. However, for RJ measures in Switzerland, no recidivism analyses are available yet.

Assumptions and expectations regarding the effectiveness of VOM correlate with the willingness of the allocating criminal justice authorities for case referrals. In this sense, the criminological evaluation of the Zurich pilot project showed that prosecutors – although generally deeming mediation in criminal law possible and meaningful – were very reluctant in referring cases, assuming that mediation is a milder option for the offender compared to the regular criminal procedure and that the latter is more efficient.[87] Yet the results also indicate that the majority of prosecutors had not devoted much attention to mediation and that their level of information was insufficient.[88] As for their understanding of mediation, several prosecutors supposed that they would virtually assume a role of mediator in their office.[89] This finding corresponds with the hypothesis that prosecutors may tend to see mediators as "competitors".

Regarding RJ measures in prisons, the Bernese "TaWi" project was evaluated by the Institute of Psychology of Law and Social Psychology of the University of Bern.[90] In this project, which was based on voluntary participation, 74 or 11% of all clients who were notified of the project decided to take pArt. Of these "TaWi" processes (of coming to terms with the offence and making amends), 22 were successfully completed or transferred to external services, 20 were aborted by inmates, 18 were discontinued due to discharge from the institution, and 10 were still on-going at the time of evaluation.[91] Scientific evaluation found a positive attitude of offenders towards this process. While the participants surveyed in the case studies showed no proven change of attitudes relating to appreciation of the victims' perspectives, slightly increased levels of readiness to take personal responsibility for their actions could be measured.[92] Furthermore, the evaluation results suggested that (if the project should be continued) the voluntariness of the process would be maintained as an important element, and that "TaWi" processes would be placed in the hands of external consultants, thus separating this function from the tasks of control of regular executive staff.[93]

---

87 *Schwarzenegger/Thalmann/Zanolini* 2006, pp. 38, 48.

88 *Schwarzenegger/Thalmann/Zanolini* 2006, p. 38.

89 *Schwarzenegger/Thalmann/Zanolini* 2006, p. 38.

90 *Oswald et al.* 2002.

91 *Imhof/Michel/Stettler* 2003, p. iv.

92 *Oswald et al* 2002, pp. 21 ff., 26 ff.; cf. *Imhof/Michel/Stettler* 2003, p. 29. The case studies are not particularly convincing owing to poor figures, as only five participants were surveyed twice.

93 *Imhof/Michel/Stettler* 2003, p. 30.

5. Summary and outlook

Switzerland is still a developing country in terms of RJ. Compared to its neighbouring countries, a backlog of up to 20 years can be identified both regarding legislation of RJ and its implementation in practice. The positive reverse of this backlog is that Switzerland would have the chance of (further) taking into consideration and using the discussion and specific results – namely the positive experiences – of its neighbours; so far, this "side glance" has mainly been provided at the academic level.[94] Within Switzerland, the use of RJ measures in the different cantons is characterized by considerable discrepancy. Few cantons have taken up a progressive stance on RJ, introducing victim-offender mediation with the support and fostering of pioneering magistrates, associations of mediators and legal scholars. In contrast, many other cantons – as well as the federal legislator – have remained reluctant in promoting RJ. Thus, the federal structure of Switzerland has proven ambivalent in the development of RJ, proving beneficial for the exploration of measures in small-scale pilot projects, yet being a drawback in terms of a widespread and consistent use of restorative measures.

In terms of legislative basis, recent promising reforms in 2007 (advancing reparation in adult criminal law and introducing VOM in juvenile criminal law) are contrasted by the setback of ignoring mediation in 2011's new adult Criminal Procedure Code. This omission signifies a setback for those cantons that had formerly provided VOM for adults in their procedural legislation. Despite the remaining option of the parties to engage in mediation on a voluntary basis (or, as provided in some cantons, within the frame of conciliation), the lack of federal legislation is a hindrance to the advancement of this RJ measure in terms of its publicity and legitimacy – and, connected to this, case referrals and funding. On the other hand, the introduction of mediation in juvenile justice has not (yet) led to the use of this instrument on a larger scale. Thus it appears that even the recent adoption of RJ measures in federal legislation has done little to assure their nationwide implementation and application, which is due to a vast indeterminacy and/or voluntariness of these provisions, leaving the cantons – and their jurisdictions – a wide range of discretion.

The fact – given the marginal number of case referrals – that the competent criminal justice authorities often use their discretion to the disadvantage of RJ cannot be explained by a single cause. Regarding the use of VOM, a premise is that this measure is considered as (unwanted) "competition" for prosecutors. This may particularly apply to the authorities in juvenile criminal law which, in Switzerland, already contains a focus on education and taking responsibility and offers feasible instruments such as community service and educative measures

94 Cf. namely *Kanyar* 2008; *Perrier* 2011.

and, since 2011, also conciliation hearings.[95] This corresponds with the general finding that Swiss criminal law contains a considerable amount of (outcome-oriented) reparative elements, the application of which is basically in the hands of the criminal justice authorities, whereas few "fully-fledged" (process-oriented) restorative models are available that would imply a referral of cases. Therefore the (beneficial) fact that Swiss criminal law is – still – relatively moderate and largely oriented toward integration can become a hindrance to the implementation of more advanced RJ measures.

Meanwhile, RJ is far from being used to its full potential in Switzerland. Further potentials to expand RJ interventions exist at all stages of the criminal justice process, also after sentencing. In terms of models, participatory processes such as circles and conferences inviting "community" members could offer promising alternatives to the common mediation approaches that are limited to victims and offenders. However, presently no reforms for advancing RJ are in planning. In the current climate in public debate and rhetoric on crime and criminal policy, which has become increasingly polarizing and punitive[96], there is concern that an integrative approach (if misrepresented as a "soft" option) would attract little support. The current parliamentary debate on constraining the ambit of reparation (Art. 53 CC) substantiates this concern. Moreover, public budget deficits and accordant general debates on cost savings may interfere with the (already scarce) funding of RJ programmes.

Notwithstanding the currently difficult general conditions, it is due that RJ will make its way to an important component in Switzerland's future criminal justice system. Regarding VOM, the increased knowledge and use of mediation in different areas – such as civil law, schools and neighbourhoods – may lead to a general sensitisation and increased awareness, thus fostering the discussion and leading to more acceptances for mediation in penal matters.[97] As for the VOM models already in use, broader acceptance can be enhanced by on-going reflection of practice, forming a basis for establishing criteria of suitability of cases and referrals, and then transforming those quality criteria into concretely applicable standards for good practice.[98] In terms of legislative basis, as a sophisticated alternative to the (re-)introduction of mediation into the CPC, a spe-

95 Cf. *Zanolini* 2009, pp. 9 ff.

96 Current reform projects on criminal law aim to increase the severity of sanctions for violent crime and abolishing suspended monetary penalties while re-introducing short-term custodial sentences (reversing 2007's reform of the Criminal Code). Regarding the exclusionary tendencies of current criminal policy, cf. *Domenig* 2008, pp. 103 ff., with further references.

97 Cf. *Faller* 2009, p. 39; *Aebersold* 2004, p. 440. Cf. also *Zanolini/Zanolini* 2011, p. 107, regarding the VOM practice of the Justice of the Peace in Ticino.

98 *Zanolini* 2007, p. 417, with further references.

cific new federal law on mediation in penal matters could be aspired to.[99] Ultimately, an enlightened criminal justice system striving for peace and safety cannot elude meaningful measures of reparation, community involvement and reconciliation.

References:

Aebersold, P. (2004): "Restorative" Justice in der Schweiz. In: Schöch, H., Jehle, J.-M. (Eds.): Angewandte Kriminologie zwischen Freiheit und Sicherheit. Mönchengladbach: Forum Verlag Godensberg, pp. 437-450.

Aebersold, P. (2011): Schweizerisches Jugendstrafrecht. 2. Auflage. Bern: Stämpfli Verlag.

Baechtold, A. (2007): Art. 86 StGB. In: Niggli, M. A., Wiprächtiger, H. (Eds.): Strafrecht I: Basler Kommentar. Basel: Helbing Lichtenhahn Verlag, pp. 1579-1591.

Domenig, C. (2008): Restorative Justice und integrative Symbolik. Möglichkeiten eines integrativen Umgangs mit Kriminalität und die Bedeutung von Symbolik in dessen Umsetzung. Bern: Haupt Verlag.

Domenig, C. (2011): Behördeninterne Mediation im strafrechtlichen Kontext. Perspektive Mediation 2011/3, pp. 141-144.

Faller, C. (2009): Historique de la médiation pénale dans le Code de procédure pénale suisse: de son introduction à sa suppression. Revue Pénale Suisse 127, pp. 18-39.

Gürber, H., Hug, C., Schläfli, P. (2007): Art. 8 JStG. In: Niggli, M. A., Wiprächtiger, H. (Eds.): Strafrecht I: Basler Kommentar. Basel: Helbing Lichtenhahn Verlag, pp. 37-42.

Imhof, M., Michel, H. P., Stettler, B. (2003): Modellversuch Tataufarbeitung und Wiedergutmachung (TaWi) – Berner Modell. Schlussbericht an das Bundesamt für Justiz. Bern: Amt für Freiheitsentzug und Betreuung.

Jositsch, D., Riesen-Kupper, M., Brunner, C., Murer Mikolásek, A. (2011): Schweizerische Jugendstrafprozessordnung (JStPO). Kommentar. Zürich: Dike Verlag.

Kanyar, A. (2008): Wiedergutmachung und Täter-Opfer-Ausgleich im schweizerischen Strafrecht. Entwicklung eines Modells unter Berücksichtigung des deutschen und österreichischen Strafrechts. Basel: Helbing Lichtenhahn Verlag.

99 As drafted by *Perrier* 2011, pp. 315 ff.

Knoepfler, J. (2002): Victim-Offender Mediation in Switzerland. Newsletter of the European Forum for Victim-Offender Mediation and Restorative Justice Volume 3, Issue 2, pp. 4-6.

Landshut, N. (2010): Art. 316 StPO. In: Donatsch, A., Hansjakob, T., Lieber, V. (Eds.): Kommentar zur Schweizerischen Strafprozessordnung (StPO). Zürich: Schulthess, pp. 1576-1581.

Oswald, M. E., Bütikofer, A., Castelli, F., Steinbach, J. (2002): Wissenschaftliche Evaluation des Modellversuchs "Tataufarbeitung und Wiedergutmachung (TaWi) – Berner Modell". Umsetzungs- und Implementierungsphase. Schlussbericht an das Bundesamt für Justiz. Bern: Universität Bern.

Perrier, C. (2011): La médiation en droit pénal suisse. Étude de la législation suisse relative à la médiation pénale à la lumière des droits français, allemand et belge. Bâle: Helbing Lichtenhahn.

Riklin, F. (2007): Art. 53 StGB. In: Niggli, M. A., Wiprächtiger, H. (Eds.): Strafrecht I: Basler Kommentar. Basel: Helbing Lichtenhahn Verlag, pp. 994-1013.

Schwarzenegger, C., Thalmann, U., Zanolini, V. (2006): Mediation im Strafrecht: Erfahrungen im Kanton Zürich. Schlussbericht zur kriminologischen Evaluation des Zürcher Pilotprojekts. Zürich: Universität Zürich.

Schweizerischer Bundesrat (1998): Botschaft zur zur Änderung des Schweizerischen Strafgesetzbuches (Allgemeine Bestimmungen, Einführung und Anwendung des Gesetzes) und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht vom 21. September 1998. Bundesblatt 1999, pp. 1979-2417.

Spindler, C. (2011): Wiederherstellung des Rechtsfriedens: Wiedergutmachung in der Strafanstalt Saxerriet. Bundesamt für Justiz, Info Bulletin 1/2011, pp. 12-15.

Vezzoni, L. (2009): La médiation en droit pénal des mineurs: de la théorie législative à la pratique. Jusletter 7. September 2009, pp. 1-12.

Zanolini, V. (2007): Erste Erkentnisse zur Mediation im Jugend- und Erwachsenenstrafrecht. Schweizerische Zeitschrift für Strafrecht 125, pp. 395-418.

Zanolini, V. (2009): Quo vadis Strafmediation? Jusletter 23. November 2009, pp. 1-11.

Zanolini, V., Zanolini, V. sen. (2011): Der Friedensrichter als Wegbereiter der Mediation in Erwachsenenstrafverfahren. Schweizerische Zeitschrift für Strafrecht 129, pp. 79-108.

Turkey

Füsun Sokullu-Akinci

1. Origins, aims and theoretical background of Restorative Justice

1.1 Overview on forms of restorative justice in the criminal justice system

Conflict resolution by means of consensus is not a widely accepted and recognized concept in the Turkish Criminal Law. In fact reconciliation was first mentioned in a very short provision in the Turkish Criminal Code in 2005 and then the concept was transferred to the Code of Criminal Procedure in 2006, with a detailed and long article. Following this, the "Directive on the Application of the Mediation Procedure According to the Code of Criminal Procedure" was published.[1]

Besides reconciliation there are further manifestations of restorative justice in the Turkish criminal justice context, though not many. "Effective regret", "postponing the announcement of the verdict", and "postponing the execution of the sentence" are examples worthy of mention, which will be explained below in more detail. Frankly speaking though, although restoration of the victims' losses is a secondary result of these institutions, their aims are far different. For example, the aims of postponing punishment or postponing the announcement of the verdict aim to keep convicts of considerably short prison sentences away from the negative effects of the prison system. A similar aim is true for alternative measures applicable to short-term prison sentences that are regulated in the Turkish Criminal Code of 2005, Art. 50.

In the Turkish Criminal Code, instead of "short-term" prison sentences, there are measures that can be applied to everyone including children. In the

1 Official Gazette, July 26, 2007.

Turkish Law, prison sentences under one year in duration are "short term" prison sentences (Art. 49/2).

In Article 50, the law states that all "short term" prison sentences *may be* converted to the alternative sentences and measures stated in the article. The term "may be" implies that the judge *can* decide to convert if he/she considers this change more appropriate for the convict. However, he/she may decide to keep it as is. On the other hand, paragraph 3 of the same article has a special provision for juveniles, the elderly and for those who are sentenced to imprisonment of less than 30 days. If these persons have not previously been condemned to a prison sentence, their short-term prison sentence *must be converted* to one of the measures stated in Article 50. There are two differences between these persons and regular short-term prison convicts. First, the conversion is not mandatory for regular offenders sentenced to imprisonment; it is in the judge's discretionary power. The judge, by taking into consideration the offender's personality, his/her social and economic situation, whether he/she has shown signs of remorse during trial and the characteristics of the crime, may convert the prison sentence to the specified alternative measures, or he/she might decide not to. The judge, on the other hand, is obliged to convert if the offender is a child, is elderly or if the sentence is to less than 30 days. Secondly, the short-term prison sentences of regular offenders may be converted to one or more alternative measures, while for the juveniles and the elderly, only one measure can be applied.

The alternative measures are: judicial fines; restitution; compensation; attending educational institutions; banning the convict from certain places or from partaking in certain activities; a ban from performing a profession or trade; and work for the public good i. e. community service[2] for a period between one half to twice the convicted sentence. Community service must be consensual. The reason is that, according to the Turkish constitution, drudgery (forced labour) is forbidden. Especially community service brings restorative justice to mind: since the victim of each crime is the public, performing work for that damaged community is a means of restoring justice. However, this is the secondary aim. The main aim is keeping perpetrators of petty crimes out of the prison system. Therefore, although reconciliation, effective regret, "postponing the announcement of the verdict" and "postponing the execution of the sentence" will be explained in detail in the remainder of this report, community service, as a primarily retributive measure, will not.

2 All measures except community service were in the abolished Code of Execution of Crimes of 1965, Art. 4. In 2005 this Article was transferred to the Turkish Criminal Code.

1.2 Reform history

Turkey is one of the states that emerged after the decline of the Ottoman Empire after the First World War. When Turkey is referred to in a historical context, one feels obliged to mention the Ottoman system as the old regime. The Ottoman period can be divided into several periods, but in this context, it is practical to divide it into two sections. The first was a period of absolute monarchy in which the sultan, as the head of the State, had full authority both in State and divine affairs and his word was taken as the law of the land. Besides the Sultan's laws, Islamic laws were also applied during this period. The main criminal sanctions were *kısas* and *diyet*. The equivalent of *Kısas* is *talio est* in Roman Law – an eye for an eye, a tooth for a tooth. So the punishment that the perpetrator received mirrored exactly what he had done to the victim. *Kısas* was only applicable to offenders who had committed intentional crimes, for instance deliberate bodily harm. *Diyet*, on the other hand, was an alternative to *kısas* for cases in which the offence was unintentional or the victim (or one of the victims) preferred the application of *diyet*. Generally *diyet* was monetary compensation, where the families of the victim and the offender would meet and bargain. The agreed amount of money is given to the victim and his family. This in a way was a primitive mode of restorative justice.

The second period starts in 1856 with the declaration of the Ottoman Magna Charta. After 1856 some new laws were passed that mainly had their basis in Continental European Laws. For example, the Imperial Criminal Code of 1856 was a translation of the French Criminal Code of 1810.

During the First World War, the Ottoman Empire was ally to the Central Powers, i. e. Germany and Austria. It was still called the Ottoman Empire, but you could hardly call it an empire. It was called the "sick man of Europe" and was very weak. Besides the defeats in the World War, all the minorities within the Empire revolted against the Central Government. The whole of Anatolia and Roumeli was occupied by the Allied Forces. A new government was established in Ankara, which from then on became the Capital. A war of independence was fought against the occupying forces. In the meantime the Sultan left the Country and moved to Nice (France) with his family. Then the Turkish Republic was founded in 1923 on the ashes of the Ottoman Empire. The Ottoman Codes remained in force for some more years and after 1926 almost all codes were renewed. The changes were to be made at such a speed that there was neither enough time nor sufficient efficient staff to draft entirely new rules, so the passed codes were translations and adaptations of Italian, Swiss, French and German codes. For instance, the Turkish Criminal Code was a translation of the Italian Penal Code (adopted from the 1889 Zanardelli Code of Italy) and the Turkish Criminal Procedure Code was based on a translation of the German Criminal Procedure Code.

All these codes remained in force until the end of the last century, and were subject to few changes in that time. Starting from 2003, there has been a new wave of legislative development. There were many reasons for this new reform movement, two of which are worth mentioning. The first one is to change every law that has been made since the establishment of the Turkish Republic in 1923. Taking into consideration the amendments and newly drafted criminal codes and criminal procedure codes in numerous European countries, the models of the adopted Turkish codes of 1920s were all abolished in their original countries, prominently due to developments in understandings of human rights. The second reason was a desire to please the western world and to garner the support of western countries for economic and political reasons.

A committee, the members of which were young academics with a strong German law influence, drafted both a new Criminal Code and a Criminal Procedure Code, both of which were passed in 2004 and came into force in 2005.

The concept of restorative justice is not well developed in the Turkish criminal justice system. Originally, reconciliation had been in the new Criminal Code. Later on, considering reconciliation more a procedural matter rather than a substantive one, the new Criminal Procedure Code of 2005 was amended in 2006 and the provisions of the Criminal Code, developed with a lot of new issues concerning reconciliation, were incorporated into the Criminal Procedure Code.

Some important changes in the last so-called "reform package" incorporated some restorative justice procedures into the system. However, unfortunately, these rules were introduced to the system not for the sake of restorative justice, but mostly for other reasons, such as to overcome the overcrowding problem of the prisons or to reduce the number of cases pending in the Appeal Court.

Neither the commissions that had drafted the new Turkish Criminal Code and the new Turkish Criminal Procedural Code nor the Turkish Parliament who enacted those codes in a fairly short time had a restorative justice idea in their mind or conscience. Had they had just a small bit of an idea as to what restorative justice entails, they would not have set aside all the rules that require the active participation of the victim in the criminal justice process. Although the Criminal Procedure Code of 2005 ameliorated the victim's position and contained detailed provisions on victim's rights in articles 233 and 234, the provisions on reconciliation, although detailed, encompassed only a limited scope of eligible offence types.

On the other hand, since the new reform codes were drafted by a small group of people, the practitioners and judges had a tough time to understand the changes and with adapting themselves to the new system. After the enactment of the codes, the people who took part in the drafting committees partook in intensive lobbying and teaching activities under the guidance of the Ministry of Justice, so as to educate and inform the people sitting on the bench.

In 2005, many judges with 30 years of civil service experience retired. They expressed concern about the difficulty of learning the new codes and adapting

themselves to the new system. On the other hand, the Ministry of Justice did not try to dissuade the old judges, because it seemed easier to train new judges in the new system. This was seen as creating places for the new generation, but still, Turkey on the whole has insufficient judges.

1.3 Contextual factors and aims of the reforms

Although the old Criminal Code (adopted from the Zanardelli Code) was a liberal criminal code in its time, time had changed many contextual conditions and new concepts had been introduced into the life of mankind. All of these changes in technology and ways of thinking created new types of crimes and different approaches to problems of punishment, and the criminal law evolved considerably during the second half of the 20th century. A more humanistic approach to criminal law prevailed in that period. The death penalty was rejected as a form of punishment completely. Besides sentencing issues, new forms of crime developed alongside the new technologies. Inventions and progresses in communications and mass media have introduced more intricate issues and problems to the legal systems.

Due to the reluctance of the Turkish legislator to adapt the changes and accept new ideas, the Turkish criminal justice system has been a bit slow in keeping pace with the changes. In fact, the legislative organ was less conservative in this respect. Until the abolition of the death penalty in 2002 by constitutional amendment and subsequent referendum, the last death penalty to be executed in Turkey had been in 1984, a few years after the 1980 military coup. From 1984 onwards, no death penalties were executed in Turkey, but only because they were not ratified by the Turkish Grand National Assembly (GNA, the legislative organ, the Turkish Parliament). In other words, because of the existence of death penalty in the law, people were sentenced to the death penalty as a result of trial at court. However, in order to be able to execute this death sentence, the Grand National Assembly had to ratify the conviction. However, no convictions were ratified by the Parliament after 1984. In other words, there was a *de facto* tendency towards the abolition of the execution of death penalty in Turkey.[3]

Some new crime types were introduced in the Criminal Code of 2005. The old criminal code had been amended a couple of times on the subject of economic crime, negligent crimes and professional malpractice laws, prior to the reform of 2005.

The 2005 reform of the Criminal Code mainly aimed to harmonize the old code with the changes that had occurred over the years. The new Criminal Code of 2005 was drafted in a very short time and enacted in a hasty manner. Within

3 *Sokullu-Akinci* 2010, pp. 159 ff.; *Sokullu-Akinci* 1998, pp. 271 ff.

the first two years of its coming into force, more than twenty amendments were made by Parliament to correct ambiguous, contradicting provisions.

When the new Criminal Code was enacted the lawmakers had not envisaged that the country would face so many problems. To overcome some of the problems, the Ministry of Justice established help desks for the judges, so that the judges could call them and summarize their case, ask the person at the other end on how to decide and what to do.

Although they both entered into force in 2005, the Criminal Procedure Code was enacted after the Criminal Code. Some of the problems encountered during the first years of the Criminal Code were rectified in the Criminal Procedure Code. To overcome the workload of the judiciaries, some sort of restorative justice was introduced to the system. Because of the delays in the judgments, the prisons and detention centers were getting very crowded. New sentencing methods were introduced into the system and the victim's involvement in the criminal justice system was encouraged by the new amendments and changes. However, there were dozens of new amendments to the CPC during the first few years.

1.4 Influence of international standards

The international communities' influence was very important in the reform movement that was carried out after 2003. Since 2002, Turkey has appeared to be more willing to join to the European Union. The governments formed after the 2002 election tried to show that they were very willing to join the EU, despite the fact that they had announced otherwise during their election campaigns. During the first four years, great efforts were made to improve Turkish-European Union relations.

Recommendations of the Council of Europe were closely monitored, and efforts were geared towards incorporating decisions of the European Court of Human Rights into the Turkish criminal justice system. The international standards and Council of Europe recommendations were the main source of guidance for the changes and amendments to the Criminal Code and the Criminal Procedure Code in 2005. Especially Recommendation R (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure is well reflected in the Code of Criminal Procedure, in that many of the victims' rights stated in that recommendation were added to the CPC in 2005.

During these years the Turkish National Assembly ratified many International Agreements that had not been ratified by previous governments. Turkey signed and become a party to many international agreements on Human Rights during this period. For example, Turkey signed the 13th Protocol to the Euro-

pean Convention on Human Rights Concerning the Abolition of the Death Penalty in all circumstances.[4]

During the last five years, Turkish governments have given the impression that they have lost their enthusiasm to join the European Union. This shift in government position is reflected in the changes and amendments in the new codes. Constitutional changes of 2010 show that any Turkish eagerness to adhere to international standards and Council of Europe recommendations is diminishing, as are the impartiality and independence of judges. The changes of 2010 put a lot of pressure on judges and their independence is diminishing more and more as the judiciary comes more and more under the control of the political authority.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

2.1 Pre-court level

2.1.1 Adult criminal justice

Reconciliation (mediation) as grounds for refraining from prosecution

After a crime has been committed, the police investigation is the first and most elementary stage of the criminal justice system. It usually starts with a complaint or the reporting of a crime by a citizen. Police work involves taking in complaints, making inquiries and submitting the findings of the investigation to the public prosecutor. Some crimes require an official complaint by the victim (so-called "complainant's crimes"). In the old Criminal Code, there were provisions and categorical lists about which situations require a formal complaint by the victim. The Criminal Code of 2005 (Art. 73) introduced reconciliation (mediation) as a means of ending disputes in cases of complainant's crimes.

The provisions for reconciliation in the old Criminal Code resembled plea bargaining, where the suspect accepted the fact that he/she was guilty of the alleged crime and was ready to compensate the losses incurred by the victim who was also a complainant. Reconciliation today, now found in the Criminal Procedural Code (Art. 253), is more detailed and the suspect does not openly accept that he or she is guilty per se, but expresses that he/she is ready to compensate the losses of the victim.

In the present Criminal Procedure Code (Art. 253), the reconciliation procedure starts when the prosecutor makes a respective proposal. When the conditions are suitableand all legal preconditions have been met, the prosecutor or a police

4 *Sokullu-Akinci* 1998, pp. 271 ff.

officer appointed by the prosecutor informs the accused and the victim in writing that a reconciliation procedure can start if they are willing to participate. The reconciliation procedure can start once all parties have agreed to participate within three days of receiving the written invitation. Should the written invitation fail to arrive with or not be delivered to the parties or their legal representatives, the reconciliation process is regarded as having failed.

Reconciliation between the victim and the offender is available for a limited number of offence types. First of all, reconciliation can be initiated for offences where the prosecution is subject to the filing of a complaint of the victim/ victims. Besides these complainant's crimes, the following crimes can be eligible for reconciliation even if they are prosecuted *ex officio*:

1) Felonious injury, excluding aggravated cases,
2) Negligent injury,
3) Violation of the inviolability of dwelling immunity,[5]
4) Abduction or retention of a child,
5) Disclosure of information or documents that are trade secrets, banking secrets or customers' secrets.

Except for complainant's crimes, crimes prosecuted *ex officio* are only eligible for reconciliation if explicitly stated so in the law.

Reconciliation cannot be applied for crimes that fall within the provisions of effective regret (see *Section 2.2.1* below) or for crimes against sexual inviolability, even if the investigation and prosecution of such crimes are initiated upon a vicitm's claim. If a crime that is within the scope of reconciliation is committed together with another crime which is not subject to reconciliation, reconciliation cannot be applied for either.

For some kinds of offences, the reconciliation process cannot be used. The legislator explicitly forbids reconciliation for some forms of bodily harm in which the prosecution is only initiated upon a victim's complaint. Thus, in these cases, once the victim has reported such an offence and filed charges, he/she has no choice other than to wait until the end of the prosecution and to accept the judgment as it is. The same also applies for come sexual offences that are classified a complainant's crimes. Some crimes, such as "violations of dwelling immunity", "abduction and retention of a child" and "disclosing the trade and financial secrets of customers to third parties" are not complainant's crimes, but they are nonetheless cited as situations for which reconciliation is possible. In general, the offences for which reconciliation is permitted are such that are considered minor offences that cause limited harm to the public and to public order.

5 In Turkey, according to the constitution, a person's home, dwelling or abode is inviolable. Violating a person's home, dwelling or abode is punishable under the Criminal Code.

In cases in which the crime under investigation is eligible for reconciliation, the prosecutor (or a police officer[6] appointed by the prosecutor) shall invite the suspect and the victim (or their legal representative if victim or offender is a minor[7]), orally or in writing, to participate in the reconciliation process. If those persons fail to reply within three days, it shall be considered that he/she has refused the reconciliation offer.

While offering reconciliation, an explanation must be made so as to explain the nature of reconciliation and the legal consequences of accepting or refusing it. If the parties cannot be found for whatever reason, the investigation will be concluded without applying reconciliation. If there is more than one victim, all of them have to consent to the reconciliation process.

At the end of the reconciliation meeting, the conciliator (administrator) will prepare a report signed by the parties and attach to it all the related documents.

During the reconciliation process, the accused does not have to admit guilt. Declarations made during the reconciliation process cannot be used as evidence in any investigation or case. The reconciliation process is not open to the public. The documents created during the process are classified, private documents. The process will last for 30 days after the conciliator has received the necessary documents from the prosecutor or police. The public prosecutor may extend this period by 20 days. At the end of this period, if the reconciliation process was successful, the conciliator (mediator) will prepare a report together with the reconciliation document signed by the parties. The public prosecutor will be responsible for the safety and secrecy of the documents.

If reconciliation cannot be reached within the prescribed period or the parties refuse to reconcile at the beginning of the process by not willingly consenting to participate to the process, the case will go to court following an indictment by the public prosecutor.

The offender and the victim may produce a document indicating that they have reached an agreement before the indictment even if the reconciliation offer was previously refused. If the public prosecutor establishes that reconciliation has been achieved with the free will of the parties and the subject matter of the contract is legal, he/she signs and seals it, which means that it is approved. On the other hand, if he/she deems that reconciliation has not been achieved, reconciliation will not be applied again.

---

6 This offer should not be made by the police officer, because he/she at that stage will not know the legal classification of the action and whether it is a crime that falls within the scope of reconciliation. *Öztürk/ Erdem* 2008, p. 1128.

7 This is regulated in more detail in a regulation. However, provisions regarding responding to any questions the parties may have are not well regulated, especially in cases in which the invitation to reconciliation is made in written form, *Aytekin İnceoğlu/Karan* 2008, p. 58.

In the Turkish criminal justice system, what is said during the reconciliation process has no effect on the criminal case. Even if the parties have started a reconciliation process and it ends unsuccessfully, there would be no effect on the case since there is a legal provision which states that any declarations by the offender during the reconciliation process cannot be used as evidence in any case (CPC Art. 253/20).

At the end of the reconciliation process, if the accused fulfils the obligations stated in the agreement, there will be no ground for prosecution. It must be stressed that entering into and fulfilling such a reconciliation agreement cannot be used later as evidence during any further criminal investigation (Art. 253/20). The fact that the suspect has accepted to reconcile cannot be interpreted as though he had confessed.

If the obligations to be fulfilled by the suspect are postponed to a future date, the filing of the public prosecution will also be postponed. During the duration of the postponement, the time of limitation is put on hold. If the conditions of the reconciliation agreement are not fulfilled, the public case will be reopened. If reconciliation is achieved, no tort claim can be asserted at a civil court for damages (CPC Art. 253/19).

When the conditions are met and all parties involved reconcile, the matter at hand is regarded as being finally closed, as long as the offender fulfils the obligations stipulated in reconciliation agreement.

According to Art. 253/23 CPC, reconciliation and all other related decision are subject to appeal and review by higher courts.

Postponing the commencement of public prosecution

According to Article 171/2 of the Code of Criminal Procedure, the public prosecutor may postpone (defer) the commencement of the public prosecution for five years if the offender has been charged with a compainant's crime for which the maximum punishment is one year of imprisonment. Such postponement is subject to the following conditions:

1. The suspect shall not have any prior convictions for intentional crimes.
2. The court must be of the opinion that the suspect will not reoffend.
3. Postponement is more useful and expedient than a public case, for both the suspect and the community.
4. Complete reparation of the damages incurred by the victim or the public due to the delinquency, via exact return, restoring what has been damaged to its original state or through compensation.

If the suspect does not commit an intentional crime within the designated time period of five years, the prosecutor shall not persue the case any further. If the suspect commits such a crime, the public prosecution starts.

2.1.2 Juvenile justice

Reconciliation

Reconciliation between victims and juvenile offenders was first rendered for a very limited number of minor offences defined in the Turkish Criminal Code of 2005, Art. 73. It was limited to a very narrow scope of offence types, all of them compainant's crimes, in which victim and offender agreed to the procedure, and was thus widely criticized.[8]

A few years later reconciliation is regulated again in more detail in the Code of Criminal Procedure, Article 253. This is quite a detailed article that has broadened the boundaries of reconciliation.[9] Article 42 of the Child Protection Law of 2005 states that, in cases for which no provisions are set forth in the Child Protection Law, the provisions of the Criminal Procedure Code shall be applied, thus rendering Article 253 applicable to children, too. Restorative justice measures that are provided in the general criminal legislation apply both to juvenile and adult offenders.

On the other hand, the Child Protection Law, passed right after the Turkish Criminal Code in 2005, broadened the limits of reconciliation concerning children to include all negligent offences, regardless of the punishment they can attract according to the law. According to Article 24 of the Child Protection Act, in addition, intentional crimes punishable with at least three years of imprisonment for minors between the ages of 15-18, or two years for juveniles younger than 15, are also eligible.

Article 24 of the Child Protection Act had originally been as follows:

"*Reconciliation with regard to juveniles dragged into crime shall be applicable for crimes the investigation and prosecution of which are dependent on the filing of a prior complaint by the victim, or which are committed intentionally and fow which the lower limit of penalty is imprisonment not exceeding two years or a judicial fine, or for negligent offences.*
(2) For juveniles who are not yet older than fifteen at the time of the offence, reconciliation shall be applicable for intentional offences punishable with at least two years of imprisonment."

8 See *Sokullu-Akinci* 2005, p. 7.

9 According to Art. 253, the following crimes are eligible for reconciliation: 1. complainant's crimes; 2. the following non-complainant's crimes in the Criminal Code: intentional assault and battery, unintentional assault and battery, violation of the immunity of domicile, abduction and detainment children by the parent who does not have legal custody of the child or by other relatives, disclosure of information and documents which are commercial secrets, banking secrets or customer's secrets.

This provision was totally amended on 12 December 2006 and now reads: "*Provisions of the Criminal Procedure Code concerning reconciliation are applied for children dragged into crime*".

The third paragraph of the CCP 253, amended on 6 December 2006 states that offences that are compainant's crimes, but are likewise subject to effective regret (see *Section 2.2.1* below) or crimes against sexual integrity, cannot be subject to reconciliation because the latter might be used against victims under 18 who are forced by their families to accept reconciliation. This is quite probable especially in rural areas and families with a patriarchal heritage.

Postponing the commencement of public prosecution

Postponing the commencement of public prosecution is possible for juveniles, too. According to the previous wording of Article 19 of the Child Protection Law, during the investigation period, after the public prosecutor had collected the evidence and if the upper limit of the prison sentence that the offence could attract according to the law was no longer than two years, the public prosecutor could postpone (defer) the commencement of prosecution for five years. The upper limit for children under 15 was three years. If the child committed no further offences within that period, it was decided that there was no reason for a public case. If the child was convicted for an intentional crime that he/she had committed within this period, a public case would be filed for the previously postponed case.

The conditions for postponing the commencement of prosecution were in Art. 19 of the Child Protection Law.[10] On 12 December 2006 this article was amended and replaced by the present article, which is a very short and simple one stating that, "if the conditions in the Criminal Procedure Code are met, the prosecution may be postponed. The postponing period is three years for children". Thus, postponement (or deferment) is possible for offenders of all ages so long as the above-mentioned conditions, previously in the Child Protection Law, are met. The only difference is that the period of deferment, which is five years for adults, is only three years for children.

10 For details please see: *Sokullu-Akinci* 2010, pp. 1,428 f.

2.2 Court level

2.2.1 Adult criminal justice

Reconciliation

During trial, if the judge decides that the alleged crime is one that is eligible for reconciliation (mediation), but victim and offender have not been informed thereof, he/she will adjourn trial and inform the parties that the situation could be a reconcilable one that they can resolve among themselves. According to the Code of Criminal Procedure Art. 254/1, the judge is obliged to inform victim and offender about the availability of the reconciliation process if the prosecutor has previously failed to do so. If the parties involved have previously refused an offer of reconciliation by the prosecutor, then the judge cannot inform the parties for a second time. The court duty to inform the parties applies only when the parties were not so informed by the prosecutor at the initiation of the investigation.

Once trial has begun, restorative justice measures are very limited in the Turkish criminal justice system. In the old Criminal Code (1926) there was an article about rape where it said that, if the victim accepts to marry the offender, the offender's prison sentence would be postponed. If a divorce did not occur at the offender's fault within five years the punishment would be dismissed altogether. This provision is not included in the new Criminal Code. Women organizations lobbied for the abolition of this clause, on the ground that this forces the victims to get married with their rapists. Although this is, in a way, a means of restoring social justice, it did nothing in terms of restoration for the raped women. It usually helped to save the rapist from a prison sentence, but the victim had to live with the rapist for the rest of her life. Sometimes more than one person raped a young girl and if one of the rapists married the victim, all would be exempt of punishment.

In the present Criminal Code, in cases of felonious injury, normally if the injury is curable with a simple medical intervention, sentence is attenuated and investigation/prosecution initiate upon the complaint of the victim. The complaint can be withdrawn any time before the end of the trial. On the other hand, the case is initiated *ex officio* if the act is committed against antecedents or descendants, spouses or siblings and the punishment is aggravated. Thus, the victim cannot withdraw the case. This issue was considered unconstitutional by judges of numerous (nearly 40) criminal courts of first instance. The Constitutional Court dismissed (overturned) the case unanimously, emphasizing that to be able to decrease the number of domestic violence incidences, and to prevent the hiding of family violence under wraps, it was of utmost importance not to leave these crimes to the initiation of the victim's complaint, because under the oppression

of the offender, the victim will often withdraw the complaint.[11] In other words, the parties have no right to reconcile. Considering the high incidence of violence against women[12] and how it is increasing, it is indeed a critical issue and the law is not permissive on this respect.

Effective regret

Restorative justice has a limited role during the trial phase. For some particular types of offending specified in the Criminal Code, provision is made for punishment to be mitigated for offenders who have shown grief and regret and who have tried to diminish the sorrow and the loss suffered by the victims. Depending on the stage of the proceedings, punishment will be decreased by between one and two thirds of the prison sentence. Almost for all cases, reparation of the victims' losses, wherever possible, is a must for the effective regret clause to be applied.

In the special part of the Penal Code, for some crimes, returning the proceeds from the crime before the commencement of prosecution is a mitigating circumstance and in cases of effective regret, the offender is not convicted at all. For example, according to Article 168 of the new Criminal Code (which regulates effective regret for certain crimes committed against property), if the offender himself or the perpetrator or the facilitator of the crime, returns voluntarily the property that he/she had taken or compensates the loss of the victim of the crime, after the commission of the crime is completed but prior to any proceedings are commenced against him, his punishment is reduced up to one third in crimes of larceny, damaging other peoples property, breach of trust, fraud and utilization without payment.

The decrease in the sentence is less, if effective regret takes place after the initiation of the trial, but before the announcement of the sentence. For example, for the crimes mentioned in Article 168, the sentence will be reduced to one half instead of one third of the prescribed sentence.[13]

---

11 *Sokullu-Akinci* 2008, pp. 78 f.

12 *Sokullu-Akinci* 2011, pp. 169 ff.

13 Effective regret also takes different forms in the new Code, most prominently in the field of narcotics offences, where offenders can be exempted from punishment or have their sentences mitigated as a result of having shown "effective regret" by cooperating with the authorities and thus helping to apprehend other offenders. Effective regret is taken into consideration also for some crimes against the person, such as trafficking of organs and tissues (TCC. Art. 93), crimes violating personal liberty (TCC. Art. 110) or crimes against the trustworthiness and functioning of the public administration (TCC. Art. 248). There are other crimes, such as illegal construction (TCC. Art. 184/5), crimes against public confidence, for example counterfeiting of money, public bonds and valuable seals (TCC. Art. 201), crimes against public peace, for example forming

Postponing the announcement of the verdict (deferred sentencing)

The Criminal Procedure Code of 2005 has certain restorative justice elements embedded in the traditional procedures of criminal justice, such as the deferment of announcing the verdict. It is possible to postpone the announcement of the verdict for five years in cases of offences punishable by a judicial fine or by imprisonment for up to two years.

According to Art. 231/6 of the CPC, the preconditions for postponing the announcement of the sentence (verdict) are: a) the accused must not have any prior convictions for intentional crimes; b) the court must be of the opinion that, because of his/her personality traits, and his/her behaviour during the trial, the accused will not reoffend; c) due to the personal characteristics of the accused and his/her attitude and behaviour during the trial, the court must conclude that it is not necessary to sentence the accused to a penalty; d) complete reparation of the damages, incurred by the victim or the public due to the offence, via exact return, restoring damages to their original state or through compensation.

The sum of compensation, fixed by the court, must be deposited immediately into the cashier of the Ministry of Finance as a lump sum. In case of failure to do so, the payment can be made in monthly instalments during the period of supervision (Art. 231/9 CPC, see below).

Where the court decides to postpone the announcement of sentence, the accused is subjected to supervised probation for a period of five years. The judge may decide that the accused: continue attending an educational program for learning a profession; be banned from certain places; be obliged to attend certain institutions or to fulfil another obligationchosen by the court within such a period. During probation, the statute of limitations shall cease running.

At the end of the probation period, if the accused has not committed an intentional crime during the probation period and his/her behaviour has been in concordance with the imposed obligations, the court shall decide for abatement of the case.

In case the suspect commits an intentional crime while on probation or if the suspect acts in violation of the imposed obligations, the court shall announce the verdict that it had deferred. However, taking into consideration the circumstances regarding partial fulfilment of the obligations, the court may reduce the penalty by up to 50%, postpone a prison sentence or convert it to one of the

societies with the purpose of committing crimes (TCC. Art. 221), bribery (TCC. Art. 254), crimes against the judicial administration, for example libel and slander (false accusation) (TCC. Art. 269), perjury (TCC. Art. 274), evasion of the convicts or arrested suspects (TCC. Art. 293), where effective regret is possible and the offender will receive a lesser sentence because the effective regret conditions are met. In all of these cases, it is accepted that the victim of the crime is the general public and no restoration duty can be imposed to the offender. Thus, it is hard to regard this type of effective regret as restorative justice.

alternatives (such as attending an educational institution for acquiring a profession or craft, or banning the convict from going to certain places etc).

The decision to postpone the announcement of the verdict may be appealed and shall be registered in a special system. These records can only be used for the purpose stated in the article concerning the postponement of punishment (Art. 23) and in connection with an investigation or prosecution, by the public prosecutor, the judge or by the court upon demand.

Postponing the execution of the sentence (Turkish Criminal Code. Art. 51)

The judge may announce the verdict but may postpone the execution of the sentence. This is possible for every convict: adult, young-adult or child. One exception can be seen in the Law for Combating Terrorism, Article 13, which states that prison sentences for crimes of terrorism cannot be postponed except for children under 15.

Otherwise, the sentence of anyone who is condemned to imprisonment of less than two years, who does not have a prior conviction to more than three months of imprisonment and who shows signs of remorse and repentance may be postponed. Signs of remorse may be, for example, paying the victim a visit or expressing regret for the crime, paying the victim's hospital bills, taking food and presents to the victim and his/her family. According to Art. 51/2, suspension of sentence may also be bound to reimbursing the losses encountered by the aggrieved party or public, repairing damage caused or delivering compensation for damages. In such cases, the sentence is enforced in the execution institution under the judge's decision until all conditions have been fulfilled. Once fulfilled, the convict is immediately released from the execution institution upon the decision of the judge.

For children, postponing the execution of the sentence is possible for sentences up to three years of imprisonment. Children may be ordered to visit an education institution during this period, so that he/she may acquire a profession or learn a skill or craft. This institution can be such that also provides residential care for the child.

2.2.2 Juvenile justice

It should be stressed again that, when there are no age-specific provisions for children and juveniles, the general provisions of the Criminal Code and the Criminal Procedure Code for adults apply, as stated in Art. 42 CC. Accordingly, since there are no special provisions governing effective regret for juveniles, the same provisions as described above for adults also apply to younger offenders. There are, by contrast, differences in the context of reconciliation and "postponing the announcement of the verdict" that shall be highlighted here.

Reconciliation

Reconciliation is also possible in juvenile justice. The Child Protection Law, passed soon after the Turkish Criminal Code, broadened the limits of reconciliation concerning children and included all negligent offences, regardless of the punishment that the law foresees for the offence (Article 24).

Regarding reconciliation at the court level for juveniles, the same applies as is the case for adults as presented in *Section 2.2.1* above. However, the particularities for the applicability of reconciliation for minors as presented in the pre-court context under *Section 2.1.2* above also apply at the court level.

Postponing the announcement of the verdict

The court can decide to postpone the announcement of its verdict in cases in which juvenile offenders are sentenced to no more than two years of imprisonment. The conditions for doing so had originally been provided in the Child Protection Law (Art. 23).[14] This detailed provision was amended on 6 December 2006 and replaced with a very short article which states that postponing of announcement of the verdict for a child is subject to the conditions in the Code of Criminal Procedure (Art. 231/5), but the probation period is three years for children, rather than five years as is the case for adults. On the same date some changes were made to the Turkish Code of Criminal Procedure that added the concept of postponing the verdict for everyone.

The positive aspect to this new formulation is that the probation period had previously also been five years for children. The negative aspect is that previously, postponing had been possible for cases in which a sentence of up to three years had been attracted. The new rule makes it two years for everyone with no exception for children.

3. Organizational structures, restorative procedures and delivery

As described in the preceding section, restorative justice measures are fairly limited in the Turkish criminal justice system. Reconciliation and reduced or postponed sentencing are the two methods of restorative justice i. e. channels through which restorative justice can play a role in the criminal process. The Criminal Code and the Criminal Procedure Code do recognize and integrate only these two systems in the official criminal justice system.

14 *Sokullu-Akinci* 2010, pp. 1435-1437.

3.1 Reconciliation

The reconciliation procedure is described in the Criminal Procedure Code. When the prosecutor establishes the fact that the matter at hand meets the conditions described in the code (see *Section 2.1.1* above), the prosecutor himself or a police officer appointed by the prosecutor will inform the parties involved, the victim, the offender and any other third party that had suffered from the crime, that reconciliation is possible. In case reconciliation has already been made, the nature and the legal consequences of accepting or refusing the reconciliation agreement shall be explained to each party. If the parties come to a reconciliation agreement, the details of the agreement will be clearly explained in a report signed by the parties. The reconciliation process is voluntary and each party is free to accept the process or not. If the victim or victims or the offender refuse to accept the reconciliation invitation or have not answered within three days after the written invitation reached them, or could not be reached at their domicile or the victim or the offender or their legal representative do not attend the reconciliation conference in person, it shall be considered that reconciliation has been refused.

Once the parties involved accept to start the reconciliation process, the prosecutor is entitled to conduct the conference her/himself, s/he may ask the Bar Association to appoint a lawyer, or s/he may appoint someone who has received law education as a conciliator (CCP Art. 253/9). The conciliator may consult the prosecutor about the procedure to follow and the public prosecutor may give directions to the conciliator. The conciliators are trained before they perform their duty. For example, the Istanbul Bar Association, in conjunction with the Ministry of Justice, has organized a (30 hour) training course for lawyers. In a smaller province with a population of about 100,000, the Public Prosecutor of that province gave a briefing to attorneys who wanted to do reconciliation. From time to time, the Ministry of Justice gives reconciliation training to public prosecutors. Since the concept is new in Turkey and is applied to a limited number of crimes, there is no extensive training for conciliators. Sometimes attorneys with no training may also perform the task, but they can always refer to the public prosecutor if there are questions.

The reconciliation conferences shall be conducted confidentially. The suspect, the victim or the person who suffered damages from the crime, or the legal representative, the legal council or the representative may be present during the reconciliation. The reconciliation conference will last just 30 days. The prosecutor may extend that period for 20 days.

At the end of the reconciliation conference, the administrator of the conference will produce a report and submit it to the prosecutor, together with the copies of the documents that have been handed over to him. If reconciliation occurs, i. e. if the parties have both agreed with each other's conditions, the

details of the reconciliation agreement[15] shall be clearly explained in the report that has been signed by both parties. If the prosecutor establishes that reconciliation has been achieved with the free will of the parties, and the subject of the agreement is in conformity with the law, then s/he will sign and seal the report and keep it within the file of investigation.

The expenses for the reconciliation process will be paid by the State. The prosecutor will evaluate the work and time spent during the conference and the administrator will be paid according to the estimate of the prosecutor. The fee of the administrator and the expenses of the reconciliation are considered as court expenses and all these payments will be compensated by the State.

3.2 Postponing the announcement of sentence

As mentioned in *Section 2.2.1* above, the judge will not announce sentence if the conditions mentioned above are satisfied. The crucial issue is whether the suspect can appeal against the decision of the court. The Criminal Procedure Code says "… if the defendant does not accept postponing the announcement of the sentence, the judge cannot postpone the announcement." So at one stage during the trial the judge will ask the defendant whether he consents to postponing the announcement of the sentence. Usually this has been done during the first session of the trial just after the defendant's identity is formally established. Omitting to ask for the defendant's consent at this stage would constitute a reason of appeal and reversal of the verdict, since this could be regarded as signs of partiality on behalf of the judge prior to final verdict.

The procedure of "postponing the announcement of sentence" is easy to follow as long as the defendant expresses his conesnt. If the judge fails to ask for consent at the beginning and the defendant does not express his will openly up until sentencing, this decision cannot be given. Postponing the announcement of the sentence is not subject to the victim's consent, but the losses of the victim should be fully compensated.

If the judge decides without the consent of the defendant then the defendant can appeal against that decision. So it is essential that the judge asks the defendant whether he consents or not at the very beginning of the trial.

15 According to Art. 20, the parties may agree on one or several of the following issues: a) Providing full or partial compensation or recovery of pecuniary or immaterial damages arising from the action; b) Providing full or partial compensation or recovery of pecuniary or immaterial damages of a third person or persons who succeed the rights of the victim or the person injured or harmed by the crime; c) Performing actions such as making donations to a public institution or a private organization serving public interest, or to person(s) in need; d) Fulfillment of certain services of a public institution or a private organization serving the public good, or participating in a programme that will make them more beneficial members of society; e) Apologizing to the victim or the person who has been harmed as a result of the crime.

3.3 Postponing the commencement of public prosecution

If the conditions given above in the previous section are met, the prosecutor will decide to prepare an indictment for the offender if all the losses of the victim are reimbursed and compensated. There is no clear procedure in the law as to how it will be made. This article, when it was first drafted, was interconnected with the reconciliation provision, especially for the situations that the victims refuse to reconcile, despite the offender's readiness to compensate the losses. In that case, postponing the commencement of the prosecution looked like a good solution, since the victim's losses were compensated, and the offender would be more careful not to commit any crime within the probation period.

4. Research, evaluation and experiences with Restorative Justice

Restorative justice is a new concept in Turkey. The detailed amendments were made in 2006. Unfortunately, the statistics are far from satisfactory. The numbers in the police statistics indicate that reconciliation is not used very much. In 2012, 3,740 out of almost 5.5 million criminal cases involving adults involved reconciliation (less than 0.07%). Judicial statistics mirror this state of affairs (see *Table 1* below).

Table 1: Number of cases before prosecutors and courts and the respective numbers of reconciliations, 2007-2010

	2007	2008	2009	2010
Total number of cases at the public prosecutor level	2,716,826	2,839,943	5,310,511	5,496,895
Thereof reconciliations	48,993	1,153	1,442	3,740
Total number of cases before the criminal courts	4,120,758	4,242,973	3,353,435	3,327,504
Thereof reconciliations	69,258	45,792	7,165	5,520

Source: Http://kutuphan.e.tuik.gov.tr/pdf/0021552.pdf.

Some modest surveys have been conducted by young scholars at the Istanbul Bar Association's Reconciliation Service in 2007 and 2009, indicating that, although reconciliation has been in the Turkish law since 2005, in practice it is used very seldom. In 2005, during the first six months that the law came into force (after 1 June 2005), in the whole of Istanbul, public prosecutors requested

conciliators from the Istanbul Bar Association only 17 times. Judges only asked in 25 cases. This number increased by 40% up to 2006, but in 2008 and 2009 the number of requests made to the Istanbul Bar Association decreased drastically (-30% by 2009). One of the reasons for this is that public prosecutors think that cases being sent to reconciliation are considered unfinished cases for the public prosecutors, which gives a negative indication of their performance.

5. Summary and outlook

There are many forms of restorative justice in comparative law, but only reconciliation and reparation are applied in Turkey. Victim and offender meetings may be very important in some cases where they would develop an understanding of one another. This would also help the offender to see better what he/she caused in the victim's life and how he/she made the victim suffer. This is very important in preventing the commission further crimes, especially in young people.

The real aim of restorative justice should be to restore justice with the active participation of the victim, and the main actor should be the victim. During restorative processes, the social relations that have been harmed are also repaired, and a message is sent out to society that the offence committed is an act that is not acceptable in that very society. The offender encounters the consequences of the offence and will feel shame and remorse, thus making the reintegration of the offender into society easier and better enabling him to be a law abiding citizen.

Criminal justice is interested in the past and wants to find out how the crime was committed, who was to blame and how that person should be punished. In restorative justice, the act is committed and the restoration of the harms caused is a matter of the future.

Another important aspect should be to find out the reasons for the commission of the crime. The offender, within the informal and friendly atmosphere of the reconciliation, may admit sincerely why he committed the crime. This may help us to prevent future criminality and recidivism.

Restorative justice is a new concept in Turkey. It is not well known in judicial circles. Neither the victims nor the society at large are aware that victims need to be restored in order to be happy and healthy individuals. Maybe this is a bit of a strong a statement. Society knows that the victims need restoration, but it does not care. The only thing that is important in Turkish society is financial settlement and how much money the victim will receive as compensation. Victims are also from the same society, so they are no different. They only want to receive more money, maybe more than they lost due to the crime, so they could make a little bit more money out the misfortune.

Restorative justice on the other hand is more than monetary compensation. There are different types and phases of restorative justice. But common to all,

dialogue between victim and offender is the essential element in the process. It could be difficult at the start but eventually at one point the victim and the offender will try to understand each other and share their sorrow. The compensation of the material loss of the victim is probably the easiest part. One could also think of a system that the burden of compensation could be shifted to the State, since its reason of existence should be to provide and facilitate the happiness and well being of their citizens. So compensation of material loss is trivial. The difficult part is restoring justice, so victim and offender will understand each other. Restorative justice in the minds of the Turkish population that has only just heard of the concept in the last few years is a means to compensate the losses of the victim (and in some cases maybe getting some extra money because the offender does not have much choice).

Another wrong perception of restorative justice in Turkey is that it is considered a solution to problems originating from the malfunctioning of the judicial system. It is thought to be a means for obtaining "cheaper" and "faster" justice. At the same time, public prosecutors think that cases that go to reconciliation are considered unfinished cases, thus shedding negative light on their performance.

International surveys and statistics show that Turkish society is one the unhappiest societies in the world. It is a very litigious society. The criminal courts' workloads are unacceptably high. The waiting period for a case in the Court of Appeal is around four to five years. There are over one million cases pending at the Court of Appeal. Everybody is complaining and everyone has a case against someone else. No one wants to talk and sort their problems out among themselves. Being a party to a lawsuit is very common in Turkey.

Restorative justice requires communication between people, trying to understand each other and feeling sorrow from the misfortune of others even if you yourself caused them. Restorative justice practices in Turkey are mainly reconciliations. It is mainly the transfer of wealth from one party to another, like compensation in a tort case. In Turkey, generally people think that if the offender has enough means to compensate the victim's losses, why should the victim forgive and let the offender get away without being punished. The victims feel much more satisfied if offenders get long prison sentences. Most of the people in society today complain that sentences are too short or judges are too lenient.

Turkey, unfortunately, does not provide a good environment for restorative justice to prosper. Widespread use of practices like victim-offender mediation, group conferencing or family conferencing could never be thought of in this environment. In most cases where family conferencing occurs, it ends with people killing each other or families being wiped out. In fact people are seen in the streets fighting or even shooting one another for traffic disputes.

On the other hand, a particular public prosecutor (a former student of mine) stressed the fact that crimes within the scope of restorative justice are complainant's crimes. For the judges and public prosecutors it is easier to apply the

"withdrawal of the complaint" (instead of reconciliation), because the procedure is much simpler.

Alternative means of resolving disputes are also met with suspicion within certain circles of Turkey. Lawyers and Members of Parliament with a law background think that reconciliation and mediation are like the *diyet* of the old Ottoman law, which has Islamic connotations.[16] They fear that this will be a step backwards from the secular European laws that Turkey adopted since the 19th century. In my opinion, although it might bear a little bit of resemblance to *diyet,* the notion of restorative justice has originated from English speaking countries without any Islamic background. Some lawyers might even be against the restorative justice process just because they consider it as a threat to their earnings.

Restorative justice does not exist during the "execution phase" (during the serving of a prison sentence) in Turkey. It should be an important factor in conditional release and amnesty cases, both of which are forms of early release. When releasing the offender, it is very important to obtain the consent of (or to at least inform) the victim, or his/her family if the victim is not living any more. We have seen examples for this in South Africa and Australia. Right now, Turkey is at the stage of explaining and justifying reconciliation. Maybe in future, when people become aware that there are other forms of justice, these may also be introduced to our system.

References:

Akbulut, İ. (2003): "İslam Hukukunda Suçlar ve Cezalar". Ankara Üniversitesi Hukuk Fakültesi Dergisi, 52/1. Ankara, pp. 167-181.

Ayata-Özyiğit, Ö. (2009): The Evaluation of Reconciliation in Turkey (Unpublished LLM. Thesis, Istanbul Bilgi Üniversity). Istanbul.

Aytekin İnceoğlu, A., Karan, U. (2008): "Türkiye'de Ceza Davalarında Uzlaşma Uygulamaları: Hukuki Çerçevenin Değerlendirilmesi". In: Aytekin İnceoğlu, A., Karan, U. (Eds.): Onarıcı Adalet, Mağdur-Fail Arabuluculuğu ve Uzlaşma Uygulamaları: Türkiye ve Avrupa Bakışı. Bilgi University Istanbul. pp. 45-83.

Bayraktar, K. (2006): Ceza Kanununda Yapılan Değişiklikler ve Uzlaşma. Cumhuriyet (Daily newspaper), 2 December 2006.

Braithwaite, J. (1999): Crime, Shame and Reintegration. Cambridge, UK: Cambridge University Press.

Braithwaite, J. (2002): Restorative Justice and Responsive Regulation. Oxford, UK: Oxford University Press.

16 *Bayraktar* 2006.

Braithwaite, J. (2003): Restorative Justice and a Better Future. In: Ohnstone, G. (Ed.): A Restorative Justice Reader: Texts, Sources,Contexts. Cullompton, UK: Willan Publishing, pp. 83-97.

Dignan, J. (2004): Understanding Victims and Restorative Justice. Berkshire, UK: McGraw-Hill Education.

Özbek, M. (2005): Çağdaş Ceza Adaleti Sistemlerinde Alternatif Çözüm Arayışları ve Arabuluculuk Uygulaması. In: Yenisey, F. (Ed.): Ceza Muhakemesi Kanunda Uzlaşma. İstanbul: Arıkan Yayınevi, pp. 85-158.

Özbek, M. (2007): "Ceza Muhakemesi Kanununda Yapılan Değişiklikler Çerçevesinde Mağdur Fail Uzlaştırmasının Usul ve Esasları". Ankara Üniversitesi Hukuk Fakültesi Dergisi, 56:4, pp. 123-205.

Öztürk, B., Erdem, M. R. (2008): Uygulamalı Ceza Muhakemesi Hukuku. Ankara.

Sokullu-Akinci, F. (1998): "Purpose of Punishment and Death Penalty. Annales de la Faculte de Droit d'Istanbul, Vol. XXXII, No. 48, pp. 271-275.

Sokullu-Akinci, F. (2005): Criticizm of the Provisions of the New Turkish Criminal Code, Concerning Restorative Justice. Annales de la Faculte de Droit d'Istanbul, Vol. 37, No. 54, pp. 3-10.

Sokullu-Akinci, F. (2008): Viktimoloji. (2nd. Ed.) Beta Yayinevi, İstanbul.

Sokullu-Akinci, F. (2010): "The Abolution Process of Death Penalty in Turkey". In: Arroyo, L., Biglino Campos, P., Schabas, W. A.: Towards universal abolution of the death penalty. RECAP. Valencia, pp. 159-167.

Sokullu-Akinci, F. (2011): "Increase in the Numbers of Women Victimization and Access to Justice for the Women of Turkey". Annales de la Faculte de Droit d'Istanbul, Vol. 43, No. 60. Istanbul, pp. 169-172.

Sokullu-Akinci, F. (2010): "Turkey". In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe. Vol. 3, Forum Verlag Godesberg, Mönchengladbach, pp. 1415-1453.

Sosyal, T. (2005): "Türk Ceza Hukukunda Uzlaşma". Yenisey, Feridun (Derleyen), Ceza MuhakemesiKanunda Uzlaşma. İstanbul, Arıkan Yayınevi.

Strang, H. (2002): Repair or Revenge: Victims and Restorative Justice. Oxford, Clarendon Press.

Yıldız, A. K. (2005): "Uzlaşma". Yenisey, Feridun (Derleyen). Ceza Muhakemesi Kanunda Uzlaşma, İstanbul, İstanbul, Arıkan Yayınevi.

Ukraine

Roman Koval, Nataliya Pylypiv

1. Origins, objectives and theoretical background of Restorative Justice

1.1 Overview of forms of Restorative Justice in the criminal justice system

Reviewing the overall practice of restorative justice in Ukraine it is fair to note that the vast majority of the interventions taking place in Ukraine are victim-offender mediations. There are rare occasions when family-group conferences or some forms of community justice forums and community circles are reported by the civil society groups that bear responsibility for introducing RJ in Ukraine. It is hard to provide accurate data in the absence of a centralized state system that would regulate and monitor how restorative justice is being introduced in the criminal justice system in Ukraine. Available research comes from civil society groups and international experts but limited resources considerably restrain the amount of data to draw accurate conclusions.

All restorative interventions that will be described in this report were initiated and realised by a network of civil society organizations and had minimum support from Ukrainian state at national level both in the form of legislative support and technical support of any kind. Therefore, any victim-offender mediation in Ukraine is mostly a stand-alone process that happens aside from the criminal procedure due to unique cooperation mechanisms designed in the absence of any specific legislative regulatory framework for penal mediation and put into force by cooperation agreements signed between local actors at the community level. Such restorative programmes are results of pilot initiatives supported primarily by the international donor community and by local authorities in some occasions.

Despite the fact that mediation is under-regulated in Ukrainian legislation, the Ukrainian Centre for Common Ground[1] (UCCG) initiated its first restorative justice pilot project in 2003. In partnership with various local NGOs, it developed a model of community-based restorative justice centre – CRJC (14 centres working nowadays in 9 Ukrainian regions) aimed at improving the reintegration of offenders into communities. Since 2006, CRJCs deliver their services based on a complex, three-level community model for crime prevention. The first and second levels of this model envisage work in schools and aim at teaching children to solve their conflicts in a cooperative, peaceful way through peer mediation and circles. The task of CRJCs at tertiary and to some extent at secondary levels of prevention is to render an opportunity for mediation to persons who have committed socially dangerous acts and their victims. It should be noted here probably that speaking about various forms of restorative justice we only mean restorative processes as defined for example by UN Handbook on Restorative Justice Programmes and guided by corresponding values and principles. Therefore we do not include community service into this list although Ukrainian courts can sometimes order it as a form of punishment under article 98 of the Criminal Code of Ukraine.

1.2 Reform history

The reform of the criminal justice system in Ukraine is on-going and restorative justice is still part of the perspective outcome that we hope for. Since the beginning of its implementation in 2003, RJ has definitely been a bottom-up initiative of civil society organizations led by the Ukrainian Centre for Common Ground (UCCG). The initiative has been supported gradually by various stakeholders: the Supreme Court of Ukraine, the Ministry of Justice, the General Prosecutor's Office, the National Academy of Prosecution, the Ministry of Family, Youth and Sports up to the Ministry of Internal Affairs and its affiliated higher education institutions.

The first stage of the introduction of RJ in Ukraine (2003-2005) was aimed at setting up a precedent of applying victim-offender mediation in criminal cases as well as developing a legal mechanism of VOM application at court level and piloting it in seven regions. Although there were only 30 cases referred to mediation in the early stage, an external evaluation conducted by the Centre for Restorative Justice & Peacemaking (CRJ & P), University of Minnesota, U.S.A., has clearly shown their conformity with values and principles of restorative justice as well as total satisfaction of both victims and offenders with the process and achieved outcomes. Besides, the legal system representatives involved in RJ

1 UCCG is a philanthropic organization whose mission is to promote restorative practices in Ukraine; it is a member of the European Forum for Restorative Justice.

programmes demonstrated a high level of support.[2] Three major obstacles for sustainable development of restorative justice in Ukraine were identified at that time: (1) a lack of legislative framework; (2) lack of awareness among legal system stakeholders; and (3) lack of financial mechanisms to support VOM. Seven years have passed and minimum progress could be seen in any of these areas, whereas the number of penal mediation cases has reached several hundreds and practical application of restorative justice has grown further from one simple procedure to a complex community-based three-level crime prevention model with a number of restorative practices available for use depending on the case.

We believe that it is due to the fact that CRJCs responsible for the development of restorative justice programmes in Ukraine are civil society organizations that the quality of services, satisfaction rate of participants and other qualitative indicators still remain at the highest level. The bottom-up strategy for restorative justice institutionalisation in Ukraine has both positive and negative aspects. On the one hand, it assures dedication and commitment of CRJC facilitators and mediators to the values and principles of restorative justice and strong community ties that can be used as extra resources and volunteer support in the restorative process when required. This is important, in particular, in the situation of the present extremely corrupt bureaucratic state system and its institutions producing the outward visibility of reported results at the level of formal statistics. Whereas under the surface of these statistics you will find the low-paid and unmotivated staff unwilling to change the traditional punitive, authoritarian approach, learn new skills or simply do extra work when it's not part of their job description. On the other hand, the obvious negative side of this situation is a low level of geographical dissemination of restorative practices, lack of legislative, financial and administrative support for restorative justice and, as a result, the absence of a strong long-term sustainable development strategy despite all the efforts of UCCG and the international donor community. For the time being, the movement can only rely on the community support and enthusiasm of some dedicated local authority officers who understand the need and positive impact of the restorative approach to crime and conflict in their communities. However, the on-going criminal justice reform and the reform of the juvenile justice system, in particular, has already emphasised a need for incorporation of restorative approaches to crime and conflict situations in a few normative documents. The community of RJ practitioners is quite optimistic about the upcoming legislative changes.

2 *Vos/Umbreit/Hansen* 2006, pp. 31-34.

1.3 Contextual factors and aims of the reforms

In 1994, the International NGO, Search for Common Ground, launched an ambitious project to develop mediation practice in Ukraine. The Project *Ukraine Mediation Group (UMG)* sponsored by the United States Agency for International Development (USAID) resulted in the creation of eight specialised NGOs (mediation groups) that aimed at institutionalising mediation as a routine conflict resolution practice in Ukraine. Court-connected mediation was identified as one of the potential areas of this institutionalisation. Two mediation groups from Odessa and Donetsk launched their early pilot initiatives in rendering restorative interventions in civil, neighbourhood and labour disputes. Several attempts of the UMG project to facilitate the institutionalisation of this practice in the Ukrainian court system did not have much success but contributed to awareness raising and some interest to mediation among legal system practitioners. Two international conferences were organized in Kyiv and Yalta and summarised the experience of mediation groups and issued two resolutions in support of court mediation in Ukraine. Unfortunately, their efforts had no practical impact. Therefore, the Ukrainian Centre for Common Ground (established in 2002) took a different direction in the justice system reform and focused on the introduction of restorative programmes to the criminal justice system. Two factors have been beneficial for the success of this mission. The first one was the high level of crime and incarceration that was recognised as a clear evidence of failure of a traditional punitive approach. During that period, the average per capita incarceration rate in Eastern Europe was 200 per 100,000 of national population whereas in Ukraine it was approximately 400 per 100,000[3]. Over 200,000 people were kept in 179 correctional facilities and approx. 134,000 were kept in police custody after discharge. Another factor was Ukraine's political orientation towards Europe, which became an officially declared European integration strategy after the Orange Revolution of 2004. Those two seem to have impacted positively on the introduction of restorative justice in the Ukrainian legal system. There has never been an active victim support movement in Ukraine; therefore, it is fair to say that restorative justice in the Ukrainian context is developing more towards offender-oriented strategies. The only national piece of legislation that directly mentions the term *restorative justice* is the Decree of the President of Ukraine #597/2011 "On the Concept of the Juvenile Criminal Justice in Ukraine" of 24 May 2011. It promotes restorative justice as an effective tool to voluntarily reach conciliation between the victim and offender, to raise a sense of responsibility in the offender for the harm done and to achieve positive changes in his/her future behaviour.

3 *Walmsley* 1999.

At the same time some rhetoric in support of victims' needs could also be found in a few policy papers and academic works issued in the past years. Therefore the most commonly used argument would be still the one that restorative justice better meets the needs of stakeholders of the crime situation and community at large.

1.4 Influence of international standards

The Draft Concept Paper on the Legislative Regulation of Restorative Justice Programmes (Mediation) in Criminal Proceedings in Ukraine refers to eight different recommendations of the Council of Europe that to various degrees encourage member states to introduce mediation in penal matters.[4] Most of them were translated into Ukrainian by UCCG and published both online and in the quarterly bulletin *Restorative Justice in Ukraine,* which is distributed among legal system and restorative justice practitioners throughout Ukraine. UCCG experts also used the CoE Recommendations when they developed the Co-operation Mechanism between community-based restorative justice centres and the legal system (see *Section 2.2* below). Many of the regulations have also been referred to in other normative documents that supported the introduction of restorative justice in Ukraine. However, any specific impact of international instruments can be hardly noticed; provided, that as of now there is no state policy on restorative justice development. Nor are we aware of any evidence of the role of the European Court of Human Rights in the promotion of restorative justice in Ukraine.

2. Legislative basis for Restorative Justice at different stages of the criminal procedure

It is important to emphasise again that current Ukrainian legislation does not regulate the application of restorative processes in criminal cases as such. Instead, there are a number of articles in the Criminal Code (CC) and the Code of Criminal Procedure (CCP), which refer to reconciliation between victim and offender without specifying the exact process of how to reach the reconciliation agreement, sincere remorse and restoration of the harm done by the offender.

4 Rec. No. R (85) 11 about the status of the victim within the criminal justice system; Rec. No. R (87) 18 about the simplified structure of the criminal justice system; Rec. No. R (87) 20 about the public reaction to juvenile delinquency; Rec. No. R (87) 21 about reduction of the degree of victimisation and providing assistance to injured persons; Rec. No. R (92) 16 about the European standards in application of civil sanctions and measures; Rec. No. R (92) 17 about delivering judgement; Rec. No. R (95) 12 about the criminal justice system management structure; Rec. No. R (99) 19 concerning the principles of organisation of mediation in criminal matters.

The current CCP was adopted by the Ukrainian Parliament in April 2012 and came into force in November 2012. The new Code introduced some innovations that still require the adoption of new legislative acts, like for example the Code of Criminal Misdemeanours. Evidently it will take time for restorative justice practitioners and their partner institutions in the legal system to adapt the existing case referral mechanism (described in *Section 3.2* below) to the new Code. The description of the case referral mechanism is primarily based on the provisions of the "old" CCP and has been adapted to the new Code primarily for the purpose of this report. For obvious reasons it is still lacking the evidence for its practical applicability. The preliminary assessment of the current CCP however argues that in fact it does not change the nature of the cooperation mechanism substantially, but instead affects the current numbers of the CCP articles concerned, the content of mediation agreements, its legal status and enforcement mechanisms.

Before we turn our attention to the cooperation mechanism and other organizational and procedural particularities, let us first highlight the legislative provisions around which they are based.

2.1 Relevant legislative provisions of the Criminal Code and Code of Criminal Procedure

2.1.1 The Criminal Code

The Criminal Code of Ukraine foresees several conditions under which a juvenile who has committed a minor or medium grave offence[5] may be discharged from punishment by a court. Firstly, in view of effective repentance – if he/she sincerely repented, actively facilitates the detection of the offence and fully compensates the losses or repairs the damage inflicted (Article 45). Secondly, if an offender reconciles with the victim and compensates the losses or repairs the damage inflicted (Article 46). Thirdly, a minor who has committed a minor or medium grave offence may be discharged from punishment by a court if it is found that the punishment may be discontinued due to the minor's genuine repentance and further irreproachable conduct. This may be used if the compulsory correction measures or probation are applied (Articles 104, 105). Finally, the person may be discharged from criminal liability in view of admission by bail on request of the collective body of an enterprise, institution or organization on condition that such person, within one year of his/her admission by bail, will

5 According to article 12 of the Criminal Code of Ukraine, the minor criminal offence is an offence punishable by imprisonment for a term up to two years or a more lenient penalty (e. g. theft, hooliganism). A medium grave offence is an offence punishable by imprisonment for a term up to five years (e. g. robbery, repeated theft, robbery with violence, medium body injuries).

not fail the trust of the collective body, avoid measures of correctional nature or break public peace (Article 47).

According to Article 66 (2) of the Criminal Code, for the purposes of imposing a punishment, the voluntary compensation for loss or damages caused by the offence shall be considered as circumstances justifying a mitigation of punishment.

Article 50 of the Criminal Code defines punishment and its purposes. Article 50-2 CC states that punishment is aimed not only at penalizing sentenced persons, but also at their reformation and the prevention of further offences by both the sentenced and other persons.

2.1.2 The new Code of Criminal Procedure

The new Code of Criminal Procedure makes no specific or explicit reference to restorative justice. However, it substantially elaborates on specific regulations with regard to reconciliation agreements between the victim and the offender and the process of its execution/non-execution. The relevant Articles of the CCP relate to Section VI – Special Procedures for Criminal Proceedings, Chapter 35 – Criminal Proceedings Based on Agreements, and are as follows.

Article 468 defines the types of agreements that can be entered into in criminal proceedings. On the one hand, accused persons and their victims can enter into reconciliation agreements. On the other hand, the accused can come to a plea agreement with the public prosecutor about pleading guilty.

Article 469 governs the initiation and conclusion of such agreements. The conclusion of a reconciliation agreement may be initiated on the initiative of the victim or the suspect/the accused. Arrangements in respect of the reconciliation agreement may be made independently by the victim and the suspect/the accused, the defence counsel and a representative or with the assistance of another person as agreed between the parties (except for the investigator, public prosecutor or judge) (Article 469-1). Reconciliation agreements between the victim and the suspect/the accused are applicable in respect of criminal misdemeanours and crimes of minor and medium gravity, and in criminal proceedings in the form of private prosecution[6] (Article 469-3).

The conclusion of a reconciliation agreement or a plea agreement may be initiated at any time between the moment of notifying the person of the

6 According to the Article 477 of The Code of Criminal Procedure of Ukraine, criminal procedure in the form of private prosecution is a proceeding that can be initiated by an investigator and/or prosecutor only upon prior complaint of a victim; examples of cases in which it is possible are: bodily injuries of various gravity, murder, rape, forced sexual relations, disclosure of bank/medical secret, discrimination based on race, religious affiliation, etc. An exhaustive list can be found in Article 477 of the The Code of Criminal Procedure of Ukraine.

suspicion, and retirement of judges into the deliberation room to pass the sentence/judgment (Article 469-5). Where an agreement cannot be reached, the fact of initiating conclusion of the agreement and the statements that were made to arrive at an agreement may not be considered as a refusal of prosecution or as a guilty plea (Article 469-6).

The investigator and the public prosecutor shall be required to inform the suspect and the victim about their right to reconciliation, explain to them the mechanism of its realization, and not to impede conclusion of the reconciliation agreement (Article 469-7).

In case criminal proceedings are conducted in relation to several persons who are suspected or accused of committing one or several criminal offences, and not all suspects agreed to conclude the agreement, such agreement may be concluded with one (or several) suspects or accused. Criminal proceedings in relation to the person (persons) with whom agreement was reached shall be subject to disjoining in separate proceedings. In case several victims, who suffered from one (the same) criminal offence, participate in the criminal proceedings, the agreement may only be concluded and approved with all victims. In case several victims, who suffered from different criminal offences, participate in the criminal proceedings, and not all of them agreed to conclude the agreement, such agreement may be concluded with one (or several) victims. Criminal proceedings in relation to the person (persons) with whom agreement was reached shall be subject to disjoining in separate proceedings (Article 469-8).

Article 471 of the new Code of Criminal Procedure is devoted to the content of reconciliation agreements. According to Article 471-1, a reconciliation agreement shall indicate its parties, state the suspicion or charges and their legal determination with reference to the relevant article (paragraph of the article) of the Law of Ukraine on criminal liability, the circumstances essential for the criminal proceedings concerned, the amount of damage caused by the criminal offence, the time period for its compensation or the list of actions other than compensation, which the suspect or the accused is required to take in favour of the victim, the time period for completion of such actions, agreed punishment and agreement of the parties to imposition of such punishment (sentencing), the implications of conclusion and approval of the agreement, set forth in Article 466 of the present Code, and implications of non-execution of the agreement. The agreement shall indicate the date of its conclusion and shall be signed by the parties.

Article 473 covers the implications of concluding and approving agreements. For the suspect and the accused, concluding and approving an agreement implies a restriction of his/her right to appeal against a sentence in accordance with the provisions of Article 394 and 424 of the present Code, and waiver from the rights set forth in Subparagraph 1, Paragraph 4, Article 474 of the present Code (Article 473-1-a). For the victim, concluding and approving an agreement restricts his/her right to appeal against a sentence in accordance with the pro-

visions of Article 394 and 424 of the present Code, deprivation of the right to demand, at a later date, making the person criminally liable for the corresponding criminal offence and to change his/her claims for compensation for the inflicted damage (Article 473-1-б).

Article 474 defines the general procedure for trial to be followed when an agreement has been reached. If an agreement was reached at the stage of pre-trial investigation, the indictment together with the agreement signed by the parties to it shall be referred to court without delay. The public prosecutor shall have the right to postpone referral of the indictment together with the agreement signed by the parties to it to court until the receipt of expert's findings or the completion of other investigative actions required to collect and fix evidence which can be lost in the course of time or which will be impossible to conduct/perform later without significant detriment to their results in case the court refuses to approve the agreement (Article 474-1). The court shall examine the agreement during the preparatory court session with compulsory participation of the parties thereto and notification of other participants to the criminal proceedings. Absence of other participants to criminal proceedings shall not preclude such examination (Article 474-2). If an agreement was reached during trial, the court shall immediately suspend the conduct of procedural actions and start examination of the agreement (Article 474-3).

According to Article 474-5, prior to making the decision on approval of the reconciliation agreement, the court, during court session, must ascertain whether the accused understands the following:

- That he/she has the right to a fair trial during which the prosecution shall be required to prove beyond reasonable doubt each circumstance in respect of the criminal offence of which he/she is accused;
- that he/she has the following rights: the right to remain silent, and that such silence will not have any probative value for the court; to be represented by defence counsel, including free legal assistance in accordance with the procedure and in the cases stipulated by law, or conduct his/her own defence; examine, during trial, witnesses for the prosecution, file motions to summon witnesses, and produce evidence in his/her favour;
- the implications of the conclusion and approval of agreements set forth in Article 473 of the present Code;
- the nature of each charge;
- the type of punishment and other measures/actions which will be enforced against him/her if the court approves the agreement.

Furthermore, prior to taking the decision on approval of the reconciliation agreement, the court, during court session, must find out whether the victim understands clearly enough the implications of approval of the agreement, set forth in Article 473 of the present Code.

The court shall be required to make sure, during court session, that the agreement was concluded by the parties thereto voluntarily, i. e. without use of compulsion, coercion, threats or promises or any other circumstances other than those provided for in the agreement (Article 474-6).

According to Article 474-7, the court shall verify whether the agreement complies with the requirements of the law. The court shall deny approval of the agreement, and the pre-trial investigation or the criminal trial shall continue, in the following cases:

- If the terms and conditions of the agreement contradict the requirements of the law, including wrong legal determination of the nature of the criminal offence which is more severe than the one in respect of which the possibility of conclusion of the agreement is provided for;
- if the terms and conditions of the agreement do not substantially correspond to the public interests;
- if the terms and conditions of the agreement violate the rights, freedoms or interests of the parties to the agreement or other persons;
- if there are solid grounds to believe that the agreement was not concluded voluntarily or the parties have not reconciled;
- if it is obvious that the accused cannot fulfil the obligations assumed under the agreement;
- if there is no factual evidence to establish guilt.

Addressing the court for the approval of another agreement during the same criminal proceedings shall not be allowed (Article 474-8). Where the court is of the opinion that the agreement should be approved, it shall pass the judgment by which it approves the agreement and imposes the punishment agreed on by the offender and the victim (or the public prosecutor in the case of a plea bargain agreement) (Article 475).

The implications of failing to adhere to the requirements set out in the agreement are defined in Article 476. In case of non-execution of the reconciliation agreement or plea agreement, the victim or the public prosecutor, respectively, shall have the right to address the court, which approved such agreement, with the motion to revoke the judgment (sentence). The motion for revocation of the judgment, by which the agreement was approved, may be filed within the statutory period of limitations established for making the person criminally liable for perpetration of the corresponding criminal offence (Article 476-1). The motion for revocation of the judgment, by which the agreement was approved, shall be examined in court session with participation of the parties to the agreement and with notification of other participants in the criminal proceedings. Absence of other participants to the criminal proceedings shall not preclude such examination (Article 476-2).

The court, by its ruling, shall revoke the judgment by which the agreement was approved, provided the person who filed the corresponding motion proves

that the convicted failed to fulfil the terms and conditions of the agreement. The revocation of the judgment shall entail fixing a trial in accordance with the regular procedure, or returning the materials of proceedings for the completion of the pre-trial investigation in accordance with the regular procedure if the agreement was initiated at the stage of the pre-trial investigation (Article 476-3). The ruling on revocation of the judgment by which the agreement was approved, or on the refusal to do so may be appealed against in accordance with the appeal procedure (Article 476-4). Deliberately failing to meet the requirements stated in the agreement shall be the reason for making the person criminally liable under the law (Article 476-5).

2.2 Relevant by-laws and policy papers

Besides these legislative provisions of the Criminal Code and the new Code of Criminal Procedure, there are also a number of policy papers and by-laws that are relevant to restorative justice in the Ukraine, namely.

- Resolutions of the Plenum of the Supreme Court of Ukraine #5 (of 16 April 2004) "On the Practice of Application of the Legislation to Juvenile Crimes by Ukrainian Courts", #13 (of 2 July 2004) "On the Practice of Application of the Legislation Stipulating the Rights of Victims of Crimes by the Courts", and #2 (of 15 May 2006) "On the Practice of Consideration of Cases on the Application of Educational Measures of Compulsion by the Courts" included recommendations that the courts actively engage civil society providers of penal mediation services.
- The need to introduce restorative justice programmes (and penal mediation, in particular) in criminal proceedings is emphasised in the Instructive letter of the Prosecutor General of Ukraine #09/1-233-08-236 (of 1 August 2008) "Regarding the Application of Reconciliation Programmes in Criminal Proceedings and Expanding Alternatives to Criminal Prosecution".
- The importance of application of restorative procedures or victim-offender mediations as a pledge of successful crime prevention, particularly with children and youths, is also emphasised in the Instructive letter of the Head of the Criminal Police Juvenile Department of the Ministry of Internal Affairs of Ukraine #58/2–1892 (of 30 September 2009) "Regarding the Organization of a Three-level Model of Crime Prevention in Children".
- Further development of the regulatory framework for restorative justice, especially mediation, is supported by the Decree of the President of Ukraine #597/2011 "On the Concept of Juvenile Criminal Justice in Ukraine" of 24 May 2011. Considering the need to establish a

comprehensive system of criminal justice for juveniles, it encourages the process of improvement of the system of juvenile crime prevention based on the application of proper and proactive techniques and the development of restorative justice. It explicitly provides for the introduction of mediation as an effective means for voluntary reconciliation between the victim and the offender and the adoption of a Law on Mediation (reconciliation).

2.3 Summary

As can be concluded from the legislative provisions stated above, reconciliation agreements can be reached at any stage of the criminal procedure, including via restorative processes that are not explicitly specified anywhere in the Law. In case of any agreement reached between the parties the case shall be referred to court for a judicial decision. In that sense the new CCP has not changed the existing procedure (described in *Section 3.2* below) except providing more legitimacy to reconciliation agreements and instructing police and prosecutors to act without delay.

Restorative justice practitioners still believe that the existing legislation is not sufficient enough for using restorative processes to their full capacity. Thus many provisions that would be favourable for the application of RJ are missing, such as the principle of confidentiality, the relationship between the legal system and mediator, admissibility of evidence, limitation periods and the nature of the mediation/restorative justice process as such. Not to mention the fact that at the moment there is only one legislative act that uses the term restorative justice – the above-mentioned Decree of the President of Ukraine #597/2011 "On the Concept of Juvenile Criminal Justice in Ukraine". The only policy paper related to it – the Action Plan of the Cabinet of Ministers on the implementation of the Decree – is very weak in addressing the needs of restorative justice implementation in the criminal justice system of Ukraine.

3. Organizational structures, restorative procedures and delivery

Restorative practices have been used in the juvenile justice system and school environment in Ukraine since 2003. In 2005, the initiative to implement restorative interventions in the criminal justice system was supported by civil society organizations from Kyiv, Luhansk, Odessa, the Crimea, and Lviv. All of them had had experience in mediating conflict situations by that time. Before 2003 mediation services were mainly used to resolve civic and family cases and economic disputes as well as to prevent conflicts in schools and multi-ethnic

communities (e. g., in the Autonomous Republic of Crimea). In criminal matters, restorative practices have been applied only since 2003.

Since their very beginning restorative programmes have been offered by local civil society organizations and primarily within the framework of donor-supported projects that have been mainly realised by the UCCG. At present, 14 towns in 9 regions have the experience of implementing restorative interventions in criminal cases.

With the view to institutionalising restorative justice, the concept of the Community Restorative Justice Centre (CRJC) was developed in 2004, thus ensuring cooperation with the Ukrainian criminal justice system. It has been tested on the basis of 14 pilot centres. Currently we are more inclined to call it a Community Centre of Restorative Practices as we recognise its potential and actual range of services provided to the respective communities. However, for the purpose of this report, the traditional term *Community Restorative Justice Centre* is used in order not to confuse the reader.

Founded as the civic initiative of several organizations, implementation of restorative justice in Ukraine today is supported by the Ministry of Justice of Ukraine, the General Prosecutor's Office, the Ministry of Internal Affairs, the National Academy of Prosecution, the National Academy of Internal Affairs, the School of Social Work of the National University "Kyiv-Mohyla Academy", and the Ministry of Education.

3.1 Community Restorative Justice Centre

A Community Restorative Justice Centre (CRJC) is a local-based non-governmental organization or a structural unit of an existing organization which implements a restorative approach to conflict resolution in the community.

As a rule, it is staffed with a coordinator who is responsible for the functioning of the centre and establishing contacts with partners (criminal justice system representatives, local authorities, and the media). Each centre also has up to four practicing mediators who meet qualifications established by local organizations. Ukraine does not license mediators because of the insufficient legal basis. To ensure the adequate training of mediators the *Ukrainian Centre for Common Ground* has developed two training courses: "Basic Mediation Skills and Process" and "Advanced Training in Mediation Skills". The participants are pre-selected by coordinators based on a specially designed questionnaire and face-to-face interviews. Upon successful completion of the full training course, participants receive mediator certificates. The newly-trained, certified mediators are usually supervised by more experienced colleagues.

Recently, in partnership with the National University "Kyiv-Mohyla Academy" a special module course has been developed to train mediators. Furthermore, a number of courses on restorative justice were developed for the higher education institutions within the network of the Ministry of Internal

Affairs. Special training courses on restorative justice were introduced into the curricula of bachelor's programmes at Kharkiv, Lviv, Donetsk, Luhansk, Dnepropetrovsk, and Odessa State Universities of Internal Affairs as well as at the Kiev National Academy of Internal Affairs and the National Academy of Prosecution of Ukraine; similar courses for master programmes are currently being developed.

There are two key conditions for the successful functioning of the Community Restorative Justice Centre. First of all, it is absolutely necessary to establish cooperation with the institutions of the criminal justice system: courts, juvenile criminal police (reformed into the Board of Prevention Work for Children as part of the Department of Crime Prevention of the Ministry of Internal Affairs of Ukraine), local police officers, prosecutors and the criminal-executive inspection since these agencies refer cases to mediation. Under conditions when mediation is not determined by law, only cooperation with the criminal justice system institutions will guarantee that information about criminal cases is referred to CRJCs. For this purpose, CRJC regional coordinators conduct a number of presentations and face-to-face meetings to and with high and mid-rank officials of these institutions. They are often invited to attend seminars, training sessions and conferences organized by the UCCG on a national level.

Secondly, it is important to ensure that local authorities also support the introduction of mediation into criminal cases and development of restorative practices in general. Local authorities in most pilot cities and towns now have demonstrated their commitment to develop restorative practices by allocating some financial and material resources to CRJCs, thus contributing to the sustainability of the centres.

3.2 The cooperation mechanism

Restorative justice practitioners from the UCCG and partner organizations have developed a Cooperation Mechanism to describe the legislative background and establish proceedings that allow criminal case referrals to CRJCs. The difference between the adult criminal justice system and the juvenile justice system in Ukraine is not sufficient with regard to the application of restorative justice. The only noteworthy exception is the requirement of mandatory participation of a defence counsel in the conduct of inquiry, pre-trial investigation, and trial of a criminal case in trial court "1) in respect of a person who has not attained 18 years and who is suspected or charged with the commission of a criminal offence – upon establishing that the person concerned is underage or of any doubt, that the person is an adult; 2) in respect of a person subject to compulsory educational measures – upon establishing that the person concerned is underage or of any doubt, that the person is an adult." (Article 52-2 of the new Criminal Procedure Code). Therefore, the authority responsible for making the decision to recommend RJ measures in a juvenile case should always assure participation of

close relatives, custodians or caretakers while obtaining their informed consent for a restorative process. Similarly, mediators should always assure that in all cases possible close relatives, custodians or caretakers take part in a restorative process.

Due to inessential differences between adult and juvenile cases with regard to the application of RJ and the fact that the Cooperation Mechanism does not distinguish the application of RJ in adult cases from that in juvenile cases, they will be described herein as they are exactly set forth in the said Cooperation Mechanism.[7]

According to the Mechanism a criminal case can be referred to a CRJC for a restorative justice procedure at any stage by the corresponding authority (an investigator, prosecutor, or a judge) if said authority decides that such a restorative procedure is applicable in that particular case. In the Ukrainian context, neither of these authorities carries obligation or specific responsibility for making the decision to *order* or *conduct* RJ measures. Rather, a legal system representative who administers the case *may* inform the parties in the criminal case about a Community Restorative Justice Centre and the services it provides, its rights and obligations within a reconciliation procedure, as well as provide the parties with contact information of the CRJC.

The Mechanism of Cooperation between CRJCs and institutions of the legal system mentions the following "criteria of mediability"/preconditions for restorative intervention or case referral to CRJC:

- *Availability/existence of the victim*: the referral should only be made where there is a person identified, who has suffered from the offence;
- *Guilt admission*: the referral should only be made when the offender admits the facts and his role in the offence (or at least does not deny it);
- *Availability of the parties*: the referral should only be made when the parties can be easily contacted by a restorative justice provider *(for example, when custody is selected as a measure of restraint it is almost impossible to organize mediation or any other procedure because of a very complicated regulatory mechanism)*;
- *Consent*: the referral should only be made with the free and voluntary consent of both the victim and the offender *(in some cases, voluntary consent is obtained by the mediator since he or she is better prepared to explain the process, its risks and potential opportunities to the parties)*.

No other preconditions for the applicability of RJ in criminal cases have been formally established. However, there is still a tendency to primarily refer cases that fall under Article 46 of the Criminal Code, namely minor criminal offences committed for the first time, because legal system representatives quite often consider the closure of criminal cases as the ultimate purpose of restorative

7 *Lobach* 2010, pp. 10-12.

justice interventions. At the same time there have been cases where mediation was successfully used following the commission of grave offences.[8]

The results of mediated agreements should be referred back to the officer who administers the case to be judicially supervised, and filed to the case. They should include the Reconciliation Agreement and a Mediator Report (mentioning mainly the case registration number, parties consent, the results of restorative process, if applicable, and the date(s) when it was conducted).

If no consent to take part in mediation is received from the parties or no agreement is reached between them as a result of the mediation, the case, including the Mediator Report, should be referred back to the formal criminal justice process. It should be noted that according to the Cooperation Mechanism CRJC staff have no access to the actual criminal file. Instead they are provided with a short description of the situation and contact details of the parties in the case by the referring authority.

Failure to reach an agreement should not be used against the offender in subsequent criminal justice proceedings. Arriving at the reconciliation agreement should not be used as evidence of admission of guilt of the offender in subsequent legal proceedings. Where a reconciliation agreement is reached between the parties, the authority that is responsible for administering the case (the investigator, prosecutor or judge) examines the documents received from the CRJC and acts in accordance with Article 474 of the CCP (General Procedure for Trial Based on an Agreement) quoted above.

Regarding the possible legal consequences of reaching reconciliation between the parties, according to the Cooperation Mechanism, in cases of first-time minor offences (punishable by law with less than two years of imprisonment) and criminal misdemeanours, the offender can be discharged from criminal liability (termination of the criminal case) at the discretion of the judge in view of: effective repentance (Article 45 CC); reconciliation of the defendant with the victim (Article 46 CC); admission by bail on request of the collective body of an enterprise, institution or organization (Article 47 CC); imposing on the juvenile compulsory measures of educational nature as stipulated in Article 105 of the Criminal Code of Ukraine; or applying a probation term on a juvenile offender (Article 104 CC).

In cases of more serious offences, the court shall give sufficient weight to the mediation outcomes, including the voluntary compensation of losses, as mitigating factors as referred to in Articles 66 and 69 of the Criminal Code of Ukraine.

No specific recommendations or mechanisms have been developed for the post-sentencing stage of the criminal procedure. To our knowledge mediation is not used at this stage in Ukraine, except for one pilot initiative in Lviv region,

8 Some examples of grave offences are: intended grievous bodily injury, rape, robbery, injury resulting in death.

where circles have been conducted among prisoners, of whom a few subsequently requested mediation with their victims. In a few cases, after serving their terms the juveniles have met with their victims for mediation.

Since there is no legislation in place that stipulates the use of restorative practices in the criminal procedure process, it would be premature to mention any of the safeguards that exist in the criminal process. In practice, however, UCCG mediators and their partners do their best to safeguard adequate legal representation and other relevant rights of the victim and the offender. As mentioned earlier in this report, the Cooperation Mechanism also recognises the right of the parties for legal representation and participation of support parties from both sides.

3.3 Victim-offender mediation

Victim Offender Mediation in penal matters was introduced in Ukraine in 2003 as a pilot initiative of UCCG and regional partner organizations. Community Restorative Justice Centres in Ukraine do not have limitations on who can inform about the case or request to conduct restorative programmes. In fact, in recent years the number of self-referred cases significantly increased: parties to conflicts, their relatives and/or advocates come to CRJCs and ask to conduct mediation. Nevertheless, the majority of cases are referred by legal system representatives. The process of case referral slightly differs with every region. However, generally it is based on the Mechanism that was described in the section above.

Usually, the restorative process and criminal proceedings are two independent parallel processes. The fact that the case has been referred to a restorative programme does not automatically lead to the suspension of the criminal justice process.

When a potentially mediable case is identified, the regional coordinator and/or appointed mediator receives the following information: a short description of the case, the accusation presented, and contact information of the parties.

Then a mediator contacts the offender and/or his/her legal guardians and briefly explains restorative interventions. If a preliminary consent is obtained, the offender and his/her official representative(s) (parents or guardians) are invited to the preliminary meeting. During this meeting, the mediator explains the process of mediation, its rules, procedure, and possible consequences; the conflict situation can also be discussed. The main purpose of the preliminary meeting is to prepare the offender and his/her supporting parties for the participation in mediation. If the offender agrees to participate, the mediator contacts the victim and invites him/her to the preliminary meeting as well.

If the offender acknowledges the facts of the crime, shows remorse and wants to repair the harm and both parties demonstrate voluntary informed consent to take part in mediation, a date and place for it are assigned.

The victim-offender mediation is free of charge for both parties because the restorative services are provided in Ukraine within the framework of international donor funded projects or mediators are paid out of the CRJC budget provided by local authorities.

Mediation is usually conducted on the premises of the Community Restorative Justice Centre at a time convenient for both parties. Both the offender and the victim would come to mediation with their supporting parties (parents, relatives, close friends, a teacher or any other significant person).

Mediation usually begins with an introduction of its rules and principles by the mediator. Then the parties discuss the conflict situation and its consequences, how the harm can be repaired and what should be done to prevent similar conflicts in the future. If the parties reach common ground, they should sign a mediated agreement where the conflict or criminal situation is briefly explained, the mediation process is described (when and where it took place, who participated, the issues discussed) and the conditions for reconciliation (e. g., material compensation) are set forth.

The mediated agreement is signed in three copies by the parties: two copies go to the parties and one copy is filed in the records of the Community Restorative Justice Centre.

The parties and/or the mediator may request relevant criminal justice institutions to add the mediation agreement to the materials of the case. In some regions there is a practice when a mediator sends a very brief report confirming the fact of conducted mediation and describing its outcomes to the legal system representative who referred the case. The report does not disclose any particular details because the information is confidential.

Finally, mediators monitor their cases. During the first two or four weeks after the mediation, the mediator should contact the parties and inquire whether they comply with the terms of the mediated agreement and how the situation has developed after the restorative intervention.

Depending on the stage of criminal justice proceedings the case was referred at the mediated agreement and the offender's compliance with it may lead to the following consequences. Firstly, police may close the case at the stage of investigation. Secondly, if the accusation was already presented, a judge may close the case or mitigate a punishment for the offender. The mediated agreements have been always taken into account by Ukrainian legal system representatives.

3.4 Family Group Conferencing and Circles

There is a tradition of conducting family group conferences and circles in Ukraine. They have proven to be successful in neighbour and family conflicts as well as in civic cases. As regards criminal matters, restorative programmes have been used as supplementary methods of working with offenders.

The attempts to organize circles in juvenile criminal matters were made in four pilot regions with the most successful results in Lviv and Zhmerynka. In Lviv restorative circles were used in juvenile correctional facilities. The main purpose of these circles was to familiarise juveniles with restorative approaches and support them and facilitate their return to their families and communities. Interestingly enough, several young people, including those whose term of release was approaching, have requested mediation with their victims after they attended the circles. In the town of Zhmerynka circles were used as a tool of support for the offenders whose case was at the stage of court hearing. It is important to note that the circles conducted in Ukraine did not fully comply with generally recognised procedure; they have been seen more as an attempt to use an informal restorative approach to youth crime.

4. Research, evaluation and experiences with Restorative Justice

As mentioned earlier in this Report, Ukrainian restorative programmes are implemented primarily as projects funded, monitored, and evaluated by international donors. However, unified national statistics of their results are rather difficult to provide because different sets of indicators are used in every individual project. For this reason, in 2010-2011 the Ukrainian Centre for Common Ground conducted a substantial evaluation research "Restorative Justice in Ukraine: Results and Perspectives".[9] The goal of the research was to review the practice of restorative justice implementation during the period from 2004 to 2010 and assess its future perspectives. The research covered eight pilot regions of Ukraine in which mediation in criminal matters was used. This section describes and analyses the results of this research.

4.1 Statistical data on the use of restorative justice measures

According to the data obtained in the research, a total of 364[10] mediations in penal matters were conducted in eight of the pilot regions of Ukraine during the period 2004 to 2011. *Table 1* below shows the breakdown per region.

9 *Pylypiv* 2011, pp. 87-99; *Ukrainian Centre for Common Ground* 2011, p. 9.

10 It is important to note again that the research covered eight regions out of fourteen. Therefore, the overall actual number of conducted mediations in criminal matters in Ukraine is higher.

Table 1: Number of conducted mediations in penal matters

City/Town	Period of activity	Number of mediations
Bila Tserkva	2006 – 2011	68
Simferopol	2004 – 2006	80
Krasnogvardiyske	2005 – 2011	63
Pyryatyn	2008 – 2011	21
Drohobych	2006 – 2011	36
Ivano-Frankivsk	2004 – 2011	23
Zhmerynka	2006 – 2011	40
Kharkiv	2007 – 2011	33
Total	**2004 – 2011**	**364**

Source: *Pylypiv* 2011, p. 97.

Out of 364 cases mediated in the eight Community Restorative Justice Centres covered in the study, 70% concerned offences against property (theft, fraud, and robbery), 25% of the offences were bodily injuries of different severity, and the remaining 5% included traffic accidents resulting in death, violation of work agreements, failure to pay alimony etc. 95% of these cases were crimes committed by juveniles aged 16-18.[11]

In terms of offence severity, the criminal cases referred to mediation can be broken down as follows.[12] 44% were minor offences (theft, fraud, petty crime, intentional minor bodily injury), 44% were offences of medium gravity (thefts and frauds committed repeatedly, robbery, robbery combined with violence) and 12% were grave offences (burglary, leaving in danger[13], traffic accidents resul-

11 *Pylypiv* 2011, p. 97.

12 In accordance with the provisions of the Criminal Code of Ukraine.

13 According to Article 135 of the Criminal Code of Ukraine, "leaving in danger" is defined as the "willful leaving of a person without help, if he/she remains in a condition dangerous to life and is unable to ensure his/her self-preservation due to young age, old age, illness or helpless condition, and where the one who left this person without help was obliged to care for this person and was able to provide help to him or her, and where this one himself put the victim in a condition dangerous to life.".

ting in death; robbery committed by an organized group).[14] Special grave offences were not referred to mediation.[15]

70% of cases were referred to the Community Restorative Justice Centres at the stage of pre-trial investigation. Information was primarily obtained from investigators of the Juvenile Crime Police and local police inspectors (these two subdivisions of the Ministry of Internal Affairs were reorganized and now are part of the Department of Crime Prevention of the Ministry of Internal Affairs of Ukraine). Almost 20% of cases were referred by courts. Approximately 10% of cases came from the prosecutors' offices, advocates, non-governmental organizations, social services, schools, and interested parties.[16]

4.2 Findings from research and evaluation

The research has shown that mediations were conducted in compliance with major principles of restorative programmes. This conclusion can be drawn from completed questionnaires mediation participants usually fill out at the end of the programme. Their answers show that 100% of offenders and victims were satisfied with outcomes of mediations; 90% of participants felt that both parties were treated equally, and 90% of respondents would recommend others to participate in mediation.

A significant part of the research was dedicated to the impact the restorative programmes had on reducing the proportion of people reoffending. According to regional coordinators, mediators, participants, and legal system representatives, mediation is a highly effective way of resolving criminal conflicts. Participants in mediation sessions asserted that restorative justice programmes settled conflicts caused by crime in a substantially different way than those in the traditional criminal justice.

Legal system representatives admitted that they referred cases to mediation and other restorative practices for two main reasons: (1) they understood needs of criminal situation participants and (2) they wanted to facilitate the satisfaction of these needs. For offenders it was important to acknowledge and accept responsibility for the crime; for victims psychological healing was important as well as receiving reparation for the harm they had suffered.

Due to their form, content, and principles, restorative justice programmes have greater influence on offenders. Participation in mediation allows them to understand their offences better, comprehend the harm they have caused to victims and take responsibility for it. The practitioners conclude that the

14 *Pylypiv* 2011, p. 97.

15 According to Article 12 of the Criminal Code of Ukraine, a special grave offence shall mean an offence punishable by more than ten years of imprisonment or a life sentence.

16 *The Ukrainian Centre for Common Ground* 2011, p. 9.

participants were at a lower risk of repeated crime than offenders who did not accept responsibility for their crimes. According to the data collected, since 2006 no cases of recidivism or repeated crimes have been reported among the participants in mediation.

The research has also shown that mediation is an important instrument for the restoration and healing of victims. First of all, victims who take part in mediation can quickly receive material restitution for the harm suffered, renew their sense of security, protection, and control over own lives. According to practitioners of Community Restorative Justice Centres, the terms of all mediated agreements were complied with by the participants. The average amount of the material compensation was approx. UAH 1,000-1,500,[17] though larger amounts have been also reimbursed. There were two cases in the Ukrainian practice of mediation when the material compensation agreed was EUR 4,000 and UAH 70,000. The offenders met all their commitments under mediated agreements and fulfilled their obligations within one month after the mediation sessions.

Local authorities are confident that restorative practices are both the way to respond to crimes and prevent them and a possibility to establish active and united communities able to solve any problem in a coherent and strategic manner.

Practitioners believe that improved legislation would allow the criminal justice system to refer even more difficult cases to mediation including those committed by adults. The accumulated experience demonstrates that mediation works both in cases of minor misdemeanours and of grave crimes. In Ukrainian practice there have been successful mediations in criminal cases classified as unintentional killing. Obviously, there are crimes where restorative programmes can be used only with reservations (special grave offences, repeated crimes, recidivism) while the majority of criminal cases can be mediated, so long as the parties to the offence are motivated to do so.

Experts assume that restorative justice could become a necessary supplement to the traditional court system. The development of restorative justice programmes in Ukraine does not strive to replace the existing criminal justice system but rather to give it a restorative character. Many respondents expressed the view that RJ programmes in some cases could serve as a viable alternative to the criminal justice system in place, especially when combined with community service.

The results of the research presented above explicitly testify that restorative justice programmes that were introduced in Ukraine in 2003 have proven to be an efficient and effective way to meet the goals of the justice system, prevent crimes, re-establish damaged relations and connections in the community, and form a safe and healthy environment in society. This can be achieved due to the following factors: (1) the offender takes personal responsibility to compensate caused harm; (2) sufficient attention is given to the needs of victims; and (3) the

17 The annual mean exchange rate in Ukraine in 2012 was: EUR 1 = UAH 10.5

community members are involved in discussions of the causes and conditions that led to criminal behaviour and make decisions on how to correct them.

The experience of effective restorative justice programmes in Ukraine, substantiated by theory and research, raises a question before the Ukrainian government and society: "How can we ensure and secure the process of introducing RJ practices into the criminal justice system of Ukraine so that members of every community all over the country could have an opportunity to use the advantages of mediation and other restorative methods?"

The received quantitative data in the pilot regions as well as the experience of other countries suggest that there is a set of objectives and tasks to be addressed in order to guarantee further development of restorative justice in Ukraine:

1. Finalize legislative regulation of mediation in criminal matters: adopt a law "On Mediation", and amend the Criminal Code and Criminal Procedure Code;
2. Ensure sustainable funding of Community Restorative Justice Centres;
3. Ensure institutional development of Community Restorative Justice Centres (including the appropriate record-keeping, continued learning and professional development);
4. Develop field research and scientific expertise in the field of restorative justice, monitor the implementation of restorative justice programmes;
5. Train criminal justice system representatives in theory and practice of restorative justice with the view of effective cooperation with Community Restorative Justice Centres;
6. Train mediators and restorative justice practitioners on the basis of existing Ukrainian mediation and RJ centres and educational institutions in order to provide a highly professional staff for Community Restorative Justice Centres;
7. Actively inform communities and primarily persons who are in conflict with law/potential participants of the possibilities and advantages of restorative justice programmes.

5. Summary and outlook

A key factor that affects RJ implementation in Ukraine is still the lack of state policies and legislative regulations in the field at the national level. Although RJ interventions have been used in Ukraine since 2003 and proved to be effective in pilot projects and some communities, its geography is still limited to 14 regions of a very large country. The model of RJ implementation in Ukraine involves the provision of victim-offender mediation (and other restorative practices) by not-for-profit Community Restorative Justice Centres that ensures a relatively

high quality of services as evidenced by the results obtained from the UCCG research and their statistical comparison with those in other countries.

On the one hand, the fact that RJ programmes have been organized and realized by civil society organizations promotes the growth of community confidence in them against the prevailing mistrust of Ukraine's population to the police and judiciary. On the other hand, the absence of the national programme for RJ, the lack of legislative regulation of the principles and mechanism of RJ introduction in the criminal justice system, lack of clear state policies at the level of financial and scientific support and training of specialists in the field etc. definitely impede the development of RJ practices in Ukraine.

Certainly, RJ has much more potential than just that used to date. The experience of other countries has demonstrated that the consistent introduction of RJ in the legal system would both contribute to its humanization and social improvement in the communities at large and would bring quite tangible economic results, in the short run (reducing the state budget for detention of offenders and their reintegration) as well as in the long run (saving and maintaining the productive and healthy work force and strengthening the country's social capital). Ukraine has great prospects for RJ implementation, as there is plenty of opportunity to use RJ at the pre-trial stage, the trial stage, and the post-sentencing stage of the criminal justice process. A lawyer's opinion on the legal issues of RJ implementation would put it that RJ can be more beneficial at the trial stage because, under current law, neither prosecutors nor police have enough discretional powers to substantially impact the legal effect of RJ application – it is the court that ultimately decides on the outcome of a case. Anyway, RJ practitioners understand that the ultimate goal is to provide Ukrainians with a real opportunity for a just solution of their own criminal situations and reconciliation.

Attitudes to RJ in Ukraine vary from full acceptance and support to its total denial and deliberate ignoring. It is primarily dependent on the awareness of target audience. Despite the low level of application of RJ programmes in criminal proceedings, it would be fair to note that the general attitude of legal system representatives towards restorative justice is primarily positive. Much of this attitude has been formed by the adequate support from the higher education institutions affiliated to the Ministry of Internal Affairs, which disseminate RJ information among their students and the prosecutors, police, and judges as well as the support from the government primarily through instructive letters, recommendations, and decrees.

In the meantime, the attitude of Ukrainian legislators to the issue leaves much to be desired. The awareness and political will of members of the parliament of Ukraine to promote RJ are virtually absent. This is particularly evidenced by the results of voting on the Law on Mediation in January 2012. The bill did not receive the required votes and was removed from further consideration.

In terms of available opportunities and trends, there are three major sets of possibilities for further RJ development in Ukraine in accordance with the ongoing criminal justice reform:

1) The enactment of the Concept of the Juvenile Criminal Justice in Ukraine looks promising as it directly emphasizes the need for the introduction of RJ interventions in the criminal justice system. Another promising step was the decision to reform the criminal juvenile police into the juvenile police. This reform also provides for RJ interventions as part of working tools of the inspector of the future crime prevention system.
2) The recent promising discussions and legislative work towards the establishment of the institution of probation quite logically can become a ground for cooperation of the legal system and civil society in the implementation and development of RJ practices in Ukraine.
3) The third set of possibilities for RJ in Ukraine is the way it was implemented and developed in the said pilot regions with the support of local authorities. This way proved to be effective and needs further efforts towards decentralisation, the strengthening of local self-administrations and local budgets, and improving advocacy work with local authorities. The authors of this Report consider it the most promising in terms of preserving the spirit and principles of restorative justice. However, one of the greatest threats to the RJ movement in Ukraine would be the administrative implementation of restorative justice by a state institution with its subsequent overregulation, observing strict formalities, reporting for the sake of appearance and, as a result, the loss of trust in it by the customers/communities.

Any expert who ventures to make predictions of the future of a social innovation in Ukraine today runs the risk of being perceived as a thoughtless do-gooder or a directly involved and biased party. Unfortunately, social issues seem to be irrelevant and do not stick out against the background of current political events. This is evidenced by the fate of many social innovations, which still go as unrealised nice projects and nice ideas, even though tested in some cases. Therefore, we would refrain from the temptation to make predictions of the future of RJ in Ukraine.

References

Betetto, N. (2011): The regulatory framework for mediation in criminal matters in Ukraine. Report. (2011). Strasbourg: Council of Europe.

Lobach, V. (2010): Mechanism of Cooperation of Ukrainian Legal System Institutions and Community-based Restorative Justice Centres Aimed at

Preventing Crime through Introduction of Mediation in Criminal Matters. Restorative Justice in Ukraine 1-4 (15)`2010, pp. 10-12.

Pylypiv, N. (2011): Restorative Justice in Ukraine: Results and Perspectives. Restorative Justice in Ukraine 3-4 (17)`2011, pp. 87-99.

The Code of Criminal Procedure of Ukraine as of 13.04.2012: Available: http://zakon2.rada.gov.ua/laws/show/4651-17.

The Criminal Code of Ukraine as of 05.04.2001: Available: http://zakon1.rada.gov.ua/laws/show/2341-14.

The Ukrainian Centre for Common Ground (2008): Development of the Restorative Justice Centres in Communities. Kiev.

The Ukrainian Centre for Common Ground (2009): Regional Model of Juvenile Crime Prevention: Experience of Implementation. Kiev.

The Ukrainian Centre for Common Ground (2011): Restorative Justice – a Way to Safe communities: Research Report. Kiev.

Vos, B., Umbreit, M. S., Hansen, T. (2006): Summary Report: Introduction of Restorative Justice in the Ukrainian Legal System. Introduction of Restorative Justice in Ukraine: results and perspectives. Conference materials. Kiev: Ukrainian Centre for Common Ground, pp. 31-34.

Walmsley, R. (1999): World Prison Population List, Home Office Research Findings No. 88, London: Home Office.

Willemsens, J., Miers, D. (2004): Mapping Restorative Justice: Developments in 25 European Countries Leuven, Belgium: European Forum for Restorative Justice.

Zemlyanska, V. (2008): Restorative Justice in the Criminal Process of Ukraine: manual. Kiev. Publisher Zaharenko.

Restorative Justice and Mediation in Penal Matters in Europe – comparative overview

Frieder Dünkel, Joanna Grzywa-Holten, Philip Horsfield

1. Introduction

The publication at hand is the result of a two year research study titled "Restorative Justice and Mediation in Penal Matters". The study was conducted by the Department of Criminology at the University of Greifswald, Germany, and was funded by the European Commission within the Specific Programme Criminal Justice 2007-2013. Further funding was also kindly provided by the University of Greifswald.

There appears to be an emerging consensus in Europe that Restorative Justice (RJ) can be a desirable alternative or addition to ordinary criminal justice approaches to resolving conflicts. RJ attributes greater consideration to the needs of victims and the community, and research has repeatedly highlighted its reintegrative potential for both victims and offenders, and the promising preventive effects such interventions can have on recidivism. Accordingly, throughout Europe, the number of countries that have introduced RJ into the criminal justice context over the past few decades is perceived to have been increasing continuously. Research into the field has increased almost exponentially, and international standards and instruments from the European Union, the Council of Europe and the United Nations have increasingly been devoted to RJ over the last 15 years.

The consensus reaches its limits, however, when one regards the ways in which RJ has been implemented in legislation and "on the ground", why it has been introduced, and the role that RJ plays in practice in the context of the criminal justice system. Previous studies have indeed painted a very heteroge-

neous picture of the European RJ landscape,[1] characterized by in some cases strongly divergent approaches to achieving similar outcomes. While some countries have succeeded in situating RJ in a more prominent position in the criminal procedure and in criminal justice practice, other jurisdictions have struggled (or not even sought) to move RJ beyond the margins of the criminal justice system, reflected for instance in strict eligibility criteria for offenders or in the geographically localized availability of providers of RJ services.

The aims of the project were to draw a comprehensive picture of RJ and mediation in the context of responding to criminal offending in Europe. The first step has already been taken at this point. The preceding 36 chapters of this expansive publication provide an in-depth snapshot of RJ and mediation in penal matters all over Europe today. The purpose of the comparative overview provided in this chapter is to summarize information on key issues from this pool of data and to create an overview of the current RJ landscape, while at the same time seeking to identify key obstacles and problems that hinder RJ in playing a less peripheral and more central role in the context of the criminal procedure, and to examine promising, experience-based solutions to these problems.

Before we present our findings on these issues, however, it appears advisable to set the objectives of the study against their contextual and conceptual backdrop, and to briefly describe and explain the applied methodology and the definitions used.

1.1 Contextual and conceptual background

The project and its objectives need to be set against the backdrop of an unprecedented growth in the availability and application of processes and practices in Europe (and indeed the rest of the world) over the last few decades that seek to employ an alternative approach to resolving conflicts, that has come to be termed "Restorative Justice" (RJ). The values reflected in restorative thinking are indeed not entirely new.[2] In fact, they can be traced back to indigenous cultures and traditions all over the world.[3] The modern "rejuvenation" of RJ has in fact taken much of its impetus from indigenous traditions for resolving conflicts in many countries, like the developments in *New Zealand*, *Australia*, *Canada* and the *USA*.[4] The gradual spreading of RJ in the context of responding to

1 So stated by *Miers/Aertsen* 2012a, p. 514. See for instance *Aertsen et al.* 2004; *Miers/Willemsens* 2004; *Mestitz/Ghetti* 2005; *European Forum for Restorative Justice* 2008; *Pelikan/Trenczek* 2008; *Mastropasqua et al.* 2010.

2 *Strickland* 2004, p. 2.

3 *Hartmann* 1995; *Liebmann* 2008, p. 302; *van Ness/Strong* 1997; *Braithwaite* 2002.

4 See for instance *Maxwell/Liu* 2007; *Roche* 2006; *Zehr* 1990; *van Ness/Morris/Maxwell* 2001; *Maxwell/Morris* 1993; *Moore/O'Connell* 1993; *Daly/Hayes* 2001.

criminal offences has been part of a general "rediscovery of traditional dispute resolution approaches", with restorative processes and practices becoming more and more used in community, neighbourhood, school, business and civil disputes.[5]

When confronted with the question as to what RJ actually is, a frequent response tends to be that it "*means different things to different people*",[6] or "*all things to all people*".[7] *Van Ness/Strong* state that "*it can seem that there are as many answers as people asked*".[8] There is no clear-cut definition of what RJ is, not least because "*it is a complex idea, the meaning of which continues to evolve with new discoveries*".[9] *Van Ness/Strong* go on to state that "*it is like the words 'democracy' and 'justice'; people generally understand what they mean, but they may not be able to agree on a precise definition*".[10]

The modern concept of RJ was originally formulated in a theory by *Christie* ("conflicts as property"),[11] and builds on the view that the traditional criminal justice process is an inadequate forum for resolving conflicts between victims and offenders and for meeting both their needs and those of the wider community in which their conflict is set.[12] "*Policymakers have become more concerned about the capacity of traditional criminal systems to deliver participatory processes and fair outcomes that are capable of benefiting victims, offenders and society at large*."[13]

The same applies to traditional state responses to offending, which tend to focus chiefly on punishment, deterrence and retribution as responses to breaches of the criminal law. While in juvenile justice the focus and purpose of intervention may well lay in educational, rehabilitative or reintegrative interventions rather than punishment,[14] in the end, the conflict caused by an offence is

5 For a look at the "dimensions of restorative justice" in this regard, see for instance *Roche* 2006; see also *Daly/Hayes* 2001, p. 2; *Willemsens* 2008, p. 9.

6 *Fatah* 1998, p. 393.

7 See for instance *O'Mahony/Doak* 2009, p. 167.

8 *Van Ness/Strong* 2010, p. 41.

9 *Van Ness/Strong* 2010, p. 41.

10 *Van Ness/Strong* 2010, p. 41.

11 *Christie* 1977.

12 *O'Mahony/Doak* 2009, p. 165 f.; *Doak/O'Mahony* 2011, p. 1,717; *Strickland* 2004, p. 3.

13 *Doak/O'Mahony* 2011, p. 1,717.

14 For a comprehensive overview of the juvenile justice landscape in Europe today, see *Dünkel et al.* 2011; see also *Dünkel/van Kalmthout/Schüler-Springorum* 1997; *Albrecht/Kilchling* 2002; *Doob/Tonry* 2004; *Cavadino/Dignan* 2006; *Junger-Tas/Decker* 2006; *Muncie/Goldson* 2006; *Hazel* 2008; *Junger-Tas/Dünkel* 2009.

principally viewed as being between the offender and the State and its laws,[15] and the process for resolving it is structured and conducted in an according fashion. *Walgrave* speaks of the "*state monopoly over the reaction to crime*."[16]

"*Many expectations have been placed upon the criminal justice system and in recent years a new one has been added: it should focus more on victims.*"[17] Victims can often feel abandoned by the system by not being involved in the resolution of the conflict to which they are a key party. "*While the defendant has a lawyer, the victim does not; instead, the victim's interests are considered to be identical with society's, which the prosecutor represents.*"[18] More often than not, victims have a desire to question the offender, to receive an apology and ideally receive some other form of reparation, desires that can only seldom be met by the criminal justice system in most countries of Europe today. Steps have been taken in the past to improve the standing of the victim in criminal proceedings in some countries, often as a result from growing victims' movements and research in the field of victimology, for example the possibility in *Germany* of attaching a civil suit to the criminal case in order to receive compensation (the so-called *Adhäsionsverfahren*), the "Compensation Order" in *England and Wales* or the *partie civile* in *France* and *Belgium*.[19] Such or similar compen sation schemes can indeed be found in large parts of Europe today. While these approaches have improved victims' prospects of being compensated, they do very little to change the position of the victim in the resolution of the conflict. The conflict continues to be defined as a dispute between the offender and the State whose laws the offender has breached. Furthermore, by being subjected to the formal criminal process, the victim runs the risk of secondary victimization, for example by being accused of lying or being attributed a degree of blame in the offence, however without being in a position to defend himself, either personally or through legal representation.

Likewise, the adequacy of traditional criminal justice processes and interventions for offenders is also disputable if a resolution of the conflict arising from the offence is the desired outcome. Beyond the general notion that criminal justice responses to crime should be designed in a fashion that seeks to promote the reintegration of offenders into the community rather than merely punishing them (for instance through imprisonment), the criminal justice *process* in many countries does very little to promote the notion of an offender's responsibility for his/her behaviour and its consequences for victims and the community. Often

15 *Doak/O'Mahony* 2011, p. 1,717; *Zehr* 1990; *Strickland* 2004, p. 2.

16 *Christie* 1977, p. 1; *Walgrave* 2008, p. 5.

17 See *Aertsen et al.* 2004.

18 *Van Ness/Strong* 2010, p. 42.

19 See the reports by *Dünkel/Păroşanu*, *Doak*, *Cario* and *Aertsen* in this volume.

their defence lawyers speak for them, thus reducing the degree to which offenders are actively involved in the process and thus to which they (can) truly face up to their actions.

RJ on the other hand aims to give the conflict back to those persons most affected by offending, by actively involving them in the procedures that respond to offending behaviour, rather than placing them on the side-lines in an almost entirely passive role.[20] According to *Christie's* theory of the re-appropriation of conflicts, RJ aims to restrict the role of the State to the provision of a less formal forum in which parties to an offence can deliberate on and actively resolve the crime and its aftermath.[21] The aim is to reintegrate offenders by confronting them with the negative consequences of their behaviour, and in doing so to bring the offender to assume responsibility for his actions and to deliver some form of redress to the victim or the community. In this conceptual approach, participation and involvement are key: victims are given a chance to state how they have been affected and what they expect from the offender, while the offender can explain himself and feel to have been able to express his position, which is likely to improve satisfaction among all stakeholders.[22] Restorative procedures are usually highly informal, and are geared to avoiding negative stigmatizing or labelling effects. Rather, RJ aims to separate the offender from his bad behaviour, and to help all parties to the offence leave the offence behind and to thus be "restored". So, restoration refers not only to the damage that has been caused, but also to the status of the stakeholders in the offence.

This overall conceptualization places the process involved at the centre of importance.[23] Accordingly, *Marshall* defines it as "*a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.*"[24] *Braithwaite's* theory of "reintegrative shaming", that regards processes of involvement, personal confrontation, voluntary active participation, family and community involvement and a focus on the harm that the offence has caused to the victim and the community, as promising strategies for fostering a sense of personal responsibility, maturation and reintegration.[25] Accordingly, in such a "narrow" definition of RJ, the primary strategies involve forms of mediation, conferencing and circles that have a focus on participation, impartially facilitated exchange, active involvement and voluntariness. *Braithwaite's* theoretical

20 *Willemsens* 2008, p. 8.

21 *O'Mahony/Doak* 2009, p. 166.

22 See for instance *Liebmann* 2007.

23 *Zehr* 1990.

24 *Marshall* 1999, p. 5.

25 *Braithwaite* 1989.

approach of reintegrative shaming implies that the key factor is the process of reaching a mutual agreement, rather than the agreement and its fulfilment themselves.

However, not all in the field adopt an "encounter" or "process"-based definition (also termed the *minimalist* or *purist approach*). Rather, others see the primary aim of restorative practices in facilitating the delivery of reparation, the making of amends for the *harm* caused ("outcome" or "reparation" oriented definitions, *maximalist approach*). *Liebmann* for instance defines RJ as "*[aiming] to resolve conflict and to repair harm. It encourages those who have caused harm to acknowledge the impact of what they have done and gives them an opportunity to make reparation. It offers those who have suffered harm the opportunity to have their harm or loss acknowledged and amends made.*"[26] Some argue for including any action that "*repairs the harm caused by crime*".[27] Therefore, schemes that provide for the making of reparation to the victim or even the community at large (like reparation orders, community service or diversion schemes) can be regarded as restorative. However, this will depend on how these practices are organized and implemented. "*As an alternative to associating the concept with a specific archetypal process, the term [RJ] should be instead thought of as encapsulating a body of core practices which aim to maximize the role of those most affected by crime: the victim, the offender and potentially the wider community*".[28] Therefore, for instance community service should only be regarded as restorative practice if it fulfils key restorative justice values like voluntary active participation, the aim of reintegration, fostering offender responsibility and the making of amends (in this case to the community through *meaningful* work).

Van Ness/Strong seek to unite the encounter and the outcome orientations in a hybrid definition, describing RJ as "*a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders*."[29] So, they feel that the best outcomes can be achieved where the delivery of reparation is facilitated through encounter, however an encounter is not absolutely necessary.

This flexibility (or room for personal preference) in defining the concept "*has led to a raft of divergent practices and a lack of consensus on how they should be implemented. As a result mediation and restorative justice programmes worldwide vary considerably in terms of what they do and how they seek to*

26 *Liebmann* 2008, p. 301.

27 *Daly/Hayes* 2001, p. 2; see also *Willemsens* 2008, p. 9.

28 *O'Mahony/Doak* 2009, p. 166; see also *United Nations Office on Drugs and Crime* 2006.

29 *Van Ness/Strong* 2010, p. 43.

achieve their outcomes."[30] The UN Office of Drugs and Crime refers to RJ as "*an evolving concept that has given rise to different interpretations in different countries, one around which there is not always a perfect consensus.*"[31] The driving forces for their introduction vary from country to country – were they introduced primarily with the aim of improving the standing of victims by providing opportunities to receive reparation or emotional healing through involvement in the process of resolving the case? Or have the developments been more focused on providing alternative processes and outcomes for (young) offenders in the context of expanding systems of diversion and a shift in the focus of criminal justice intervention from retributive to rehabilitative, reintegrative strategies, with victimological considerations being an "added bonus"? Or both? Such considerations as well as the social, penal, political, cultural and economic climate/context will have had an effect on how RJ has been implemented, how it is linked to the criminal justice system (if at all) and the role it plays in the practices of criminal justice decision-makers.

What has become clear, however, is that the outcomes achieved through restorative practices have indeed been very promising ones. Numerous research studies all over Europe have measured significantly elevated satisfaction rates among victims and offenders who have participated in restorative justice measures compared to control groups.[32] While such levels of satisfaction are no doubt greatly dependent on the way the specific programme in question has been implemented, they nonetheless indicate that it is indeed possible to better meet the needs of victims through RJ. At the same time, RJ has repeatedly and continuously been associated with promising recidivism rates,[33] making them viable alternatives to traditional criminal justice interventions (see *Section 5* below).

The clearest point of European consensus lies in the fact that the perceived expansion in the provision of RJ has been a real one, and that more and more people are coming to regard it as an attractive alternative or addition to the criminal justice system, regardless of the role it plays or the outcomes aimed for. This consensus is reflected in the continued growth in the degree to which RJ is the subject of international conferences as well as of international instruments from the Council of Europe, the European Union and the United Nations, for instance:

30 *Doak/O'Mahony* 2011, p. 1,718.

31 *United Nations Office on Drugs and Crime* 2006, p. 6.

32 See for instance *Campbell et al.* 2006 on experiences in *Northern Ireland*.

33 See for instance *Latimer/Dowden/Muise* 2005; *Bergseth/Bouffard* 2007; *Sherman/Strang* 2007; *Shapland et al.* 2008; *Shapland/Robinson/Sorsby* 2012.

- Committee of Ministers Recommendation Rec (99) 19 concerning mediation in penal matters;[34]
- Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings;[35]
- Resolution 2002/12 of the Economic and Social Council of the United Nations on basic principles on the use of restorative justice programmes in criminal matters;[36]
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime;
- Council of Europe Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice;[37]
- Council of Europe Recommendation No. R. (2008) 11 on European Rules for Juvenile Offenders Subject to Sanctions or Measures;[38]
- Council of Europe Recommendation No. R. (2006) 2 concerning the European Prison Rules.[39]

Growth in the number of research projects and publications relating to the issue has been on the verge of exponential. As *Daly* states, "*no other justice practice has commanded so much scholarly attention in such a short period of time*".[40] So there is also agreement that such research is desirable, which is not least reflected in the fact that the European Commission specifically sought to fund research into the matter, as was the case with the study on which the publication at hand is based.

1.2 Aims, definitions and methodology

As already stated above, the overall objective of the study was to draw a comprehensive picture of RJ and mediation in the criminal justice context in 36 European countries, to identify recurring problems and obstacles to the implementation of RJ in the context of the criminal procedure as well as to find promising

34 *Council of Europe* 1999.

35 *Council of Europe* 2001.

36 *United Nations Economic and Social Council* 2002.

37 *Council of Europe* 2003.

38 *Council of Europe* 2008.

39 *Council of Europe* 2006.

40 *Daly* 2004, p. 500.

experiences in Europe in overcoming or avoiding these obstacles. The participating countries are compiled in *Table 1* below.

Table 1: Countries covered in the study

Austria	Macedonia
Belgium	Montenegro
Bosnia and Herzegovina	The Netherlands
Bulgaria	Northern Ireland
Croatia	Norway
Czech Republic	Poland
Denmark	Portugal
England/Wales	Romania
Estonia	Russia
Finland	Scotland
France	Serbia
Germany	Slovakia
Greece	Slovenia
Hungary	Spain
Ireland	Sweden
Italy	Switzerland
Latvia	Turkey
Lithuania	Ukraine

In light of the diversity and flexibility in defining the concept of RJ, it was necessary to draw a conceptual outline. As our starting point, we drew on the definitions of "restorative processes" and "restorative outcomes" as provided in Articles 2 and 3 to ECOSOC Resolution 2002/12.[41] Article 2 defines a restorative process as:

> "*any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.*"

41 *United Nations Economic and Social Council* 2002.

Further, Article 3 states that:

"*restorative outcomes are agreements reached as a result of a restorative process. [They] include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.*"

So, first of all we were interested in restorative processes, such as mediation and conferencing, in terms of why they were introduced, how they are linked to the criminal procedure, how they have been implemented in legislation and "on the ground", the quantitative role they play in criminal justice practice and positive and negative experiences that have been made with them (or rather: problems that have been faced and solutions to those problems).

However, using such a definition excludes many initiatives that imply the delivery or making of reparation or restitution without a preceding restorative process having taken place – practices that are in fact widespread in Europe today in the form, for instance, of reparation orders, community service orders, or legal provisions allowing prosecutorial or court diversion on the grounds that amends have been made. The research team, therefore, decided to widen the scope of what should be covered in the project so as to include pathways through which making reparation is facilitated in, and has an effect on, the criminal justice process, and to in turn ascertain to what degree they are in fact implemented in a fashion in practice that can be regarded as restorative.

With this conceptual frame in mind, in order to address the project objectives, in a first step, national reports were commissioned from each of these 36 countries that, when taken together, provide a comprehensive point of reference for information relating to RJ all over Europe. The reports were authored by researchers, practitioners and representatives of ministries and NGOs in accordance to a pre-determined common report structure so as to facilitate comparability for later analyses, covering a wide range of issues that are compiled in *Table 2* below.

Table 2: Structure of the national reports

Chapter 1: Origins, aims and theoretical background of Restorative Justice
The authors were asked to provide a brief overview of forms of RJ available in their country, the relevant reform history in theory and practice, the contextual factors that served as motors for reform and the role of international standards.
Chapter 2: Legislative basis for Restorative Justice at different stages of the criminal procedure
The second chapter was devoted to sketching out the points at which RJ can gain access to the criminal procedure (pre-court level/diversion; court level; while serving prison sentences) differentiated between adult and juvenile criminal justice, identifying the preconditions for their applicability, the respective decision-makers, legal safeguards and the consequences on the criminal procedure of participating (successfully) in restorative justice measures.
Chapter 3: Organisational structures, restorative procedures and delivery
The authors were asked to provide descriptive accounts of the different restorative processes and practices that are available in their countries, in terms of: the course of restorative processes including case referral mechanisms; participants to the processes; organizational structures; strategies of interagency communication/collaboration; agencies/bodies responsible for conducting restorative justice measures; training of mediators; sources of funding; levels of geographic coverage.
Chapter 4: Research, evaluation and experiences with Restorative Justice
The fourth chapter was devoted to a presentation of statistical data that can give an insight into the role that RJ plays in criminal justice practice, as well as to summarizing findings from national research and evaluation into the field of RJ (descriptive inventory research, action research, recidivism analyses, participant satisfaction surveys, evaluations etc.).
Chapter 5: Summary and outlook
A summary of the key issues and findings, good and bad experiences, questionable or promising practices, obstacles.

In a second step, these national reports have been subjected to analysis with the aims of:

1.) drawing a picture of the landscape of Restorative Justice and mediation in penal matters today, in terms of what there is, why it has been introduced, how it ties in to the criminal procedure and what quantitative role it plays in practice;
2.) identifying recurring obstacles to Restorative Justice that prevent it from playing a less peripheral role in practice, and, in connection to this;

3.) seeking to identify solutions to these obstacles based on European experiences and research.

In order to do so, besides referring to the reports, a first project conference was held in Greifswald, Germany, in May 2012, where the participants congregated for the first time to present the state of affairs in their countries and to exchange their views on what factors pose the greatest obstacles to RJ today. At a second project conference, held in Gdańsk, Poland, in May 2013, the project participants discussed these specific issues in more detail, and a number of recurring conclusions and viewpoints came to light that served to confirm the focus of our analysis (see *Sections 5* and *6* below for the outcomes of these discussions). The remainder of this report is devoted to providing an overview of the central findings from this analysis.

1.3 The structure of this overview

Section 2 is devoted to briefly mapping out restorative justice reform in Europe. In doing so, we investigate the motors for reform, i. e. the contextual factors that have proven to have been key driving forces behind the introduction of Restorative Justice schemes as an alternative or additional strategy for resolving or addressing criminal cases. Understanding the context through which restorative justice initiatives and programmes have come to spread (or not) helps to understand the reasons why they have (not) been put into practice in the various different ways that they have.

This is followed by a presentation of the restorative justice landscape in Europe in *Section 3* that starts with a look at the different routes through which RJ can access or be brought into the criminal procedure (*Section 3.1*). Subsequent subsections are then devoted to the different forms of Restorative Justice and practice that can be found in Europe today. VOM (*Section 3.2*) and conferencing (*Section 3.3*) are each investigated in turn, looking in particular at their spread in Europe, how they have been implemented and their relationship to the criminal procedure. *Section 3.4* is devoted to different manifestations of "sentencing circles" that have been emerging in Europe in recent years. Finally, community service is investigated in *Section 3.5*, with a particular focus on the degree to which it can be regarded as "restorative justice" based on the way it is implemented in Europe.

In advance it is safe to say that the picture drawn by this analysis is very much in line with the findings of previous research studies,[42] in that it

42 For instance *Miers/Willemsens* 2005; *Miers* 2001; *Aertsen et al.* 2004; *Miers/Aertsen* 2012a.

"*continues to be one of considerable heterogeneity, even if the various programmes are aiming to address common questions.*"[43]

This degree of variation can also be observed when investigating the quantitative role that RJ plays in the practices of the criminal justice system and procedure. While in some countries RJ plays a more central role, in the vast majority it is restricted more to the periphery of practice. *Section 4* is devoted to sketching an overview of this practice, and investigates whether there are any discernible trends in the use of RJ, while drawing attention to the difficulties that can be associated with such an endeavour.

In *Section 5* we address experiences that have been made with RJ and VOM in Europe. We draw together research findings that, when taken together, indicate that it is indeed desirable to seek to promote the use of RJ in the context of responding to offences for all involved. *Section 5.1* is then devoted to identifying the factors that the authors of the national reports have stated as being the central obstacles to achieving more widespread recognition and use of RJ and VOM in practice. Promising strategies for overcoming these problems are the subject of *Section 5.2* and *5.3*.

The chapter closes with a summary of the key findings from the study, along with a series of recommendations for future endeavours to spread the use of RJ and VOM beyond the periphery of the criminal procedure and criminal justice practice, and to move it closer to centre-stage.

2. Motors for restorative justice reform in Europe

An analysis of the 36 reports shows that, just as conceptual understandings of what RJ actually implies show a great deal of variation, so too do the factors that have been central driving forces in its development in the countries of Europe and indeed worldwide. There is not merely one reason why RJ has come to be regarded as a promising approach to resolving conflicts between victims and offenders. Rather, there are a whole handful of factors that have been decisive in the evolution of RJ to a "worldwide movement"[44] over the last three decades, and to its entry into the realm of the criminal procedure.

As already stated earlier in this article, the idea of resolving conflicts through encounters and mutual decision-making and focusing on the harm caused by the offence and the resulting imbalance of rights and needs is not entirely new and can be traced back to indigenous cultures and traditions all over the world. The *modern* roots of RJ in penal matters are said to be found in abolitionist thinking.[45] Europe's earliest bottom-up VOM initiatives in *Austria*,

43 *Miers/Aertsen* 2012a, p. 514.

44 *Aertsen et al.* 2004, p. 16.

45 For instance *Christie* 1977.

Norway and *Finland* in the early 1980s had their roots in this notion of the "re-appropriation of conflicts" which, as described in *Section 1.1* above, regards the formal criminal justice system as an inadequate forum for resolving conflict, and which instead endorses "giving the conflict back" to those persons who have inflicted or suffered harm so as to better meet their needs and restore their rights.[46] The reporters from the *Netherlands*, *Spain*, *Belgium* and *Croatia* stated that developments in their countries were also driven by the notion that traditional criminal justice processes are in fact inadequate for truly resolving conflicts.

In reality, abolitionist thinking will have played a significant role in all countries that provide for restorative processes like VOM or conferencing, albeit not expressly, as the concept of providing an informal forum for stakeholders in an offence to resolve their conflicts themselves is intrinsic to restorative processes. Essentially, choosing to implement restorative processes can be seen as an implicit confirmation that abolitionism is the ideal to be applied in order to achieve whatever goals have been set in the countries' given social, cultural, political, legal, historical, penal and economic decision-making contexts.

2.1 Changing paradigms of criminal justice and juvenile justice

The early developments in *Finland* also served the purpose of providing an alternative to the use of imprisonment with juvenile offenders. The reports from *Estonia*, *Hungary*, *Ireland*, *Northern Ireland*, *Norway*, *Poland*, *Romania*, *Russia*, *Scotland*, *Slovakia*, *Slovenia*, *Turkey* and the *Ukraine* all echoed that the introduction of RJ into their systems was driven at least in part by the aim of decarceration. The aim of reducing the use of imprisonment was tied to developments in many countries in Europe that sought to effect an overall shift in criminal justice thinking, away from a purely retributive strategy of inflicting punishment for breaches of the law, towards a rehabilitative, reintegrative approach (*Austria*, *Belgium*, *Bosnia and Herzegovina*, *Croatia*, *France*, *Germany*, *Hungary*, *Ireland*, *Italy*, the *Netherlands*, *Northern Ireland*, *Portugal*, *Romania*, *Russia*, *Scotland*, *Serbia*, *Slovenia*, *Spain*, *Switzerland* and the *Ukraine*).[47] Such general criminal justice reforms were characterized overall by an increased focus on expanding discretionary decision-making among key "gatekeepers" to the criminal justice system and introducing alternative responses to crime that seek to rehabilitate and reintegrate offenders. The "principle of opportunity" at the level of the police or prosecution services and the powers of courts to drop cases in certain circumstances have been widely expanded over the past few decades, thus providing "access points" to the system for the

46 *Willemsens* 2008, p. 11.

47 See for instance *Cavadino/Dignan* 2006; 2007.

implementation of diversionary measures and practices, including such that reflect restorative values (see *Section 3* below). Widespread legislative provision has been made for "reconciliation" between victim and offender and/or the making of amends ("effective repentance") to be regarded as grounds for dropping the case or for mitigating sentences (see *Section 3.1* below), which in turn opens the door for the use of restorative processes and/or for victim and offender to achieve restorative outcomes, or for made reparation to be taken into consideration.

In many countries in Europe, these developments towards diversion and decarceration were particularly reflected in juvenile justice, or rather, within the context of reforming the ways in which offending by young people is responded to, be it through the youth justice system or youth welfare/youth assistance services. The reports from *Austria*, *Belgium*, *Bosnia and Herzegovina*, *England and Wales*, *Estonia*, *Germany*, *Ireland*, *Italy*, *Northern Ireland*, *Norway*, *Portugal*, *Romania*, *Russia*, *Spain* and *Switzerland* indicated that such reform movements were key contextual factors for the introduction of RJ. Systems for responding to juvenile delinquency have increasingly sought to employ a more educational approach with a focus on providing alternative processes (so as to avoid stigmatization) and alternative measures (to seek to positively influence the offender with the aim of reintegration).[48] In the context of juvenile justice reform, the reintegrative, educational prospects of restorative outcomes and the alternative processes they can entail came to be regarded as promising means for achieving this.

2.2 Developments in the field of victimology and victims' rights

Another key driving factor for the development and expansion of RJ initiatives in Europe in the last few decades has lain in developments in the field of victimology and victims' rights.[49] The reports from *Croatia*, *Denmark*, *England and Wales*, *France*, *Germany*, *Greece*, *Montenegro*, the *Netherlands*, *Norway*, *Poland*, *Romania*, *Russia*, *Scotland*, *Serbia*, *Slovakia*, *Spain*, *Sweden* and *Switzerland* indicated that the introduction of restorative thinking into their systems was also driven by parallel attempts to strengthen the role of victims in the criminal procedure – so the deficiencies of traditional criminal justice in meeting the needs of victims[50] was one of the primary driving factors. "*Whilst initially victims' rights movements were focused on promoting victims' interests*

48 See for instance *Dünkel/van Kalmthout/Schüler-Springorum* 1997; *Albrecht/Kilchling* 2002; *Doob/Tonry* 2004; *Cavadino/Dignan* 2006; *Junger-Tas/Decker* 2006; *Muncie/Goldson* 2006; *Hazel* 2008; *Junger-Tas/Dünkel* 2009; *Dünkel et al.* 2011.

49 See for instance *Dignan* 2004; *Miers/Aertsen* 2012a, p. 530; *Willemsens* 2008, p. 11.

50 See *Aertsen et al.* 2004; *van Ness/Strong* 2010, p. 42.

to the detriment of offenders' interests",[51] today "*most victims' advocates are oriented towards a broader scope of social, personal, and juridical needs of those victimized by crime*".[52] Accordingly, legislative provisions have been increasingly introduced that seek to involve victims through restorative processes, or that seek to facilitate the making of reparation and the alleviation of caused harm, to which the restorative ideal, regardless of whether an encounter or outcome-oriented definition is applied, can cater very well.

2.3 The influence of international standards and European harmonization

A more recent driving force that is closely connected to the aforementioned factors has been the influence of international standards and recommendations from the Council of Europe, the European Union and the United Nations, that have recently come to focus increasingly on mediation, RJ and the role and rights of victims in responding to crimes (see already *Section 1.1* above).[53]

International instruments governing responses to juvenile offending have also made increased reference to mediation and RJ as being desirable practices, for instance in § 8 of Council of Europe Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice,[54] and Basic Principle 12 of the "European Rules for Juvenile Offenders Subject to Sanctions or Measures" (Council of Europe Recommendation No. R. (2008) 11).[55] Rule 56.2 of the European Prison Rules states that "*whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners*."[56]

Within the study, the reports from *Bosnia and Herzegovina*, *Bulgaria*, *Croatia*, the *Czech Republic*, *Estonia*, *Hungary*, *Macedonia*, *Montenegro*, the *Netherlands*, *Poland*, *Portugal*, *Romania*, *Slovenia*, *Serbia*, *Turkey* and *Ukraine* all stated that the developments in the field of RJ in their countries needed to be understood in the context of international standards. On the one hand, the standards have provided guidance on the ways in which restorative strategies have been implemented in law and practice, as they are regarded as depicting "best practices" in the field. But more importantly, these instruments have also

51 *Willemsens* 2008, p. 8.

52 *Walgrave* 2008a, p. 618.

53 See in particular *Willemsens* 2008 for an investigation into the role of such standards in Europe. See also *Miers/Aertsen* 2012a, pp. 538 ff.

54 *Council of Europe* 2003.

55 *Council of Europe* 2008.

56 *Council of Europe* 2006.

been central driving forces for introducing RJ and the "access points" through which it can enter the (juvenile) justice system *per se*.

This latter issue needs to be understood within the context of European harmonization and EU accession.[57] Particularly Eastern European countries (for instance *Bosnia and Herzegovina*, *Bulgaria*, *Croatia*, the *Czech Republic*, *Estonia*, *Romania*, *Slovenia* and *Ukraine*) stated that their motivation or impetus for introducing RJ schemes had come from the desire to harmonize their legislation and practices to western states. Other countries point to the obligations arising from certain international instruments as being pivotal in the passing of legislation so as to provide a statutory framework for victim-offender mediation or other restorative processes and practices that had in fact already been provided "on the ground" for quite some time. The role of Art. 10 of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings that obliged Member States to make legislative provision for mediation by 22 March 2006, is of particular relevance in this regard. Legislative reforms in *Hungary* and *Finland* in 2006, and in the *Netherlands*, *Estonia* and *Portugal* one year later, were said to have been motivated by this Framework Decision. In *Finland*, doing so had a positive effect on the use of RJ in practice, as it provided clearer guidance for a tested nationwide system of non-statutory mediation that had existed for quite some time. However, in *Hungary*, pressure to implement the requirement from the Framework Decision in fact resulted in a hurried, untested and thus greatly flawed top-down reform.[58]

2.4 Summary

As has been illustrated above, the driving forces behind the introduction of RJ and mediation into the context of responding to criminal offences are rather diverse. Naturally, it was seldom the case that developments in a country were driven only by one of these different factors, as can be taken from *Table 3*. On the contrary, there has indeed been a certain degree of overlap, as the different issues are also interrelated to a certain degree.

Also, these factors are not exhaustive, as the local political, economic, social, historical, cultural backgrounds and contexts are vital as well. For instance *Bulgaria*, *Croatia*, *Hungary*, *Ireland*, *Portugal*, *Romania*, *Slovenia* and *Turkey* stated that a primary concern had been a reduction of the caseloads of overburdened court systems, while *Bulgaria*, the *Czech Republic*, *Macedonia* and *Northern Ireland* stated that the introduction and implementation of RJ in their countries had been facilitated by (and needed to be placed before the contextual

57 *Liebmann* 2007, p. 49.

58 See the reports by *Tapio Lappi-Seppälla* and *András Csúri* in Volume 1.

background of) a perceived lack of trust in the justice system due to a phase of societal transition and conflict.[59]

Table 3: Factors influencing the introduction and implementation of Restorative Justice in penal matters in Europe

Abolitionist thinking; traditional criminal justice system deemed inappropriate forum for resolving conflicts	*Austria; Belgium; Croatia; Finland; Latvia; the Netherlands; Norway; Spain*
Strengthening victims' rights; victim's movements	*Croatia; Denmark; England and Wales; France; Germany; Greece; Montenegro; the Netherlands; Norway; Poland; Russia; Scotland; Serbia; Slovakia; Spain; Sweden; Switzerland*
Inefficient/overburdened criminal justice system	*Bosnia and Herzegovina; Bulgaria; Croatia; Greece; Hungary; Ireland; Latvia; Macedonia; Portugal; Romania; Slovakia; Slovenia; Turkey*
Rehabilitation and reintegration over retribution and punishment; diversion	*Austria; Belgium; Bosnia and Herzegovina; Croatia; France; Germany; Hungary; Ireland; Italy; the Netherlands; Northern Ireland; Portugal; Romania; Russia; Scotland; Serbia; Slovenia; Spain; Switzerland; Ukraine*
Reforms in particular in the field of Juvenile Justice or Youth Assistance and Welfare	*Austria; Belgium; Bosnia and Herzegovina; England and Wales; Estonia; Germany; Ireland; Italy; Northern Ireland; Norway; Portugal; Romania; Russia; Spain; Switzerland*
Curbing custody rates	*Estonia; Hungary; Ireland; Northern Ireland; Norway; Poland; Romania; Russia; Scotland; Slovakia; Slovenia; Turkey; Ukraine*
Compliance with international standards, EU harmonization	*Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Estonia; Hungary; Macedonia; Montenegro; Netherlands; Poland; Portugal; Romania; Slovenia; Serbia; Turkey; Ukraine*
Lack of trust in the judiciary following period of transition	*Bulgaria; Czech Republic; Macedonia; Northern Ireland*

The ways in which these motors or aims combined with each other as well as with the overall penal, social and economic climate and the criminal justice system of a given country, will have had effects on the ways in which restorative processes and practices have been legislated for (if at all) and implemented in

59 For an elaborate look at the role and potentials of transitional contexts, see *Clamp* 2014. See also *O'Mahony/Doak/Clamp* 2012.

practice, how they are tied into the criminal procedure and on the quantitative role that it plays in a countries criminal justice practice. Accordingly, there is a great degree of variation in Europe in these regards, to which we now turn our attention.

3. Restorative Justice in penal matters in Europe – the landscape

This section of the report is devoted to mapping out the picture that has resulted from the reform developments described in the preceding section of this report. What forms of RJ have been introduced? How widespread are they in terms of national coverage of availability? How have they been incorporated into or placed alongside the criminal procedure? When are they applicable?

Summarizing somewhat, from a "process" or "encounter"-oriented perspective, the most widespread manifestation of RJ in Europe is victim-offender mediation (VOM). By contrast, programmes that seek to employ conferencing schemes or sentencing circles that involve a wider circle of participants are by far less widespread, and are limited to juvenile offenders in the majority of cases (see *Sections 3.3* and *3.4* below). This is not entirely surprising, as European international standards predominantly focus on mediation.[60] In fact, the definition of RJ provided in Directive 2012/29/EU of the European Parliament and of the Council on 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, is the same as the definition of mediation applied in Council of Europe Recommendation No. R. (99) 19 concerning mediation in penal matters. To a certain degree this exemplifies that, in seeking to establish processes that reflect restorative values, the focus in Europe has been on mediation. 35 out of 36 reports refer to the existence of such services and programmes that seek to provide offenders and victims with an opportunity to take part in mediation, albeit with stark differences in the degree of national coverage and how they have been implemented (see *Section 3.2* below).

60 *Zinsstag/Teunkens/Pali* 2011, p. 19

Table 4: Restorative processes, practices and outcomes in Europe

Restorative processes seeking to achieve restorative outcomes	
Victim-Offender Mediation/ Reconciliation	*Austria; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Denmark; England and Wales; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Macedonia; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Scotland; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Turkey; Ukraine*
Conferencing	*Austria; Belgium; England and Wales; Germany; Hungary; Ireland; Latvia; Northern Ireland; the Netherlands; Norway; Poland; Scotland; Ukraine*
Making reparation to victim/community without need for preceding restorative process	
Reparation/Reconciliation	*Austria; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Denmark; England and Wales; Estonia; France; Germany; Greece; Hungary; Ireland; Italy; Lithuania; Macedonia; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Serbia; Slovakia; Slovenia; Spain; Switzerland; Turkey; Ukraine*
Community Service	*Austria; Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Denmark; England and Wales; Estonia; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Macedonia; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Serbia; Slovakia; Slovenia; Spain; Switzerland; Turkey; Ukraine*

If we change lenses and seek to include practices that reflect the making of reparation to victims and communities without there having been a preceding restorative process, it becomes apparent that *Community Service* is very widespread in Europe, receiving mention in 32 of 36 national reports (albeit with certain reservations in most cases with regard to its restorative nature, see *Section 3.5* below). Likewise, 31 of 36 authors reported that criminal justice decision-makers (police, prosecutors, courts) in their countries have discretionary powers to take the making of reparation (or attempts to do so) and "reconciling" with the victim into consideration when making charging, prosecution or sentencing decisions, or to refer offenders to make reparation prior to making such decisions (either as routes of diversion or as grounds for sentence mitigation). In fact, it is precisely these points of decision-making that we shall be focussing on first in this section, as they constitute the "access points" through which restora-

tive processes, like VOM and conferencing, can gain entry to the criminal justice system in most of Europe, as shall become clearer as this *Section 3* progresses.

Therefore, *Section 3.1* is devoted to a look at the different gateways to the criminal justice system in Europe today. Subsequently, VOM and conferencing, as restorative practices involving restorative processes, are each investigated in individual subsections (*Sections 3.2* to *3.3* respectively), followed by a brief look at "Sentencing Circles" that have begun to emerge in some countries (*Section 3.4*). In presenting these practices, they are placed into the context of the "access-points" described in *Section 3.1*, to which we shall shortly be turning our attention. Finally, *Section 3.5* is dedicated to "Community Service". As has already been stated earlier, and as shall become even more apparent further below, Community Service in Europe today should not really be enumerated together with practices like VOM and conferencing, as it only falls under RJ when a particularly wide definition based on the alleviation of harm and making reparation is applied (i. e. working for the harmed community). However, community service *could* bear great restorative potential if implemented in a fashion that brings it closely in line with the central foundations and notions of RJ, which is why a separate section has been devoted to the matter.

3.1 Gateways to the criminal justice system

As already highlighted in *Chapter 2* above, the emergence of restorative processes and practices all across Europe has to be viewed against a complex contextual backdrop. Through juvenile justice and adult criminal justice reform, linked with a stronger focus on the interests and rights of victims, decision-makers throughout the criminal justice system have been increasingly equipped with powers (via amendments to Criminal Codes and/or Criminal Procedure Codes) to divert cases from prosecution, conviction and/or sentencing into alternative procedures and measures that bear superior reintegrative and rehabilitative potential than purely retributive intervention, while at the same time alleviating court caseloads.

Prosecutors (and police forces in some countries, for instance *England and Wales*, *Northern Ireland*, *Ireland* and the *Netherlands*) have seen expansions in their *statutory discretion to divert criminal cases* by dropping charges subject to certain conditions. In 34 of the 36 countries covered in this study, among such conditions we find the condition of having "made reparation" to or having "reconciled" with the victim (see *Table 5*). Thus, where an offender has alleviated (or in some cases sought to alleviate) the harm caused by the offence, either by his own initiative or upon the making of such a requirement by the prosecuting agencies, he can be *released from criminal liability*. Many Eastern European countries (for instance in *Bosnia and Herzegovina*, *Croatia*, *Estonia*, *Latvia*, *Lithuania*, *Macedonia*, *Montenegro*, *Poland*, *Russia*, *Serbia*, *Slovakia* and *Slovenia*) in particular make legal provision for cases to be dropped where

victim and offender achieve "reconciliation", or where there has been "effective repentance" (like *Poland*, *Portugal*, *Russia*, *Spain*, *Turkey*, *Ukraine* for example). Such diversion is usually limited to offences that carry a certain penalty, usually offences that can attract a prison sentence of three to five years, but often also to so-called "complainant's crimes" (crimes in which charges/criminal complaints have to be brought by the victim, for instance in *Bulgaria*, *Finland*, *Montenegro*, *Portugal*, *Serbia*, *Spain*, *Turkey*).

Likewise, while not as widespread as prosecutorial diversion, in 26 of the countries covered in this study, the *courts have powers to refrain from convicting or sentencing an offender* on similar grounds. Courts can either postpone the procedure so as to enable reparation to be made, mediation to be conducted or reconciliation to be achieved, or can close the case due to the fact that, in the run-up to the trial, the offender has made reparation and/or reconciled with the victim, or has at least undertaken efforts to do so (as is the case in *Germany* for example). Also, 20 of 36 countries reported that courts can regard made reparation, achieved reconciliation or "effective repentance" as a *mitigating factor in sentencing* (*Belgium*, *Croatia*, *Denmark*, *Estonia*, *Finland*, *Germany*, *Greece*, *Ireland*, *Latvia*, *Lithuania*, the *Netherlands*, *Poland*, *Portugal*, *Romania*, *Russia*, *Spain*, *Sweden*, *Switzerland*, *Turkey* and the *Ukraine*).

What is important to understand at this point is that, while there is wide consensus in the laws that achieving reconciliation or making reparation can be taken into consideration in the criminal procedure, *how* such reconciliation is to be achieved, *how* reparation should be determined and/or *how* it should be delivered is mostly not clearly defined. Rather, the legal regulations governing prosecutorial and court diversion as well as sentence mitigation serve as the most central "access points" through which restorative processes like VOM and conferencing can enter into the criminal procedure as "tools" for achieving reparation or reconciliation. However, in the legal sense, reparation and reconciliation, as outcomes, can also be achieved without there necessarily having been a restorative process (like VOM or conferencing) involved, as the law makes no such requirements in the majority of cases. Thus, while reparation/reconciliation as grounds for diversion or mitigation of sentence are legally prescribed and thus valid nationwide, VOM and conferencing as means of achieving them not always are. Mention of "reconciliation" in the legislation should be taken as implying a measurable legal fact or outcome rather than a particular process. Therefore, just because the term "reconciliation between victim and offender" is used, it does not mean that an impartially facilitated encounter between the two actually took place.

It needs to be noted, though, that in many countries, for example in *Greece*, *Lithuania*, *Montenegro*, *Serbia*, *Slovakia*, *Turkey* and numerous other Eastern European countries, the laws foresee "reconciliation processes" or "reconciliation procedures", in which victim and offender are summoned before a prosecutor or judge who in turn seeks to help the parties reach an informal

solution to the offence. Such practices should not, however, be confused with actual VOM, as they lack an important hallmark of VOM – the impartiality of the facilitator. We return to this issue in *Section 3.2* below.

31 of 36 reports indicated that their national courts are equipped with *special sentencing options* (special sanctions or measures) that reflect restorative justice thinking, most prominently community service (31 of 36 countries covered in the study) or other forms of court-ordered reparation like "reparation orders" (in *England and Wales*, *France*, *Germany*, *Northern Ireland* and *Scotland*), but also court-ordered restorative processes like youth conferences in *Northern Ireland* and *Ireland*, so-called "Referral Orders" in *England and Wales* and VOM in *Germany*.

Another route through which RJ can come to be applied in the criminal justice process is during the serving of a sentence to imprisonment or detention. Restorative practices like conferencing or VOM can serve as promising elements of release preparation and/or even as a ground justifying early release, but likewise can also serve as alternative, more inclusive means for resolving conflict within prisons and detention centres. Prisons bear great potential for restorative practices, as they are in fact places characterized or even defined by conflict. However, only 18 out of 36 authors stated that restorative justice approaches were being used in this context on an experimental level. We return to this issue in more depth in *Section 5.2.4*.

Finally, it needs to be addressed that the availability of RJ (or rather, access to RJ) is not always restricted by certain legal preconditions or to certain stages of the criminal procedure. Rather, some countries provide restorative justice programmes as a general service that is (and in some countries *has to be*) offered to all victims and offenders, regardless of the offence and regardless of the course of the procedure (for instance *Belgium*, *Denmark*, *Finland*, the *Netherlands* and *Sweden*). These countries apply a more "victim"-oriented approach, in which the focus is on resolving the conflict between victim and offender in all cases in which the parties wish for such conflict resolution, rather than conditioning access to RJ on offender and offence characteristics and focusing on the consequences of making reparation (potentially following restorative processes) for the offender ("offender"-oriented approach).

Table 5: Stages of the criminal procedure at which restorative practices and outcomes can play a role in Europe

Delivery of reparation or successful restorative process as grounds for/condition of *pre-court* diversion	*Austria; Bosnia and Herzegovina; Belgium; Bulgaria; Croatia; Czech Republic; England and Wales; Estonia; Finland; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Macedonia; Montenegro; Netherlands; Northern Ireland; Norway; Poland; Portugal; Romania; Russia; Scotland; Serbia; Slovenia; Slovakia; Spain; Sweden; Switzerland; Turkey; Ukraine*
Delivery of reparation or successful restorative process as ground for/condition of *court* diversion	*Austria; Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Estonia; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Macedonia; (the Netherlands); Montenegro; Poland; Scotland; Switzerland; Romania; Russia; Serbia; Slovenia; Spain; Switzerland; Turkey; Ukraine*
Restorative justice as a ground for sentence mitigation	*Belgium; Croatia; Denmark; Estonia; Finland; Germany; Greece; Ireland; Latvia; Lithuania; the Netherlands; Poland; Portugal; Romania; Russia; Spain; Sweden; Switzerland; Turkey; Ukraine*
Court Sanctions with restorative character (including Community Service)	*Austria; Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Denmark; England and Wales; Estonia; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Macedonia; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Serbia; Slovakia; Slovenia; Spain; Switzerland; Turkey; Ukraine*
Use of restorative justice practices in prison settings	*Belgium; Bulgaria; Denmark; England and Wales; Finland; Germany; Hungary; Italy; Latvia; the Netherlands; Norway; Poland; Portugal; Scotland; Switzerland; Russia; Spain; Ukraine*
Restorative justice is available to all victims and offenders at all stages of the procedure	*Belgium*; *Denmark*; *Finland*; *Germany*; *the Netherlands*; *Sweden; Romania*

3.2 Victim-offender mediation

The most widespread encounter-based restorative practice in Europe is Victim-Offender Mediation (VOM). According to Council of Europe Recommendation No. R. (1999) 19, VOM implies "*a process whereby the victim and the offender*

are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)".[61] *Liebmann* defines it as "*a process in which an impartial third party helps two (or more) disputing parties to reach an agreement.*"[62] VOM essentially provides victim and offender with a safe, structured setting in which they can engage in a mediated discussion of the offence, and come to a mutual agreement on how the aftermath of the offence should be resolved. Taken together, the key variables that define a process as VOM are that offenders and victims participate voluntarily, are in agreement on the facts of the case and thus the distribution of roles in the process, and are provided a "safe environment" in which their encounter is impartially mediated by a third party.[63]

As already indicated in *Section 3.1* above, there is a need for caution when dealing with the terms "reconciliation" and "victim-offender mediation". Several countries in Europe make legislative provision for "reconciliation processes" or "reconciliation procedures". This is the case for instance in *Greece*, *Lithuania*, *Montenegro*, *Serbia*, *Slovakia* and *Turkey*, where the person responsible for conducting the process of reconciliation is a prosecutor or a judge, which virtually negates any likelihood of *impartiality* on behalf of the "facilitator" of the process, particularly from the offender's perspective. Similar concerns can be voiced regarding the use of (albeit specially trained) police officers in the context of restorative police cautioning in *Ireland*, *Northern Ireland* and *England and Wales*. Furthermore, from a legal perspective, in lots of Europe the term "reconciliation" is to be understood as an outcome – as in: the fact that victim and offender "have reconciled" – rather than the actual process through which that outcome was achieved. Accordingly, in many countries VOM is used as one of many possible means for achieving reconciliation (see below).

In this section, we have sought to compile a general overview of how widespread VOM services are in Europe (not to be mistaken with there being nationwide legislation in theory). According to the national reports, services that offer VOM can be found in all countries covered in the study with the exception of *Northern Ireland*, however with strongly varying degrees of national coverage. In fact, the number of countries in which all regions can provide VOM-services is in fact small (*Austria*, *Belgium*, the *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Hungary*, *Latvia*, the *Netherlands*, *Norway* and *Poland*). The remaining countries, by contrast, have local or regional initiatives run by research teams, NGOs or state agencies in certain regions of the country, that vary significantly in their geographic scope.

61 See *Council of Europe* 1999.

62 *Liebmann* 2007, p. 27.

63 See for instance *Bazemore/Umbreit* 2001.

Table 6: Availability of providers of Victim Offender Mediation Services according to degree of geographic coverage

Country	Nationwide availability of VOM services	Regional availability of VOM services
Austria	X	
Belgium	X	
Bosnia and Herzegovina		X
Bulgaria		X
Croatia		X
Czech Republic	X	
Denmark	X	
England and Wales		X
Estonia		X
Finland	X	
France		X
Germany	X	
Greece		X
Hungary	X	
Ireland		X
Italy		X
Latvia	X	
Lithuania		X
Macedonia	X	
Montenegro		X
The Netherlands	X	
Northern Ireland		X
Norway	X	
Poland	X	

Country	Nationwide availability of VOM services	Regional availability of VOM services
Portugal		X
Romania		X
Russia		X
Scotland		X
Serbia		X
Slovakia		X
Slovenia		X
Spain		X
Sweden	X	
Switzerland		X
Turkey		X
Ukraine		X

A great degree of variation can also be found in terms of how VOM has been implemented, for instance in terms of the agency or body responsible for providing the service infrastructure (NGOs in *Belgium*, the NGO "Centre for Common Ground" in *Ukraine*; Probation Services in *Austria* (NEUSTART) and *Latvia*; social services like in *Finland*, *Montenegro* and *Estonia*; private services like SiB in the *Netherlands*, or a mixture thereof as is the case in *Germany*, *Romania*), who the mediators are (volunteers with training like in *Norway* and *Finland*, professionals like in *Austria*, trained probation officers like in *Hungary* and *Latvia*, or a mix thereof as is the case in *Belgium*) and also the procedures that are in place for referrals between the agencies and services involved.

VOM is linked to the criminal justice system in a number of ways throughout Europe. In most of Europe, access to VOM is determined through the discretionary decision-making of prosecutors, courts or other criminal justice agencies who refer "suitable" or "appropriate cases" in the context of their diversionary and sentencing powers, or who take previous VOM into consideration in the context of those powers. Thus, in the interest of proportionality, in these countries there are usually statutory limits on the kinds of offences that can be referred to VOM, usually limited to offences that can attract a custodial sentence of up to three or five years, that are often applicable not only to VOM but to diversion in general.

In some countries, the law makes explicit mention of VOM as a means for diversion or as a court measure. In *Austria*, for example, VOM is one of several options within a pre-court and court diversion scheme for offenders of all ages (the other options being Community Service and probation). There, VOM can be applied in cases of offences for which the maximum penalty does not exceed five years, the offender has assumed responsibility for the offence and both parties voluntarily consent to the mediation process. Successful participation in VOM results in the case being closed. In others, VOM can enter into the criminal justice system as a means of achieving "settlement", "agreement" or "reconciliation" in the context of legislative provisions governing diversion. For instance in *Finland*, achieving reconciliation through mediation can be grounds for non-prosecution, court diversion or a mitigation of sentence. In *Romania*, VOM is applicable nationwide (for juveniles and adults) in cases of "complainant's crimes" (so too in *Finland*), as well as certain minor crimes specified in the Mediation Act to which the provisions governing non-prosecution due to "reconciliation" apply. Furthermore, the prosecutor can waive prosecution in cases where a fine or imprisonment for up to seven years is provided and the offender has made efforts to remove or diminish the consequences of the offence.

However, not all countries in Europe condition access to VOM on the fulfilment of certain legal requirements/conditions (offence types, offence severity, offending history etc.) at certain stages of the process. Instead, a small handful of countries (*Belgium*, *Denmark*, *Finland*, the *Netherlands*, *Sweden* and *Romania* to a certain degree) follow a more victim-oriented approach to VOM. What stands out in these countries is that the use of VOM is not necessarily linked to the criminal procedure – instead, decision-makers (police, prosecutors and courts/judges) offer to victim and offender to refer them to mediation as a general service. The offender is usually not *guaranteed* the benefits of diversion or mitigation when VOM has been "successful". In the majority of cases, criminal proceedings and sanctioning shall ensue for the offender, regardless of whether or not VOM ends in an agreement or whether that agreement is fulfilled.

In the *Netherlands*, for instance, VOM is provided nationwide as a service to all victims and offenders of all ages, regardless of offence severity. The outcome of VOM only comes to the attention of the courts if offender and victim agree to share that information, and courts are in no way obliged to take it into consideration in their decisions. In *Denmark*, too, § 4 of the Code on VOM explicitly states that "*VOM does not replace punishment or any other court decision as a consequence of a crime*", but *can* be taken into consideration as a mitigating factor in sentencing. As in the *Netherlands*, the availability of VOM in *Denmark* is not dependent on the course of the criminal procedure. VOM can be applied before or after sentencing (or at any later date if the parties so desire) and is not subject to limitations in terms of eligible offences.

Overall, it can safely be stated that VOM is widespread in Europe when it comes the number of countries that actually provide for it. However, the spread of availability of actual VOM services in those countries varies tremendously, and is in fact geographically constrained in all but a handful that provide them on a nationwide scale. In practice, VOM comes to be used in the context of resolving minor forms of criminality through diversion – only rarely are no legal limitations on eligible offences or offenders in place, and is predominantly used more in cases of young offenders, though provision for adults appears to be on the increase.

3.3 Conferencing

Family group conferencing was first developed in the late 1980s in New Zealand in the context of seeking to address difficulties in the way young people (those from a Maori background in particular) perceive and experience criminal justice.[64] "*The model sought to develop a more culturally sensitive approach to offending, through placing particular emphasis upon the desirability of including victims, offenders and communities in rectifying harm caused by criminal behaviour.*"[65] In the following decades, this model served as a template for conferencing initiatives in Australia, the USA and Canada. As we shall see, so far it has gained entry to European criminal justice contexts to a lesser extent.

Just as is the case with the overall concept of RJ, finding a definition of conferencing that everyone agrees on is a difficult task. "*[It is] indeed a very malleable mechanism and there are […] as many types of conferencing as there are crimes or cultures.*"[66] Rather, it is to be regarded as a process for resolving (criminal) conflicts that reflects certain values and ideals that recur in the vast majority of definitions and schemes in Europe and indeed all over the world. *Zinsstag/Teunkens/Pali* provide the following description of conferencing:

> "*Painting with a broad brush, conferencing consists of a meeting, taking place after a referral due to an (criminal) offence. The condition […] for it to happen is that the offender admits (or does not deny) guilt and takes responsibility for the crime. The meeting will be primarily between the offender, the victim (but it should never be an obligation for him/her), their supporters and a facilitator. Subsequently a number of other individuals may also take part, depending on the scheme or crime, such as a representative of the police, a social worker, a community worker,*

64 *O'Mahony/Doak* 2009, p. 175; *Zinsstag/Teunkens/Pali* 2011, p. 45; *Hayes/Maxwell/Morris* 2006.

65 *Doak/O'Mahony* 2011, p. 1,736.

66 *Zinsstag/Teunkens/Pali* 2011, p. 18; see also *Zinsstag/Vanfraechem* 2012.

a lawyer etc. After a period of preparation, the assembly will sit together and discuss the crime and its consequences. They will try to find a just and acceptable outcome for all, with an agreement including a number of tasks to achieve for the offender in order to repair the harm committed to the victim, the community and society in general."[67]

Maxwell/Morris/Hayes[68] state that conferencing:

"*emphasizes addressing the offending and its consequences in meaningful ways, reconciling victims, offenders, and their communities through reaching agreements about how best to deal with the offending, and trying to reintegrate or reconnect both victims and offenders at the local community level through healing the harm and hurt caused by the offending and through taking steps to prevent its recurrence.*"

Thus, while mirroring key values of VOM, conferencing differs from VOM insofar as there is a much stronger focus on the community element of the conflict involved,[69] not least represented by the great number of participants involved in the process.[70]

Looking at the European landscape, it quickly becomes evident that the vast majority of countries that do provide forms of restorative conferencing as a means for responding to offences do so on an experimental, localized basis. Conferencing is provided on a nationwide scale only in *Belgium*, *England and Wales* (with major reservations), *Ireland*, the *Netherlands* and *Northern Ireland*. Local restorative conferencing initiatives were reported to be in place in *Germany*, *Latvia*, *Hungary*, *Austria*, *Ukraine*, *Poland* and *Scotland*. These experiments have been implemented in varying fashions and are tied to the criminal justice system in different ways and to different degrees, however being provided almost only in cases of offending by young people (and in some cases, like for instance *Germany*, by young adult offenders).

In *Ireland*, conferencing is available in the juvenile justice systems at two stages. Firstly, since 2001, in the context of an elaborate police diversion scheme, young offenders aged under 18 can be referred to a restorative conference in the context of a "formal warning". It need be noted that there are no formal legal restrictions to the types of offences that are eligible for such diversionary restorative conferences. They have in fact in the past been conducted for cases of robbery, sexual assault, arson and serious assaults. Instead, it

67 *Zinsstag/Teunkens/Pali* 2011, p. 18.

68 *Maxwell/Morris/Hayes* 2008, p. 92.

69 *O'Mahony* 2008.

70 *Van Ness/Strong* 2010, p. 29; see also *Zinsstag/Vanfraechem* 2012.

is for the police to decide which cases are appropriate for diversion *per se*, and in turn which diversionary route they should take. Such decisions shall naturally take the public interest in prosecution into consideration. Where the offender assumes responsibility for the offence and voluntarily consents to participate in a conference, said conference is convened at the local police station, facilitated by a specially trained police officer. Parents, guardians, friends, supporters, social workers and representatives from local authority agencies (education, health for instance) are eligible conference participants, as are the victim and his/her family and supporters where the victim consents. Following exchange and discussion the aim is for all participants to actively participate in the drafting of a conference plan. Where such a plan is agreed, the police drop the charge. Conference plans cannot be enforced. At the court-level, since the Children Act 2001, where a juvenile has not been diverted from prosecution, but a court considers that a conference may be appropriate, the Children Court may direct the Probation and Welfare Service to convene a family conference. As is the case with conferences at the police level, there are no restrictions on offences that are eligible for conferencing, and the key requirement is that the offender accepts responsibility for the offence, i. e. there is agreement on the facts of the case. The circle of participants is the same as in the case of conferences at the police level, as is the outcome to which the process aspires (a conference plan). Court-ordered conferences differ from diversionary conferences though in that they are facilitated by specially trained probation workers rather than police officers. Furthermore, conference plans are subject to approval by the court, and non-compliance results in the re-initiation of court proceedings. Compliance with the plan results in the charge being dismissed.

In *Northern Ireland*, a model of statutory youth conferences was introduced in 2002 following major criminal justice reform in the wake of the Good Friday Agreement of 1998 that sought to raise confidence and trust in the justice system following decades of sectarian and political violence.[71] There, prosecutors can refer cases to the Youth Conference Service for a "diversionary youth conference" if the young person admits guilt and thus assumes responsibility for the offence and voluntarily consents to participate in the conferencing process. As light forms of criminality are targeted by the police diversion system, such diversionary conferences at the level of the prosecutor are intended for offences of a more increased severity and/or for offenders who have previously come into contact with the criminal justice system. At the court level, youth courts are statutorily obliged to refer young offenders who admit guilt and voluntarily consent to participate in the conferencing process to the Youth Conference Service for a so called "court-ordered youth conference." In terms of offence severity, the only restrictions that apply are that offences carrying a mandatory

71 For an overview of the developments in the juvenile justice system in *Northern Ireland*, see *O'Mahony* 2011; *Chapman* 2012; *Zinsstag/Chapman* 2012.

life sentence when committed by adults, "grave crimes" (such that carry a maximum penalty of 14 year's imprisonment or more when committed by an adult) and certain terrorist crimes are not automatically referred to conferencing. Overall, this allows for a rather wide range of offence severity to be referred to conferencing, one that is significantly wider than is provided for by the principle of opportunity at the prosecutor's level in most countries that offer VOM.

In *England and Wales* an approach has been adopted that at first glance appears to closely resemble the court-ordered conferences of *Northern Ireland*. In the context of so-called "Referral Orders" (introduced by the Youth Justice and Criminal Evidence Act 1999) youth courts are obliged to refer all young offenders who are convicted for the first time and who plead guilty to the offence(s) in question to a so called Youth Offender Panel. The panel, consisting of community volunteers, the offender, his/her family members and the victim (where the latter agrees), reflect on the offence and draft a Young Offender Contract in which it is stipulated how the offence should be responded to. Among other elements, these contracts entail the making of reparation to the victim (where the victim consents) or to the community, but also statutory supervision and other obligations and prohibitions. Failing to comply with the referral order is a punishable statutory offence. What makes the Referral Order problematic and thus compromises its truly restorative value is that victim participation appears to be a secondary consideration, with actual victims only attending in 13% of cases, and with reparation being made to the actual victim only in 8% of cases. Rather, *Jonathan Doak* points out in the *English* report that the Referral Order can be regarded as an example for a noticeable trend in parts of Europe, in that the label "Restorative Justice" is applied to measures and processes that in fact can only be marginally regarded as such, because the term sounds progressive and has come to be regarded as a "selling point" for new forms of intervention.

In *Belgium* conferences can be recommended at the court level, albeit also limited to juveniles. Similar to *Northern Ireland*, in *Belgium* conferencing – besides mediation – is "*considered to be the primary response to youth crime*".[72] What stands out in *Belgium* though is that courts are obliged to offer conferences in all cases in which a victim has been identified regardless of offence severity. Likewise, successfully fulfilling any agreements stemming from the conference need not automatically result in the case being closed or there being no further form of intervention that seeks to reflect public interest in how crimes are responded to. The focus is thus on providing the parties to the offence an opportunity to determine through voluntary participation and active involvement in the process how they feel their conflict should be resolved. If this outcome suffices to satisfy the public interest in how the offence is responded to, there need not be any further action on behalf of the state.

72 See the report on *Belgium* by *Ivo Aertsen*.

In the *Netherlands* "Own Strength" conferences are available nationwide, having first been initiated as a pilot project in the mid-90s. They are employed for the purpose of repairing harm, reintegrating offenders and reducing the likelihood of reoffending. There are no fixed limitations in terms of eligibility: in principal anyone involved in a conflict can sign up for a conference, regardless of offence or age. The only true precondition is that both victim and perpetrator are willing to participate voluntarily. The circle of participants includes representatives of the social contexts of both victim and offender (i. e. friends, family members, teachers, social workers). The aim of the conference is that the participants actively and mutually agree on a conference plan or action plan, the fulfilment of which is monitored by the Own Strength Centre. What stands out about the approach used in the *Netherlands* is that, as is already the case with VOM, Own Strength Conferences, too, exist completely independently of the criminal law – conference outcomes usually have no bearing on the penal process, unless victim and offender mutually agree to forward the outcome of the conference to the judge, who then in turn has to decide on whether or not he/she takes that outcome into consideration at all. No promises about consequences for the penal process are made in order to secure the voluntariness and own initiative of the perpetrator. In this regard, the strategy followed in the *Netherlands* could be regarded as being a victim-oriented.

Moving from nationwide to local coverage, a number of pilot initiatives can be observed. In *Germany*, a pilot study initiated in 2006 in *Elmshorn* sought to provide a restorative practice at the court level that is applicable to more serious forms of offending by juveniles and young adults, like assault, robbery, blackmail and burglary.[73] The circle of participants is wider than in mediation – beside juvenile and young adult offenders, victims and community members as well as police officers are invited to participate. After charges have been filed, juvenile judges refer cases to conferencing that they consider appropriate, so long as the prosecutor agrees. In the course of the conference, victim and offender seek to find a mutual solution to the offence that is subjected discussion among all participants. If all participants agree, a written conference agreement is formulated and signed by all. This agreement is then forwarded to the judge and the prosecutor. They will be informed about the fulfilment of the agreement by the mediators. Where the agreement is fulfilled, the case may either be dropped or the court can take it into consideration in sentencing as a mitigating circumstance.[74] The conferencing model is based on the *New Zealand* model of Family Group Conferencing and the *Belgian* Conferencing model Hergo (*Herstelgericht Groepsoverleg*). The aim of conferencing in this model is to strengthen community relationships and to contribute to crime prevention.

73 See *Hagemann* 2009, pp. 236 ff.

74 See *Hagemann* 2009, pp. 238 ff.; *Blaser et al.* 2008, pp. 27 ff.

A number of other pilots and local initiatives are still ongoing, and have in fact only been in place for a short period of time. In *Austria*, for instance, a two-year pilot has been underway since Spring of 2012 that seeks to provide different forms of conferencing for juvenile offenders and their victims: "reparation conferences" involving both victims and offenders; conferences without direct victim involvement but with other family and community representatives that seek to help juveniles in socially problematic situations; and conferences that seek to foster the reintegration of offenders following release from prison. The project is being carried out by the Institute for Criminal Law and Criminology at the University of Vienna and is evidence-based in that it is accompanied by continuous evaluation. In the report on *Poland*, too, mention is made of experimental conferencing schemes having been implemented in Warsaw. Here, too, first outcomes, experiences and evaluations have yet to be published, so it remains to be seen how they function in practice, and whether or not they may be expanded to a greater degree of geographical coverage in the (near) future.

The reports from *Hungary* and the *Netherlands* indicated that pilot projects have been introduced that seek to incorporate conferencing into the context of prisons and/or youth detention centres. In the *Netherlands*, conferencing was introduced in a juvenile detention centre for girls aged 12-24 years with severe conduct problems in 2002. In the course of the conferences, victim and offender along with supporters meet in person to have a restorative discourse. The focus is on this process itself, rather than on achieving an action plan or a particular outcome that is to be delivered.

In the *Ukraine*, conferences have been introduced on an experimental basis in juvenile correctional facilities in *Lviv*. The main purpose of these circles was to familiarise juveniles with restorative approaches, to foster victim awareness and empathy, and support them in and facilitate their return to their families and communities. Victim participation is not foreseen in this model, but nonetheless the focus of the project and the outcomes it aspires to can by all means be regarded as restorative practices.

In summary, according to the national reports at hand, forms of conferencing are a particularly rare breed in Europe, being stated in only 13 of the 36 national reports submitted (see *Table 7*). This can to a certain degree be attributed to the fact that European international standards predominantly focus on mediation. Also, compared to mediation, conferences are far more complex processes that can last for several sessions, as they (depending on the implementation of the scheme in question) seek to involve a significantly larger number of participants in the process. This makes the development of protocols and the effort involved in preparing conferences by far more time consuming (for all involved), and thus potentially more expensive than mediation. In turn, this may make it difficult to justify applying conferencing in minor cases.

Table 7: Countries providing forms of conferencing according to geographical availability

Country	Nationwide availability	Regional availability
Austria		X
Belgium	X	
England and Wales	X	
Germany		X
Hungary		X
Ireland	X	
Latvia		X
The Netherlands	X	
Northern Ireland	X	
Norway		X
Poland		X
Scotland		X
Ukraine		X

In fact, interestingly, the case studies presented above leave the general impression that conferencing is sought to be used in cases of more serious offending, and is thus, when it is provided for, frequently available as an option at the court level. Several countries reported that conferences were held for serious offences like robbery, sexual assault or burglary. Another clear commonality is the fact that, in practice, conferencing is predominantly used in the field of juvenile justice – only the *Netherlands* stated that conferencing was open to all age groups, and the *German* pilot in Elmshorn also included young adult offenders aged 18 to under 21. This focus on young offenders is not least due to the perception that young people are more likely to carry a positive reintegrative influence from the process due to their continuing mental and social development, and the number of agents that (can) have a positive influence on them. In closing, research and experiences with conferencing from these countries and also overseas indicate that it is indeed a viable means for resolving criminal cases, as is underlined by high rates of participant satisfaction and promising rates of recidivism.[75]

75 See *Sections 5* and *5.2.3* below.

3.4 Peacemaking circles

One form of restorative practice that is even more seldom in Europe are so-called "peacemaking circles".[76] A peacemaking circle is an alternative, inclusive and non-hierarchical approach to conflict resolution that has its origins in ancient tribal conflict resolution rituals.[77] *Canada* can be seen as the birth place of peacemaking circles, where they have been used for a long time by First-Nation groups as a means of resolving conflicts.[78]

Compared to other restorative practices, peacemaking circles aim to address even broader levels of harm by involving a larger spectrum of people affected by the crime committed.[79] "*The most important difference between the circle, the conferencing and mediation model is that in addition to communities of care, members of the wider community and state officials (police, prosecutors, probation officers etc.) are also present.*"[80] This serves to delineate circles from victim offender mediation, in which mediated discourse and exchange only occurs between the direct parties to the offence. Furthermore, a major difference between circles and conferencing lies in their differing foci. Conferencing tends to be implemented in a fashion that places particular emphasis on the family context. Peacemaking circles by contrast seek to strongly and widely involve the community by actively involving representatives from various facets of social life in the circle meetings.

"Modern" peacemaking circles involve multiple procedural steps or phases, usually divided into "case selection", "healing circles", "sentencing circles" and "follow-up circles".[81] Usually, case selection occurs through cooperation between local justice agencies and community justice committees or panels. Once a case has been deemed appropriate for a circle, the next stage is the "healing circle", at which the facts of what has happened are discussed, and all participants share their views and feelings. "*If the discussion in the healing circle proves to be constructive, helpful and sincere, then a sentencing circle is formed for the discussion on the elements of a sentencing plan. After all parties have agreed a sentence, follow-up circles, in various intervals, are formed to monitor the*

76 See for instance *Lilles* 2001; *Rieger* 2001; *Pranis/Stuart/Wedge* 2003; *Stuart/Pranis* 2008.

77 See *Gavrielidis* 2007, p. 34.

78 See *Stuart/Pranis* 2008, p. 121; *Dhondt et al.* 2013; *Törzs* 2013.

79 *Fellegi/Szegõ* 2013, p. 9.

80 *Törzs* 2013, pp. 30 f.

81 See *Gavrielidis* 2007, pp. 34 f.; see also *Fellegi/Szegõ* 2013.

progress of the offender."[82] Circles can tie in to the criminal process at virtually any stage, be it the pre-trial level or the court level.

In September 2011, the University of Tübingen, Germany, began an EU-funded action research project titled "How can Peacemaking Circles be implemented in countries governed by the 'principle of legality'"?[83] The two year project, running from September 2011 to August 2013, sought to introduce local circle pilots in multiple regions in *Germany*, *Belgium*[84] and *Hungary*.[85] "*The project aimed at experimenting with [peacemaking circles] in these three European countries, which have similar legal roots. Furthermore, the objective was to explore whether this method can be implemented into the European legal systems, and if so, how.*"[86] In each country, the partner institutions entered into cooperation with local mediation service providers and established local collaborations in order to hold peacemaking circles in criminal cases, and to simultaneously and retrospectively investigate whether and how such practices can be implemented in countries that are governed by the principle of legality and the rule of law.[87]

Research results are expected to be published in early 2015. A "Handbook for Facilitating Peacemaking Circles" has already been published based on the findings from the project.[88] Furthermore, a follow-up study is planned to run from September 2013 to August 2015, in which the circles shall be evaluated in terms of participant perceptions and attitudes among other issues.

3.5 Community Service

There is widespread provision in the juvenile and criminal justice systems of Europe for forms of community service, which is available everywhere in Europe in some form (see *Table 5* above). In the context of the criminal justice process, community service is primarily used:

1. as a substitute sanction for cases of a specific severity in terms of the term of imprisonment defined by law (*Belgium*, *Bosnia and Herzego-*

82 *Gavrielidis* 2007, p. 35.

83 For information on the project, see *Dhondt et al.* 2013; *Fellegi/Szegõ* 2013; see also the Foresee website, at http://www.foresee.hu/en/segedoldalak/news/592/bf41d09c06/5/.

84 The responsible partner institution in *Belgium* is KU Leuven.

85 The *Hungarian* project partner is Foresee Research Group/National Institute of Criminology.

86 *Fellegi/Szegõ* 2013, p. 10.

87 *Dhondt et al.* 2013.

88 *Fellegi/Szegõ* 2013.

vina, *Croatia*, *Denmark*, *Estonia*, *Finland*, *France*, *Macedonia*, *Norway*, *Portugal*, *Romania*, *Slovakia*, *Slovenia*, *Switzerland*);

2. as an alternative sanction introduced as a stand-alone option with the aim of curbing custody or otherwise providing more "rehabilitative" responses to crime, particularly by young people (*England and Wales*, the *Czech Republic*, *Latvia*, *Lithuania*, *Macedonia*, *Scotland*, *Switzerland*, *Northern Ireland*); and/or;
3. as an educational/alternative measure in juvenile justice as a condition for diversion from prosecution or court punishment (*Austria*, *Belgium*, *Denmark*, *Finland*, *Germany*, *Latvia*, *Macedonia*, *Montenegro*, the *Netherlands*, *Norway*, *Serbia*, *Slovakia*, *Slovenia*, *Spain*, *Sweden*). In *Germany* and *Italy* it is applied for adults only as a substitute sanction for non-payment of fines or as a condition of probation. In some countries it is the primary form of intervention used for responding to the delinquency of juvenile offenders. For instance in *Germany* in 2012, 40.9% of all court sanctions and measures handed down against 14- to 17-years-old juveniles and 18- to 20-years-old young adults were community service. In *Latvia*, in 2011 29% of all court sanctions were to community service. In *Switzerland*, 46.5% of all juvenile cases dealt with by prosecutors or courts ended in community service being ordered in 2010.

There is debate about whether or not there is a definition of RJ that can accommodate this practice. This debate was reflected in the course of the study, as it became clear that for a significant share of authors, community service did not fall within the definition of what they would term "restorative", and thus did not warrant mention or further elaboration in their report (for instance *Austria*, *Belgium*, *England and Wales*, *Denmark*, *Ireland*, *Northern Ireland*, *Norway*, *Finland* and *Sweden)*. The respective authors were asked to add brief statements on whether or not community service is available in their countries, and if so, why they decided not to cover it in detail. The majority of these responses go along the lines of what *Christa Pelikan* stated in her report on *Austria*, namely that community service:

> "*does indeed contain reparation as an important element of restorative justice: reparation performed by the offender for the benefit of the wider community […]. We will not deal with this […] measure in this place. According to our understanding an essential feature of restorative justice is missing, namely the active participation of both the victim and the offender, or the process orientation that is constitutive of restorative justice.*"[89]

89 See the report on *Austria* by *Christa Pelikan*.

Ivo Aersten (writing on *Belgium*) stated that:

> "*... some argue to broaden the scope of restorative justice and to also include – under certain conditions – court imposed reparation orders, community service and even victim assistance. For the sake of clarity, and taking into account definitions promoted through international guidelines, we will limit the Belgian overview to the core types of restorative justice interventions, namely victim-offender mediation and family group conferencing.*"[90]

The definition of "restorative outcomes" contained in Article 3 of ECOSOC Resolution 2002/12 on Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, states that community service can be the result of an agreement stemming from a restorative process. In practice, though, there are not many reports in which it was clearly or explicitly stated that community service is envisaged as an element of such agreements (only *Belgium*, *Bosnia and Herzegovina*, *Northern Ireland*, *Slovenia* and *Portugal* explicitly stated this). In *Spain*, *Latvia*, *Poland* and certain Cantons of *Switzerland*, community service can imply that the offender works for or to the benefit of the victim, which could fall within an outcome-oriented definition of RJ so long as the offender and victim voluntarily consent to it. In *Germany* and *Belgium*, destitute offenders who perform community service can be "remunerated" for their work via a special fund so that they are able to make financial reparation to their victims. In *Belgium*, the fund is sponsored by private donors on the one hand, and by province governments on the other. This way, the community is involved, not only by making means available to the offenders and the victims and by creating opportunities for voluntary work, but also by the operation of a committee that handles the requests for intervention by the compensation fund.

If we look at the kinds of work being performed in the context of community service, several countries state that it is done to the benefit of welfare or humanitarian institutions, charities or persons in need (for instance in *Belgium*, *Bosnia and Herzegovina*, the *Czech Republic*, *Serbia*, *Slovakia*, *Montenegro* and *Switzerland*). Such work is by all means meaningful, aims to reintegrate offenders and fosters a sense of responsibility towards the community, and can be regarded as a form of "community involvement" and delivery of reparation to the society at large. In a very widely drawn "outcome" oriented scope, such practices could be regarded as fulfilling restorative elements.

However, since such particular forms of work are not guaranteed in practice, and since it is frequently employed as a "voluntary" alternative to imprisonment or prosecution, the true degree of "voluntariness" – an essential characteristic of

90 See the *Belgian* report by *Ivo Aertsen*.

restorative thinking – can be questioned, as can its restorative value in general. As *Anette Storgaard* (*Denmark*) writes:

> "*Essentially, the community service order is just a prison sentence that is suspended on the condition that a certain number of hours work are delivered at a certain place with a certain time. Therefore, in the Danish context there are zero grounds for even remotely considering [it] to be restorative in nature.*"[91]

András Csúri (*Hungary*) stated that in practice community service is defined as an involuntary punitive measure. In *Norway*, community service is called "community punishment", similar to the *Community Punishment Order* that had been available in *England and Wales* for juvenile offenders aged 16 or 17 up until its replacement in 2008 by the *Youth Rehabilitation Order*. The *Youth Rehabilitation Order* is an example for menu-based sentencing, in which sentencers can select different requirements to be attached to the order. These requirements are distinguished into punitive, reparative, supervision and rehabilitative elements, and community service falls within the first category. The authors of the *Lithuanian* report stated that while community service:

> "*…usually entails the cleaning of public green spaces, little is done for the victim and no restorative process is involved. While the work can be regarded as a service to the damaged community, overall community service in Lithuania can only sparingly be regarded as a form of restorative practice.*"[92]

In essence, it needs to be borne in mind that, at least according to some commentators, like *Martin Wright* in 1991, "*the central tenet of CS had originally lain in restorative thinking, with punitive elements of community service orders […] [attending] its imposition […] only as by-products of the offender's commitment of time and effort.*"[93] The restorative elements of this measure can be seen in the delivery of reparation to the community in which the offence occurred. This is a very abstract approach. If one applies a narrower lens, and conditions the restorative nature of an intervention on active participation and involvement of the direct parties to a criminal offence and the concept of "healing", then the number of countries in which community service can be regarded as restorative sinks to close to zero. The reintegrative effects that working for humanitarian or welfare institutions, people in need or charities can

91 See the *Danish* report by *Anette Storgaard*.

92 See the report on *Lithuania* by *Skirmantas Bikelis* and *Gintautas Sakalauskas*.

93 See *Wright* 1991, p. 44.

have, especially on young offenders, linked with the fact that the community receives reparation in return, nonetheless allows community service to be classified as a measure with great reparative and restorative potential, so long as it is implemented in the right ways for the right reasons.

3.6 Summary

In summary, when looking at the landscape of RJ and mediation in penal matters today, what becomes clear on first sight is that manifestations of restorative thinking can be found all over Europe.

The most common form of restorative practice from an "encounter"-based perspective is VOM. However, it has been implemented in a plethora of different ways to significantly varying degrees of geographical coverage and thus availability.[94] While 35 out of 36 reporters made reference to the existence of VOM services in their countries at all, only *Austria*, *Belgium*, the *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Hungary*, *Latvia*, the *Netherlands*, *Norway* and *Poland* provide nationwide service coverage. In other countries, for instance *Switzerland* and *Bosnia and Herzegovina*, availability and provisions are different in the different entities that constitute the Federal State. In the vast majority of the remaining jurisdictions, VOM services gain access to the criminal procedure via local and regional partnerships between local service providers (be they government agencies, NGOs or research-teams involved in local projects), and local criminal justice authorities that latch onto the procedure at key stages of decision-making, most prominently in the context of diversion. Accordingly, VOM is regarded as an appropriate practice in cases of less severe offending in most of Europe.

In some countries, the "void" of RJ beyond the pre-court level is filled with conferencing initiatives that are applicable to offences of a greater (or sometimes undefined) severity. However, in contrast to VOM, forms of conferencing are more seldom. Only the reports from *Austria*, *Belgium*, *England and Wales*, *Germany*, *Hungary*, *Ireland*, *Latvia*, *Northern Ireland*, the *Netherlands*, *Norway*, *Poland*, *Scotland* and *Ukraine* referred to there having been experiences with conferencing at any level. Nationwide statutory programmes, though, are only provided for in *Belgium*, the *Netherlands*, *Ireland*, *Northern Ireland* and *England and Wales*. In the remaining jurisdictions, conferencing – like VOM – latches on to the criminal process at key points of diversionary decision-making, and is predominantly limited to juvenile offenders.

There have been some cases in which conferencing has been used experimentally in the context of prisons and youth detention centres. The same also

94 This is a confirmation of findings from previous research into VOM in Europe, see for instance *Pelikan/Trenczek* 2008; *Miers/Willemsens* 2004; *Mestitz/Ghetti* 2005; *Aertsen et al.* 2004.

applies to VOM initiatives. Only 18 of the 36 authors stated in their reports that restorative practices were being used in the context of prisons as means of release preparation, rehabilitation programmes, tools for internal dispute resolution or for fostering a more inclusive climate. However, only very few countries make this a requirement in their legislation and at the same time provide resources and strategies for its implementation nationwide. Rather, experiences have been limited to the experimental level. We return to the potentials for RJ in the context of prisons and detention centres in *Section 5* below.

So overall, in terms of restorative processes, they are provided for in all countries covered in the study, however they have yet to be expanded to a nationwide coverage in most jurisdictions, which in turn is likely to have a negative effect on the quantitative role that they play in criminal justice practice (see *Section 4* below).

Taking a step back, and applying a maximalist, outcome-oriented lens, it becomes clear that virtually all countries covered in the study make legislative provision for the making of reparation or putting right the harm caused by the offence to factor into administrative and judicial decision-making (see *Table 5* above). This occurs most notably at the level of prosecutorial/pre-court diversion, but also (albeit less widespread) in the context of court diversion and sentence mitigation. In some jurisdictions, reference is made to "achieving reconciliation"; others refer to "making reparation" or "effective repentance" as grounds for non-prosecution, non-conviction or sentence mitigation. Thus, overall, "access-points" through which made or making reparation (via any means, including restorative practices like VOM and conferencing) can enter into the equation are widespread in Europe, thus providing a great deal of potential for the use of RJ to be expanded in practice as – to date – in most of Europe, provision of VOM and conferencing services is geographically constrained.

Remaining in the maximalist perspective, the same can be said for different forms of Community Service. 32 of 36 authors stated that Community Service was available in their country (some doing so with great reservations as already described in *Section 3.4* above), however only a select few examples can be regarded as actually having a restorative nature (in that Community Service is performed directly for the victim, a restorative process is involved in determining the kind of work, work is done for welfare or charitable organisations, participation is truly voluntary, work is performed in a non-stigmatizing fashion etc.). At the same time, it needs to be borne in mind that Community Service was initially conceptualized as a restorative practice, and that making reparation to the community at large can indeed be implemented in a fashion that reflect restorative justice values. We return to the potentials of Community Service as a means for increasing the role of RJ in practice in *Section 5* below.

There has been much talk of the "potential" of RJ in the practice of the criminal justice system. Besides the potential of RJ to better meet the needs of victims, offenders and the communities in which offending occurs, potential also

needs to be understood from a quantitative perspective – what role does RJ play in the decision-making practices of criminal justice systems?

4. The role of Restorative Justice in criminal justice practice

As already elaborated in *Section 2* above, in some countries restorative initiatives and/or legislation were introduced primarily as a means of providing alternative procedures and measures in the context of general criminal justice and particularly juvenile justice reform. In others, strengthening the role of victims and reinforcing their rights was the primary driving force. Therefore, the theoretical, ideological role that RJ plays is largely defined by the driving factors behind its introduction, which in turn – despite clear signs of overlap throughout Europe – are dependent on the national context. Accordingly, as we have seen in *Section 3*, the forms of RJ that are available, the ways they have been implemented, how they are connected to the criminal procedure (if at all) and their effects on that process (if any) vary significantly throughout Europe. The same degree of variation can also be observed regarding the extent to which restorative justice initiatives or measures play a quantitative role in the context of criminal justice practice.

4.1 Problems with measuring the role of Restorative Justice in criminal justice practice

Measuring the role that restorative processes, practices and outcomes play in the context of criminal justice practice (in terms of case numbers, and the share they make up of all recorded responses to offending) is not a straightforward task.[95] First and foremost, many authors in the study reported that, in their countries, the state of official statistical data sources is fragmented (*Switzerland*, *Germany*, *England and Wales*, *Ireland*, *Spain*) or entirely lacking (for instance *Bosnia and Herzegovina*, *Bulgaria*, *Denmark*, *Greece*, *Italy*, *Macedonia*, *Norway*, *Romania*, *Scotland* and *Turkey)*. Where official statistical sources are available, the role of RJ can be reflected in such data sources only difficultly. Sometimes all that is registered in official justice statistics is the legal provision that is applied (forms of diversion from prosecution, court or sentencing that can have restorative elements attached as conditions), while the conditions that were attached to that decision (for instance, that reparation be made, community service be rendered, or VOM be undertaken) are not. Equally, statistics do not record the mitigating factors that courts take into account in sentencing. This issue is particularly pronounced when the definition of RJ is drawn widely to include the making of

95 See *Miers/Willemsens* 2004, pp. 155 ff. and *Willemsens* 2008, pp. 22 ff. for some challenges in "measuring" RJ in practice.

reparation or the delivery of restitution to victims without the involvement of a restorative process, as in such cases – unless reparation is made in the context of a statutory intervention or there are special reparation schemes in place whose performance is monitored – reparation as a means of achieving reconciliation often occurs in an entirely unregulated and informal fashion that cannot be measured. Or rather: how reconciliation was achieved, whether reparation was made, is rarely statistically discernible.

In interpreting the available data, the degree of "coverage" always has to be borne in mind. For instance, in many countries the legal "access point" (for instance prosecutorial discretion to drop the case in certain circumstances) is available nationwide, but providers of RJ or VOM services have only been established in certain regions of the country (for instance in *Bulgaria*, *Croatia*, *Ireland*, *Montenegro*, *Serbia*, *Russia* and the *Ukraine*). An example for a need of caution in interpreting data is *Russia*, where 20% of all court cases were dropped due to successful "reconciliation" in 2011 (200.000 in absolute figures). In practice, however, victim-offender mediation or other processes employing impartial facilitators are used only very rarely as their availability is limited to certain geographical or administrative regions.

In practice, unless provided by a monitored state service, the task of counting the frequency to which *restorative processes* like VOM played a role in a case would come down to the service providers of the respective processes in the context of monitoring their own performance.[96] However, in their data they do not always differentiate between the authority or body making the referral or the legislative basis that the referral was based on. Where there are different providers involved, it becomes less likely that the picture is precise or complete or even comparable in itself as they may count in different ways (number of referrals, number of sessions, number of offenders, number of victims etc.). In *Belgium* for instance, depending on the programme, "cases" are counted on the basis of the number of offenders involved, the number of victim-offender relations, or the number of judicial files. Keeping elaborate statistics is a costly undertaking that many smaller VOM initiatives/programmes might have difficulties bearing in the long term.

In some countries, all that is available in terms of data are results from accompanying research or studies linked to individual pilot projects or the like, often dating back a number of years to the beginnings of RJ in the country. For example, in *Denmark* the last study providing a respective insight stated that from 1998 to 2002 there were on average only 40 cases of VOM each year. In *Norway*, the most recent data available are from 2001. Considering the pace of development and expansion in the field of RJ it is quite possible that the state of affairs may well have changed in the meantime.

96 In this regard, see *Vanfraechem/Aertsen* 2010, p. 273.

Finally, the figures provided – whatever the source – do little to give a sense of the true extent to which RJ is used – they are seldom refined to take into account the total population of the country, the total number of offenders brought to justice etc. Therefore, just because an absolute number is high in international comparison, it need not be an indicator for RJ being used more to its full potential. 11,953 successful mediations in *France* (with a 2008 population of over 63 million) do not have the same weight as 2,600 successful mediations in *Slovakia* (with an estimated population of about 5.5 million). Likewise, while 2,469 referrals of juveniles to VOM by the courts sounds like a promising number for less greatly populated countries, in *Germany* it accounted for only 2% of all court sentences in 2011.

4.2 Data on the quantitative use of Restorative Justice in practice

With these shortcomings in mind, overall it can be said that RJ plays a major role in the criminal justice practice of only a small handful of countries. In terms of restorative measures that seek the making of reparation to the victim or the community (an "outcome"-oriented definition of RJ), the statistical situation is bleak (as already explained above). Where data are available, they predominantly cover statutory interventions, most frequently community service. Due to this and the conceptual reservations towards community service stated in *Section 3* above, the number of reports in which data on the use of community service in practice were provided was very small. What can be said, based on the data available, is that in many countries it is used predominantly in the context of juvenile justice. In some it is the primary form of intervention used for responding to the delinquency of juvenile offenders. For instance in *Germany* in 2010, 43.8% of all court sanctions and measures handed down against juveniles were community service. At the same time, its availability for adults is limited to being an alternative sanction for fine-defaulters in order to avoid imprisonment as substitute sanction. In *Latvia*, in 2011 29% of all sanctions against youth were to community service. In *Switzerland*, 46.5% of all juvenile cases dealt with by prosecutors or courts ended in community service being ordered in 2010, compared to just 4.3% among adults.

In terms of restorative processes, the clear leaders are *Finland* – where 9,248 adult offenders and 4,311 juvenile offenders were referred to VOM in 2011 – and *France*, where 11,953 adult offenders successfully participated in VOM in 2010, and 1,294 juveniles did so in 2009 (plus an additional 9,383 reparation orders). Naturally, *Russia's* 200,000 cases that were dropped due to "successful reconciliation between victim and offender" in 2011 would easily trump the Finish efforts, but as already stated above, the share of those cases that actually involved a restorative process cannot be ascertained and is likely to be rather

low considering the restriction of VOM service providers to only a few regions of a very large country. Similar reservations (speaking from a "process"-oriented definition of RJ) regarding the restorative value of the process apply to the 5,622 cases of "reconciliation" in *Lithuania* in 2012. These figures could, however, imply a large number of cases in which reparation was delivered, which according to a wide definition of RJ would be an indicator for a more central role.

In *Austria* (estimated 2008 population: 8.5 million), 6,181 adults and 1,286 juveniles were referred to mediation in 2010 – roughly 5-6% of all juveniles who come to the attention of the prosecution service are referred to VOM. In *Belgium*, about 5,500 juveniles were referred to mediation services in 2011, a further 153 were referred to conferencing by the courts. More than 2,300 adults were referred to mediation in the context of "penal mediation provisions", and a further 3,200 cases were referred to mediation for redress (about 700 of which while the offender was serving a prison sentence). In *Germany* (about 82 million inhabitants in 2008), 2% of all youth court interventions in 2011 were referrals to VOM (2,500 in absolute terms), and a further 3.2% were Reparation Measures. Data on pre-trial referrals are however not recorded, implying that the role VOM plays in *Germany* is higher than the statistics suggest. In *Norway* (about 2.2 million inhabitants in 2008), about two thousand young offenders are referred to VOM each year. By contrast, only about $1/10^{th}$ that number of adults are referred. In *Hungary*, (with an estimated total population in 2008 of 10 million) 3,874 referrals of adults to mediation, and a further 370 juveniles were recorded. In *Slovenia* (2 million in 2008 approx.), in 2011, 1,532 adult offenders and 88 juvenile offenders were referred to mediation. In *Latvia*, a country with a population of around 2.2 million, 450 VOM referrals were made in the first half of 2013. The report from *Slovakia* (with a population of roughly 5.5 million in 2008) stated that 2,600 VOM referrals were made in 2009. 417 referrals to VOM were recorded in *Estonia* (est. pop. of 1.3 million in 2008) in 2011, accounting for 8% of all cases of prosecutorial diversion in that year. The authors from the *Netherlands* (est. pop. 16.5 million in 2008) presented data indicating that in 2011 about 50 restorative conferences and 1,100 VOMs were conducted with young offenders. *Poland* (about 38 million inhabitants in 2008) reported of 3,604 cases of VOM in 2011, and in the *Czech Republic* 1,200 cases of VOM were reported (accounting for 3.5% of all diversions), which appear rather low considering the nationwide provision of services and the population of roughly 10 million people. In *England and Wales*, 33% of all court sanctions are "Referral Orders*"*. The "Referral Order" implies the referral of young offenders who are convicted for the first time upon a guilty plea to a Youth Offender Panel comprising community volunteers, the offender, the victim and other supporters of the parties, who together draft a "contract" that outlines how to respond to the offence and how the offender can make amends. However, speaking in a narrow sense, the restorative value of the *Referral Order* remains

to be discussed, with a victim participation rate of only 12% and only 7% of agreed reparation actually being made to the direct victim.

In the remainder of the countries who were able to provide data, regardless of the source, the annual caseloads are at best in the very low hundreds, and not representative for the whole country due to the localized availability of VOM and other restorative processes/practices. But the picture remains that they are used only sparingly, or rather, not to their full quantitative potential. While no data are available in *Bosnia and Herzegovina*, *Bulgaria*, *Croatia*, *Denmark*, *Greece*, *Italy*, *Macedonia*, *Montenegro*, *Romania*, *Serbia* and *Switzerland* there is an appearance that restorative processes play only a very minor quantitative role according to the authors.

4.3 Trends in the use of Restorative Justice in practice

Based solely on the data provided, there is no clear cut trend in the development of the quantitative role of RJ in the context of criminal justice practice. The numbers of referrals to VOM rose in *Estonia* from 32 in 2007 to 450 in 2011 – in 2007 VOM accounted for 2% of all court sanctions compared to 8% in 2011. *Finland* has witnessed a 35.5% increase in the number of referred adults. In *Germany*, the absolute number of offenders referred to VOM by the courts rose from 1,134 in 2004 to 3,594 in 2010, +317%. *Hungary* (2007: 2,451; 2011: 4,794), *Latvia* (2005: 51; 2013: est. 950; use of Community Service increased from 1.059 to 3.951 in same time span) and the *Netherlands* (2007: 400; 2010: 1,150) reported to have witnessed similar increases. In *Russia* (again to be regarded with caution) the share of juveniles being discharged from criminal liability due to successful reconciliation with the victim has increased dramatically from 3.7% in 2002 to 31.5% in 2011.

In other countries the opposite development can be observed. The absolute number of referrals to VOM decreased in *Austria* by 15.9% for adults and 20.1% for juveniles, parallel to a rise in the use of community service for juveniles. In *Portugal* the absolute number of adults referred to VOM dropped from 224 in 2009 to just 90 in 2011. *Slovakia* reported a decline of 29.8% in the number of referrals to VOM from 2007 to 2009. *Spain*, *Slovenia* and the *Czech Republic*, too, reported similar developments. Besides the expansion of the available alternatives at key stages of the criminal procedure that appear to be more attractive to criminal justice practitioners (see *Section 5* below), many of these countries pointed to the effects of the European economic crisis as being central to these decreases. It is thus likely that their use will increase again once the economic situation has settled.

These absolute figures do not reflect changes in the overall caseloads of the justice system or demographic developments and thus need to be taken more as an indicator than as hard evidence. While these countertrends balance each other out to a certain degree, taking into account the significant number of countries

that were unable to provide data but that have nonetheless witnessed growth in the number of practice initiatives "on the ground" over the past few years, and taking into consideration that many of the countries that have witnessed declines stated to have been affected in particular by temporary economic constraints, it would be fair to conclude that the absolute number of cases in which decision-makers deem RJ appropriate – whatever the reasons – has been on the increase in Europe, but has yet to find its way into mainstream practice in most of the continent.

Finally, it needs to be stressed that a minor *quantitative* role does not automatically imply that RJ is not being used to its full potential, or that the outcomes that are aspired to are not being achieved. Rather, the quality of services, the satisfaction of participants, the reparation of harm and a positive reintegrative effect on the offender should be the primary benchmarks for such an assessment, rather than impressive numbers. Quality of services should not be compromised to increase caseloads.

5. Tapping the potential of Restorative Justice in penal matters

Restorative processes are a promising approach as they provide benefits to all stakeholders in an offence. As *Liebmann* sums up, victims "*can learn about the offender and put a face on the crime; ask questions of the offender; express their feelings and needs after the crime; receive an apology and/or appropriate reparation; educate offenders about the effects of their offences; sort out any existing conflict; be part of the criminal justice process; put the crime behind them.*"[97] At the same time, "*offenders have the opportunity to own the responsibility for their crime; find out the effect of their crime; apologise and/or offer appropriate reparation; reassess their future behaviour in the light of this knowledge.*"[98] There has been a growing body of research-evidence over the last decades that indicates that these outcomes can in fact be achieved in practice, and that make a strong case for regarding restorative practices as promising and desirable means for resolving criminal conflicts and for achieving a number of different outcomes in doing so.

Research has, for instance, measured high rates of satisfaction among victims and offenders who have participated in restorative processes. *Latimer/Dowden/Muise* conducted a meta-analysis on studies that sought to examine more than thirty restorative justice programmes (VOM and conferencing) in terms of effectiveness, which showed that restorative programmes achieved higher rates of satisfaction among both victims and offenders than traditional

97 *Liebmann* 2007, p. 28.

98 *Liebmann* 2007, p. 29.

criminal justice responses.[99] Another meta-study, by *McCold/Wachtel*, came to similar conclusions, indicating elevated levels of satisfaction and perceptions of fairness.[100] These experiences imply that VOM and conferencing can be implemented in a fashion that meets the needs and interests of both victims and offenders very well.

What also emerges from the research literature is that restorative practices are often associated with promising effects on recidivism, as evidenced by a growing pool of research results.[101] Despite certain methodological shortcomings,[102] the overall impression stemming from the studies is that RJ does not have a *negative* impact on re-offending.[103] *Bonta et al.*, who conducted a meta-analysis of restorative programmes, state that "*restorative justice interventions, on average, are associated with reductions in recidivism. The effects are small but they are significant. It is also clear that the more recent studies are producing larger effects.*"[104] A recidivism study conducted in *Northern Ireland* by *Lyness/Tate* (2011) found that court-ordered youth conferences held in 2008 were linked to lower re-offending rates (45.4%) compared to community-based disposals (53.5%) and youth discharged from custody (68.3%).[105] Diversionary youth conferences had a rate of 29.4%, though again, there is a need for caution in weighting these findings due to selection-biases and offender-intrinsic characteristics. A study by *Schütz* covering VOM with adult offenders who had committed minor assaults found that, over a three year period, the reconviction rate for VOM participants was significantly lower than for the control group (14% vs 33%).[106] Finally, research has evidenced that the best outcomes are achieved when a restorative process is involved.[107]

Sherman/Strang point out that RJ also has potential to reduce the costs of criminal justice.[108] On the one hand, restorative practices in the context of di-

99 *Latimer/Dowden/Muise* 2001; see also *Umbreit/Coates/Vos* 2008, p. 56 f.

100 *McCold/Wachtel* 2002. Further studies include *Campbell et al.* 2006; *Braithwaite* 2002; *Umbreit/Coates* 2001; *Umbreit/Coates/Vos* 2008, pp. 56 f.

101 See for instance *Sherman/Strang* 2007; *Shapland et al.* 2008; *Umbreit/Coates* 2001; *Braithwaite* 2002; *Schütz* 1999; *Latimer/Dowden/Muise* 2005; *Bonta et al.* 2008; *Umbreit/Coates/Vos* 2008, pp. 56 f.; *Shapland/Robinson/Sorsby* 2012.

102 In this regard, see *Bonta et al.* 2008.

103 *Aertsen et al.* 2004, pp. 38 f.

104 *Bonta et al.* 2008, p. 117. Small but positive significant effects on re-offending have also been reported by *Bergseth/Bouffard* 2007.

105 *Lyness/Tate* 2011.

106 *Schütz* 1999.

107 *Van Ness/Strong* 2010, p. 43.

108 *Sherman/Strang* 2007, p. 86.

version can reduce court case-loads and thus the expense involved in bringing offences to justice. Furthermore, reducing the number of offenders coming before the courts can have down-tariffing effects on overall sentencing practices, as has recently been experienced in *England and Wales* with the Youth Restorative Disposal and Triage Programmes.[109] These deflationary effects can spread across the entire sentencing spectrum and thus reduce the use of costly custodial sentences.[110] Finally, the potential positive effects on recidivism can imply lower costs occurring to society at large in the future.

In light of these positive experiences with restorative practices, and set against the assumption that RJ is a promising and desirable strategy that achieves the best outcomes when restorative processes are involved, the question arises as to why they play such a peripheral role in the criminal justice systems of most countries in Europe as described in *Section 4* above.

5.1 Recurring problems and challenges

While each country has its own contexts and thus its own specific constellation of problems, both in terms of introducing and also of sustaining initiatives and schemes that draw on restorative values, a number of recurring yet interconnected issues and variables stand out from the reports. These were highlighted further at the first conference meeting held in Greifswald, Germany, in May of 2012, where the project participants met up for the first time. Each author provided a brief overview of the state of affairs of RJ in penal matters in their jurisdiction, and sought to highlight key obstacles.

First and foremost, there is the issue of availability – RJ is not available to all offenders at all stages of the procedure.[111] A large number of stakeholders are denied access to VOM on the basis of the severity of the offence committed, their age, or other statutory or administrative preconditions. Only very few countries provide access to restorative practices regardless of offence severity and age. Overall, RJ practices are used mostly in cases of less-serious offending – options that have been proven as promising in cases of more serious crimes, like conferencing in particular, are the exception in Europe (only five countries provide nationwide conferencing schemes) and are limited to juveniles in the majority of cases. While VOM remains the most widespread restorative practice in Europe today, as already elaborated in *Section 3.2* above, the degree of actual service coverage is very limited in the majority of countries. Therefore, where the preconditions for taking VOM into consideration in decision-making are

109 See the report on *England and Wales* by *Jonathan Doak*. See also *Bateman* 2010; *Horsfield* 2015.

110 See *Horsfield* 2015.

111 As recommended in Article 4 of Recommendation (99) 19.

theoretically met, victims and offenders often have no access to such services. Likewise, while "access-points" have been legislated for virtually everywhere in Europe (diversion, mitigation, community service etc.), in practice only very few regions offer restorative services that latch onto those access-points. Finally, since RJ is predominantly reserved for minor offending, offenders in prisons and youth detention centres, as well as their victims, are unlikely to have had the opportunity to participate in VOM because their crime (or victimization) was too severe.

Another central point of friction is the fact that whether or not available restorative practices come to be applied, offered or taken into consideration is a matter that is usually decided on by judicial and procedural "gatekeepers" at different stages of the criminal procedure (police, prosecutors, courts, prison administrations).[112] On the one hand, this has proven to be problematic because the ideals and values of RJ come to be regarded as being in conflict with the values of retributive justice, to which the decision-makers are more accustomed. For example, according to a *Polish* study among judges, prosecutors and mediators, a considerable proportion of questioned judicial and procedural actors felt that "*restorative justice does not represent the social understanding of justice*".[113] Other countries stated that low uptake of VOM services for instance is connected to prosecutors and courts wishing to retain their "*monopoly on conflict resolution*". In *Austria*, the *Czech Republic*, *Germany* and *Hungary*, it was stated that low use of restorative practices is connected to the availability of other modes of "intervention" that are more in line with traditional understandings of crime and punishment, or that allow a swifter administration of justice. *Van Ness/Strong* state that "*it can seem that inertia has entrenched for good the old ways of thinking and doing in criminal justice.*"[114]

Several reporters indicated that the legislative basis plays a significant role in this regard, in that an unclear, inappropriate legislative basis (or a complete lack thereof) can reduce faith in restorative alternatives and foster a perception of RJ being only of peripheral importance to the criminal justice process. One instance of inappropriate legislation can be found in *Bulgaria*, where the Law on Mediation states that the offence types that can be referred to Mediation shall be defined in the Code of Criminal Procedure: however, the Code of Criminal Procedure has not been amended to accommodate this provision, making it a legislative "dead-end" that provides no guidance for decision-makers. The same applies to certain Cantons of *Switzerland*.

112 Reporting on the *German* conferencing pilot in *Elmshorn*, *Hagemann* indicates that the primary problem that the pilot faced was a lack of referrals. *Hagemann* 2009, p. 243.

113 See the *Polish* report by *Wojciech Zalewski*.

114 *Van Ness/Strong* 2010, p. 141.

On the other hand, some authors pointed to the risk of "institutionalization" that legislation brings with it, in that the values underpinning RJ could come to be "watered down" so as to be able to be accommodated within the criminal justice system.[115] In practice, this implies that certain key ideals and values that underpin RJ are sacrificed to the benefit of achieving outcomes that are geared more towards the aims of criminal justice rather than RJ.[116] *Umbreit* speaks of the "risk of McDonaldization" in this regard.[117] The assumed conflict between restorative and retributive aims, and the negative consequences that adaptations to RJ to fit it into the criminal justice system can have were the reasons stated by the legislators in the *Netherlands* as to why they sought to keep VOM separate from the criminal justice system. In the juvenile justice system of *England and Wales*, with the Referral Order RJ has been statutorily implemented in a fashion that is geared less to actually achieving mutually negotiated restorative outcomes, and rather towards effecting the monetary compensation of the community and fostering faith in the criminal justice system while appearing to be progressive due to using the "restorative label". Likewise, *David O'Mahony* from *Northern Ireland* indicates in his report that the availability of restorative options could indeed result in offenders being subject to "interventions" that are in fact disproportionate (net-widening). Referring to experiences with restorative police cautioning, *O'Mahony* indicates that the perceived attractiveness of restorative schemes could move decision makers to make use of them, even though such a degree of intervention is not necessary, stating that in some cases, conferences were organized as a response to the theft of a candy bar or a bottle of lemonade.[118]

Another recurring problem according to the national reports is that there is a lack of knowledge, information and understanding among practitioners on the benefits of RJ for victims, offenders and communities, implying that – where forced to decide between a restorative and a non-restorative measure – practitioners are likely to fall back on what they know for lack of knowing better. However, this problem extends beyond practitioners and encompasses a large number of persons and authorities, for instance legislators, politicians, prison administrators and also the general public, who all have a role to play.[119]

The question thus arises: what can be done to counter these obstacles? What steps can be taken to move RJ from the margins of criminal justice practice? And how can this be done without compromising its values to the benefit of

115 See in this regard in particular *Aertsen/Daems/Robert* 2006 with further references.

116 See *Vanfraechem/Aertsen* 2010, p. 274.

117 *Umbreit* 1999.

118 *O'Mahony/Chapman/Doak* 2002; *O'Mahony/Doak* 2004.

119 See in particular *Pali/Pelikan* 2010; *Van Ness/Strong* 2010, pp. 141 ff.

criminal justice measures of effectiveness? At the second project conference in Gdańsk, Poland, held in May of 2013, the project participants congregated to exchange their views and experiences in this regard. In the course of the talks and discussions, three factors (simplifying somewhat) came to be prominent: improving the availability of RJ *per se*; the need for an evidence-based approach to developing practice and policy; the need to raise awareness as to the benefits of RJ for victims, offenders and communities versus traditional criminal justice processes and responses, and thus build support for RJ at various levels of society.

5.2 The availability of restorative practices in the criminal justice system

The first suggestion for increasing the role that RJ plays in the practice of the criminal justice system is a more than logical one: to improve or provide access to restorative practices at all stages of the criminal procedure, as recommended in Article 4 of Council of Europe Recommendation Rec (99) 19 concerning Mediation in Penal Matters. This can be achieved on different levels that are subsequently addressed in the next four subchapters:

1. by reforming the legal preconditions or restrictions that determine eligibility for restorative practices (*Section 5.2.1*);
2. by introducing new statutory or non-statutory forms of restorative practice in the form of conferencing and circles (*Section 5.2.2*);
3. by seeking to implement community service in a less punitive and more inclusive, restorative fashion (*Section 5.2.3*); and
4. by expanding the use of restorative justice measures in the context of prisons and detention centres (*Section 5.2.4*).

5.2.1 Widening the applicability of Restorative Justice

In the majority of countries in Europe, the legal provisions that govern when and how reparation or reconciliation can factor into the criminal procedure set certain preconditions that have to be met. In most countries, VOM and reparation come into play in the context of diversion, and their applicability is thus determined by ideas of proportionality and public interest in prosecution. Accordingly, they are restricted to offences that can only attract a certain sentence to imprisonment (usually three to five years), to "complainant's crimes" (crimes in which the victim has to file charges to initiate the criminal proceedings) or certain forms of minor or less severe offending that are defined in legislation. Such an approach excludes more severe crimes from the outset, and places principles of proportionality and due process before the interests of the victim.

Many victims who might be interested in VOM will be excluded because they have been victimized "too severely".

Similarly, RJ plays a much more significant role in responding to juvenile offending, not least because of the rehabilitative, educational and reintegrative focus of many juvenile justice systems in Europe today[120] (to which RJ can cater very well), and because the strict principle of legality has been loosened much more often for young offenders than for adults, thus providing more "access-points" for RJ to enter into the system. However, experience has shown that promising outcomes can also be achieved with adult offenders and their victims,[121] so that it appears desirable to seek ways to implement restorative practices for persons who have reached adulthood. While juveniles are overrepresented when it comes to their share of all offending, it does not change the fact that there is a large absolute number of conflicts that cannot be resolved via restorative approaches because the offender was too old – a circumstance for which the victim should not be blamed, but essentially often is. Restorative justice should not be limited to juvenile offenders, as "*restoration to the victim is the starting point for restorative justice.*"[122]

Naturally, lifting or loosening eligibility restrictions that are based on offender characteristics (in terms of the offence committed, the age of the offender etc.) can enlarge the total eligible population substantially, thus increasing the likelihood that RJ comes into play. One option would indeed be to lift these restrictions and to make VOM, for example, a general service that is offered to all victims and offenders once the offence comes to the attention of the authorities. Such an approach is followed in the *Netherlands*, *Denmark* and *Finland* for instance. However, in doing so there is a need to make legislative provision so that participation in VOM or the making of reparation must be taken into consideration, as is demanded in Article 10 of Council Framework Decision of 15 March which states that "*each Member State shall ensure that any agreement between the victim and the offender reached in the course of mediation in criminal cases shall be taken into account*".[123]

In the *Netherlands* and in *Denmark*, agreements reached through restorative processes have little to no bearing on the criminal process at all, as the legislator refused to deviate from traditional processes and punishments. It is anticipated that the lack of "incentives" for the offender will enhance the degree of his voluntariness and filter out cases of tactical remorse, i. e. those persons who

120 See *Dünkel et al.* 2011; see also *Dünkel/van Kalmthout/Schüler-Springorum* 1997; *Albrecht/Kilchling* 2002; *Doob/Tonry* 2004; *Cavadino/Dignan* 2006, *Junger-Tas/Decker* 2006; *Muncie/Goldson* 2006; *Hazel* 2008; *Junger-Tas/Dünkel* 2009.

121 For instance in Austria, see *Schütz* 1999; or in the UK, see *Shapland et al.* 2008.

122 *Willemsens* 2008, p. 8.

123 *Council of Europe* 2001.

would not have participated in VOM if there had been no "benefits". It is a widespread concern that the voluntariness of an offender's participation can be compromised or doubtful when mediation has a significant bearing on the further course of the criminal procedure. In the vast majority of countries, participating in VOM (in some countries regardless of the outcome of the process) can have the effect that prosecutors refrain from charging offenders before the court, that courts decide not to impose punishment or that the sentence they do impose is mitigated so as to take the offender's participation in VOM into consideration. However, at the same time this could be regarded as reaffirming the conflict between offender and the State while doing little to improve the standing of victims in criminal proceedings.

In *Finland*, too, there is no obligation to take participation in VOM into account in determining the appropriate state response to the crime. *Tapio Lappi-Sepällä* from *Finland* pointed out that this could indeed be regarded as having a net-widening effect, in that offenders face up to their actions and responsibility, yet can nonetheless be subjected to criminal sanctions. Essentially, while doing so can increase the qualitative value of and "restorativeness" of the process and the outcomes resulting from that process, it also serves to confirm that the conflict is indeed also one between the offender and the state.

5.2.2 Implementing conferencing and circles particularly for more serious types of offending

A further step towards expanding the availability of RJ in the criminal justice system would be to introduce practices that seek to expand the applicability of RJ to more serious offences at the court level. A recent, albeit emerging, trend in Europe has been the increased attention that is being devoted to forms of conferencing.[124] Likewise, experiments (action research) with so-called "peace-making circles" or "sentencing circles" have been initiated a small handful of countries, that bear potential for being an adequate approach to resolving more complex, often more serious offence-related conflicts.

The growth in the implementation of conferencing schemes has come as a consequence of positive experiences with conferencing models in New Zealand and Australia since the 1990s that have since spread to Europe and North America, most recently in wide ranging youth justice reforms in *Northern Ireland*.[125] There, a statutory conferencing system is in place that makes conferences the primary course of action for all young offenders. Similarly, in *Belgium* conferencing has been introduced on a nationwide scale as a means of

124 For a comprehensive analysis and investigation into conferencing, see *Zinsstag/Vanfraechem* 2012.

125 See also *Chapman* 2012; *Zinsstag/Chapman* 2012.

court-level diversion in youth justice – there, too, courts are obliged to offer conferences in all cases in which a victim has been identified, regardless of offence severity. Overall, however, besides these two countries, only the Republic of *Ireland* and the *Netherlands* offer conferencing on a nationwide scale. Some could say that the same applies in *England and Wales*, but as already elaborated above, due to the lack of focus on victim participation and the resulting low participation rates, the *Referral Order* can only difficultly be regarded as a restorative practice.

Conferencing has been the subject of numerous evaluations that have in sum pointed to high levels of participant satisfaction, long-term economic saving potential and promising recidivism rates.[126] In addition to these potential advantages, conferencing at the court level has also come to be regarded as a viable alternative or additional element for responding to offences of a greater severity than can usually be covered in the context of diversion, the realm in which VOM predominantly finds application in Europe.[127] Furthermore, since conferencing has thus far usually been limited to juvenile offenders, projects should be brought underway to investigate how such practices can appropriately and adequately be expanded or specifically target adult offenders, potentially of certain types of crime.

It will likewise be interesting to see how the EU-funded project "Peacemaking Circles in Europe", headed by the University of Tübingen (see *Section 3.4* above), is evaluated, i. e. what experiences can be drawn from its findings and how it can serve as a catalyst for further expansion of such practices both within the participating countries (*Belgium*, *Germany*, *Hungary*) and beyond. Research results are expected for early 2014, and a second project phase focusing on evaluating the pilots in terms of participant perceptions and attitudes, follow-up with participants etc. is planned to run from September 2013 to August 2015.

5.2.3 Reforming community service

In Europe today, legislative provisions that govern community service are available virtually everywhere (see *Section 3.5* above). It is used in different contexts and ways – sometimes as a substitute sanction for offences a certain severity (in terms of the term of imprisonment defined by law), as an alternative sanction introduced as a stand-alone option as a means of avoiding custody particularly for young people, and/or as an educational/alternative measure as a condition for diversion from prosecution or court punishment.

126 See for instance *Campbell et al.* 2006; *Sherman/Strang* 2007; *Bonta et al.* 2008.

127 In *Northern Ireland*, *Campbell et al.* (2006) found that 26% of offences in conferencing were either serious or very serious offences.

However, regardless of the precise role it plays in the criminal procedure and the sanctioning system, as it stands in Europe today, community service can only rarely be regarded as a restorative practice. This is due to the fact that in most countries, it serves as a "voluntary" alternative to prosecution or custody that is intended to serve retributive rather than reparative or restorative ends. Only four country reports explicitly stated that community service could be an element of agreements reached via restorative processes like VOM, VOR or conferencing (*Bosnia and Herzegovina*, *Northern Ireland*, *Slovenia* and *Portugal* explicitly stated this). In *Spain*, *Latvia*, *Poland* and certain Cantons of *Switzerland*, the offender can work for or to the benefit of the victim. In *Germany* and *Belgium*, destitute offenders who perform community service can be "remunerated" for their work via a special fund so that they are able to make financial reparation to their victims.

Accordingly, it is the generally held view among the majority of researchers (also in this study) that community service cannot be regarded as restorative in practice today in most of Europe, as pointing to the making of reparation to the community alone is not enough to warrant that label. At the same time, it offers great potential for restorative thinking to be expanded greatly into the realm of diversion and court sanctioning, not least because the legislative basis for ordering it already exists in a large number of countries, which provides a great deal of potential.

Strategies should be sought that seek to enhance the restorative value of community service. This could be done by tying it into restorative processes. In cases of "victimless crimes", the work to be performed could be determined upon reflection of the impact of the offence on the local community in which it occurred, with direct involvement of the community and the offender in that process (individualized project-based work). This could provide strong reintegrative potential for offenders and foster community cohesion to a much greater degree than picking up litter in neon overalls. Naturally, it depends on what the legislator wants to achieve by ordering it. Likewise, provision should be made for finding routes for offenders to be able to work for or to the benefit of their direct victims where both parties consent to it, preferably also involving forms of direct or indirect mediation as a means of ascertaining that willingness and the form of work to be performed. Finally, at the very least, systems need to be in place to ensure that the work performed is such that can be regarded as being of particular value to the local community that suffered from the offence (work for welfare or humanitarian organisations for instance, or such work that enhances an offender's understanding of the needs of the community, especially those that have resulted from his/her misbehaviour).

5.2.4 Restorative Justice in prisons and youth detention centres

Article 4 of *Council of Europe* Recommendation Rec (99) 19 concerning Mediation in Penal Matters states that "*mediation in penal matters should be available at all stages of the criminal justice process.*"[128] Basic Principle 12 of Council of Europe Recommendation Rec (2008) 11 makes a similar recommendation for juveniles and expands the scope to cover other forms of restorative practice. As serving sentence is by all means to be regarded as a stage of the criminal procedure, there is evidence that these recommendations are not being appropriately met in practice.

Only 18 of the 36 authors making reference to RJ in the context of imprisonment in their reports (*Belgium*, *Bulgaria*, *Denmark*, *England and Wales*, *Finland*, *Germany*, *Hungary*, *Italy*, *Latvia*, the *Netherlands*, *Norway*, *Poland*, *Portugal*, *Scotland*, *Switzerland*, *Russia*, *Spain*, *Ukraine*). The majority of countries in which RJ finds application in this context provide only localized pilot projects in individual institutions (*England and Wales*, *Germany*, *Bulgaria*, *Hungary*, *Latvia*, *Italy*, *the Netherlands*, *Norway*, *Poland*, *Scotland*, *Switzerland*, *Ukraine*). In many of these countries, little to no information has yet been published, as many projects are still in their infancy or were not accompanied by continuous evaluation.

This is somewhat disappointing, given that restorative practices can bear great potential for fostering responsibility and offender reintegration, putting victims at ease, and for defusing the otherwise harsh realities of prison life to make it more closely resemble life in freedom. Prisons and youth detention centres bear great potential for restorative practices, as they are in fact places characterized or even defined by conflict.

On the one hand, conflict is the defining characteristic of the prison population, in that all persons residing there have been in conflict with the state and its laws. Likewise, the conflict defines the role distribution between offenders and prison staff. From a practical perspective, since the big picture in Europe is that the use of restorative practices is predominantly limited to the sphere of diversion from court or punishment in most countries, offenders serving prison sentences and the persons they have harmed are unlikely to have had the opportunity to participate in a restorative process. This suggests that, while the conflict between offenders and the state has been resolved, the conflict between victim and imprisoned offender will frequently not have been.

Restorative practices like conferencing or VOM can serve as promising elements of sentence planning, release preparation and/or even as grounds justifying early release.[129] Victims can receive closure and peace of mind at the

128 *Council of Europe* 1999.

129 For an insightful overview, see *van Ness* 2007.

offender's upcoming release, and offenders can receive the opportunity to participate in measures that are promising means for their reintegration and future prospects, and for enhancing their accountability. Group conferences held prior to release, that involve family members, the victim, supporters, but also representatives of local authorities and social agencies (employment, education, housing, health) can strengthen the offender's release context and help generate important social ties and roles that promote the likelihood of successful reintegration.

Council of Europe Recommendation Rec. (2008) 11 states in Rule 79 that "*regime activities shall aim at education, personal and social development, vocational training, rehabilitation and preparation for release. These may include: ... programmes of restorative justice and making reparation for the offence*." The overall notion of this rule is essentially the need to incorporate a stronger victim-orientation into correctional settings and sentence planning.[130] However, in practice, approaches to putting these words into action are greatly lacking.[131] In *Poland*, *Portugal* and *Croatia*, legislative provision is indeed made for RJ to gain entry to penal institutions, but the provisions appear to be defunct in practice. In *Switzerland*, reparation is a mandatory element of sentence planning for adult offenders; however no further provision is made in terms of how this should be achieved.

There are of course also positive examples. In *Portugal*, a legal reform in 2009 enshrined in statute that prisoners can participate, when they freely consent, in restorative justice programmes, in particular via mediation sessions with victims. The law goes on to state that prison administrators are free to enter into cooperation and partnerships with NGOs, universities and research institutes in order to develop programmes that aim to enhance empathy for victims and raise awareness to their needs. However, there is a lack of a commitment to restorative practices in the prison context despite the excellent statutory circumstances. According to the authors of the report on *Portugal*, this appears to be due above all to a lack of initiative on behalf of the prison administrators.

In *Belgium*,[132] for example, in 2001 a pilot project for mediation between prisoners and their victims was initiated. It allowed for 'mediation for redress'[133] services to be offered on request of the inmate, the victim or the victim's family. The programme focused on serious crimes, including cases of rape, armed

130 For some German insights, see for instance *Rössner/Wulf* 1984, pp. 103 ff.; *Walther* 2002; *Gelber/Walther* 2013.

131 *Hartmann et al.* 2012.

132 See also *Aertsen* 2005; *Gelber* 2012.

133 For what "mediation for redress" implies, see the report on *Belgium* by *Ivo Aertsen* in *Volume 1*.

robbery and murder. In 2005, the legislative basis for mediation for redress was reformed, making mediation available in all prisons of the country. Overall, the statutory basis in *Belgium* states clear penological objectives: the underlying idea is that the execution of the prison sentence must support the rehabilitation of the offender but also the restoration towards the victim.

In *Germany*,[134] some Penal Codes of the *Länder* (the German federal states) make provision for victim-oriented, reparative and reflective measures to play a more prominent role in individual sentence and regime planning. For instance, § 2 Subpara. 5 in Book 3 of the Code on the Execution of Prison Sentences of the Federal State of Baden-Württemberg states that, in order to rehabilitate and successfully reintegrate the offender, steps shall be taken to foster understanding of the harm that the offence has caused to the victim and to provide measures via which reparation can be made or reconciliation can be achieved. The Code on the Execution of Prison Sentences of the Federal State of Brandenburg makes similar provision in its § 3 Subpara. 1. § 8 Subpara. 1 of the Code on the Execution of Prison Sentences of the Federal State of Thuringia, in defining fundamental principles for the execution of adult and juvenile prison sentences, states that the execution of prison sentences shall be designed in a fashion that offenders come to face and actively address their offending behaviour and its harmful consequences. More recently, an EU-funded international research project has been initiated by the "Schleswig-Holstein Association for Social Responsibility in Criminal Justice, Victim and Offender Treatment."[135] The project is titled "restorative justice at post-sentencing level supporting and protecting victims" and shall run from 1 January 2013 to 31 December 2014. The aim of this action research is to find effective, context-specific ways to improve the standing and rights of victims by providing a strong victim orientation to restorative practices in prison. "*Action research methodology enables a creative search for the best possible implementation of RJ methods at prison settings for diversity of cases and within different legal and institutional frameworks.*"[136] Furthermore, "*action planning will reveal which RJ method is most suitable for the setting of individual institutions and partner countries. These can include pilot projects of victim offender mediation, conferencing, victim empathy training, victim groups, guided visits for victims in prison, victim offender dialog and other methods or a combination of the such. These will be qualitative evaluated through observation and guided interviews with victims, aiming at further in-depth knowledge on their needs and expectations.*" First results are expected to be published in early 2014.

134 See *Hagemann* 2003.

135 See the project website at: http://www.rjustice.eu/en/about2.html.

136 See the project website at: http://www.rjustice.eu/en/about2.html.

Particularly interesting experiences have been reported from *England and Wales*. There, the notion of "restorative prisons" was examined in a project run by *King's College London* from 2000-2004.[137] The focus of this project lay in services that prisoners can provide to the local community of which the prison is a part, for instance in the form of community work/service, in order to give something back to the community, to make reparation, in a positive and constructive manner. The notion of connecting correctional institutions to their local communities has been further developed in parts of the *United States* and to a certain degree in *England and Wales* with the "justice reinvestment model". This approach seeks to enable local communities that bear a certain responsibility for "their" prisons, to autonomously design and provide alternative sentencing programmes in order to save costs on imprisonment.[138]

On the other hand, prisons are places with great potential for *internal* conflict, either among inmates or between inmates and prison staff. Restorative justice can serve to provide an alternative route for resolving disciplinary issues and even as a channel for prisoners' involvement and representation in internal decision-making processes on issues that affect the entire prison community, and can foster a prison climate that is based less on behaving correctly out of fear of reprisal and punishment, and more on a mutual understanding of community needs.[139] Developing such an understanding can in turn carry over into life in freedom upon release.

Rule 56.2 of the *European Prison Rules* states that "*whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners*." Rule Nr. 94.1 of Council of Europe Recommendation Rec. (2008) 11 goes on to state that "*disciplinary procedures shall be mechanisms of last resort. Restorative conflict resolution and educational interaction with the aim of norm validation shall be given priority over formal disciplinary hearings and punishments*." This approach is reflected in nearly all Codes on the Execution of Juvenile Prison Sentences of the German *Länder*, in that, in resolving disciplinary issues, an educational, restorative procedure is provided that should be prioritized over formal disciplinary measures and processes.[140]

Again in *Belgium*, in 1998 the criminological institutes of the universities of Leuven and Liège initiated a pilot project in six prisons in order to develop a restorative justice approach to be applied during the administration of prison

137 *Stern* 2005.

138 See *Allen/Stern* 2007.

139 See *Johnstone* 2007; *Edgar/Newell* 2006.

140 See in detail: *Faber* 2014.

sentences.[141] The most important element of the project was the appointment of a full time "restorative justice advisor" in each prison, operating at the level of the prison management, whose task was to support the development of a culture, skills and programmes within the prison system which give room to the victims' needs and restorative solutions. Examples of actions were the training of prison officers and other staff and the development of specific programmes in prison in cooperation with external agencies such as victim support and mediation services. The approach was expanded to all prisons in 2000. However, in 2008 the function of the restorative justice advisor was unexpectedly abolished by the Ministry of Justice for reasons unknown.

In *Scotland*, restorative approaches have been used to assist in prisoner to prisoner problems, arguments and bullying in a prison for women offenders. Their value lies in their appropriateness for resolving inter-prisoner disputes without having to resort to ordinary disciplinary sanctions. Where a conflict of such type occurs, the parties can be referred to a facilitated meeting that seeks to identify the facts of what has happened, the consequences in terms of harm and how to stop it happening again in the future. This practice aims at outcomes that go beyond mere apologies and thus implies the drafting of an action plan to this effect. Part of the motivation behind this approach also lies in seeking to better meet the needs of women prisoners identified as "aggressors" or "offenders" in such cases, as they themselves are often vulnerable and have a history of victimisation. Thus, "*a bullying strategy based on demeaning the bully, trying to identify them, or taking privileges away seems ineffective and potentially damaging to the self-esteem of women who are already vulnerable. Interventions need to start early in induction and be focused on how bullying makes people feel rather than what will be 'taken off you' if you engage in it.*"[142]

It needs to be borne in mind that the development of restorative practices in prisons will need to take the obstacles into account that are intrinsic to the prison setting, namely a lack of trust and strict hierarchies, and the consequences restorative practices can have on these *vice versa*. Likewise, there is a need for caution in bringing RJ into the context of imprisonment, an institution with a focus on "inflicting pain" on those who experience it.[143] There is the danger that, by providing restorative justice and practices within penal institutions, one legitimizes imprisonment, making imprisonment more attractive for decision-makers. At the same time, "*a purist refusal to pursue restorative justice in prisons will result, it is suggested, in a restriction of restorative justice to less*

141 *Robert/Peters* 2003; *Aertsen* 2005.

142 *Brookes* 2006.

143 *Edgar/Newell* 2006, pp. 22 f.

serious crimes where it would operate as an alternative, not to imprisonment, but to some other non-custodial sanction."[144]

Restorative approaches are not an end in itself and need to be seen as part of a whole systems approach or support programme for individual prisoners. Nonetheless, serious thought should be put towards reforming prison legislation in a fashion that requires the serving of sentence to be planned in a fashion that places the interests of victims, making amends and inclusionary conflict resolution practices more in the foreground.

5.3 The role of evidence-based policy and practice and of building support for Restorative Justice

We have seen in *Section 5.2* above that there are indeed opportunities to enhance the quantitative role that RJ plays in the criminal procedure. In reality, though, loosening the statutory restrictions that are currently in place that create an artificial barrier to RJ for many victims, offenders and communities would require legislative change. The same applies to aspirations to introduce statutory conferencing systems, as has been achieved in *Northern Ireland*, *Ireland* and *Belgium* in particular, and to "opening up" the otherwise securely locked prison system to VOM and other restorative approaches and practices.

However, as has already been indicated in *Section 5.1* above, one recurring theme in the reports has been that the political will that is necessary for such reforms to be put into practice is often greatly lacking. On the one hand, this is due to the fact that people in positions to effect such changes are unaware of the benefits that RJ can bring for victims, offenders and general society. This lack of awareness extends down from the level of politicians and legislators to prison administrators, judges, prosecutors, probation managers and also the general public. In the context of the politicization of crime and punishment that is currently noticeable in various countries in Europe, RJ is often regarded as a "soft option", which pushes it to the periphery of the system both in theory and in practice. Accordingly, politicians are unlikely to promote RJ if there is no public demand for it.

In order to outmanoeuvre the political and legislative levels as best as possible, the most promising approach is to facilitate public support and demand through bottom-up reform through practice. Essentially, there is need to expand the availability of actual providers of restorative justice services and practices – for where there are no services, there can be no referrals or recommendations, and no demand for RJ can develop. Civic-society and Non-Government Organisations as well as academia play a central role in this regard.

144 *Johnstone* 2007, p. 17.

In founding restorative justice programmes, regardless of whether they involve VOM, conferencing, more elaborate community service strategies or practices to effect the making of reparation, projects need to be evidence-based in their strategy. In practice, this implies a need for continuous accompanying monitoring, evaluation and "what works" research[145] that seeks to optimize the projects to the economic, political, social, legislative, criminal justice and local context. "*Impact evaluations […] are the only way to determine objectively whether a programme or policy accomplishes what it set out to do*."[146] Findings from evaluation need to be rechanneled and disseminated to all actors involved, so that they can be put into effect – so that processes, practices and strategies can be fine-tuned to contextual change so as to optimize the outcomes produced,[147] making them more attractive in the eyes of decision-makers and achieving high rates of satisfaction among victims and offenders who take part in them, and subsequently recommend them.

Likewise, such endeavours should always include parallel strategies for the dissemination of information on the programme (what the *United Nations* term a "communication strategy"),[148] what it aims to achieve, how it aims to achieve it and what the benefits of the programme are, with the aim of building support for RJ. On the one hand, decision-makers need to be made aware both of the benefits of RJ, and also of the availability of such practices in their administrative catchment areas in general. Local restorative justice providers should seek to give lectures and deliver training to practitioners in the context of their education and training.[149] "*Notions of forgiveness and healing, for example, may be relatively foreign to members of the judiciary trained in legal procedures and substantive law.*"[150] Article 25 of Directive 2012/29/EU of 25 October 2012 (requiring training of decision-makers in victimology) could be an important facilitator in this regard. However, the time frames set for the implementation of such obligations should be such that allow sufficient prior testing and evaluation of adequacy to the national context. Doing so increases the likelihood that a local prosecutor, judge or prison manager will be interested in seeking to incorporate RJ into their professional contexts – either by according it a greater role in their practices (opting for VOM in the context of

145 *Vanfraechem/Aertsen* 2010, p. 273; *United Nations* 2006, pp. 81 ff.

146 *Van Ness/Strong* 2010, p. 149.

147 See *Van Ness/Strong* 2010, who state that "*evaluation provides a means to test the link between vision and practice*", pp. 151 ff.

148 *United Nations* 2006, pp. 54 ff.; see also *Aertsen et al.* 2004.

149 For an interesting example of providing training in restorative justice and practices in prisons, see *Barabás/Fellegi/Windt* 2010; see also *United Nations* 2006, p. 55.

150 *United Nations* 2006, p. 55.

diversion rather than another alternative, take it or the making of reparation in general into consideration in sentencing etc.), or by seeking to introduce or promote restorative programmes in their own administrative areas.

Essentially, experience has shown that the success of restorative justice initiatives is often based on the presence of dedicated and keen individuals in the right positions at the right time. Educating people in these positions (prison administrations, prosecutors, judges, probation managers) on the benefits of RJ can only serve to increase the likelihood of beneficial constellations coming together again in the future.[151]

On the other hand, in order to generate bottom-up pressure on legislators and decision-makers, another key factor lies in sensitizing and raising awareness in the general public, and prioritizing programme implementations that best meet the needs of the stakeholders in the offence.[152] The media play a key role in this regard.[153] Stakeholders can only resolve their conflicts through restorative channels if they are aware that such channels even exist. "*Backing from the community is important because it will reinforce support sought from the core and supporters.*"[154] Likewise, they are only likely to take part in such processes again or recommend them to others in their position (and increase demand in RJ) if they are satisfied with the overall experience, both in terms of the procedure and in terms of the outcome.

Experience has also shown that establishing restorative justice programmes can be a long and arduous road. Many initiatives have come and gone along with their sources of funding, and *Latvia*, *Portugal*, *Poland*, *Slovakia* and *Spain* indicated that the economic crisis in recent years has had an important role to play, negatively affecting service providers and moving decision-makers to opt for swifter, less complicated forms of diversion or non-intervention. Therefore, the work of NGOs, the voluntary sector and academia is vital, both in settings up programmes and in disseminating knowledge of RJ at all levels of the procedure and society, as NGOs are "*closer to the communities than criminal justice personnel usually are*"[155] and are associated with higher levels of legitimacy. The EU also plays an important role in this regard, in that it can (and does) promote respective "action research" initiatives through the allocation of grants all over Europe (see below).

Regardless of penal climate and political will, what experience has also shown is that a legislative basis needs to be evidence-based. Any legislative

151 *Van Ness/Strong* 2010, p. 142; *United Nations* 2006, p. 56.

152 *Pali/Pelikan* 2010; *Aertsen et al.* 2004.

153 *Pali/Pelikan* 2010.

154 *Van Ness/Strong* 2010, p. 142.

155 *United Nations* 2006, pp. 75 f.

basis for RJ needs to be based on experience, not theory alone, if it is to achieve the best outcomes. "*The specific form that restorative justice practices will take will necessarily depend upon the specific environment (cultural, social, and political) in which the criminal justice system operates.*"[156]

Countries that have seen the best experiences with RJ, in terms of introducing and sustaining a network of nationwide coverage and yielding decent caseloads (for example *Germany*, the *Netherlands*, *France*, *Finland*, *Belgium* and *Austria*), provide a strong legislative basis for RJ. What these countries all have in common is that their legislation is based on years of experience with systems that have gradually grown from local initiatives to nationwide practices that have been subject to evaluation and adaptation. Therefore, a sound, tested legislative basis will more likely be adequate for achieving the desired outcomes in its given context, and at the same time can increase faith in decision-makers to refer to it.[157]

What is interesting in this regard is the effect of Art. 10 of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings that obliged Member States to make legislative provision for mediation by 22 March 2006. Legislative reforms in *Hungary* and *Finland* in 2006 were said to have been motivated by this Framework Decision. In *Finland*, doing so had a positive effect on the use on RJ in practice, as the legislative basis provided clearer guidance for a tested nationwide system of non-statutory mediation that had existed for quite some time. Accordingly, the quantitative use of mediation increased substantially in *Finland* following the legal reforms.[158] However, in *Hungary*, pressure to implement the requirement from the Framework Decision in fact resulted in a hurried, untested and thus greatly flawed top-down reform that did little to increase faith in the practice.[159]

It should not be assumed that, just because an implementation strategy works well in one country, it will automatically work well in another (the same in fact applies to different regions in a single country). For example, while *Northern Ireland* and *England and Wales* have similar legal traditions and to a certain degree overlapping legislation, it would be wrong to assume without any further thought that the conferencing system employed in *Northern Ireland* could simply be superimposed onto *England and Wales* and yield the same promising results, bearing in mind the role of the cultural and political climate in

156 *United Nations* 2006, p. 56.

157 See *United Nations* 2006, p. 51.

158 See the report on *Finland* by *Lappi-Seppälä* in *Volume 1*.

159 See the report on *Hungary* by *András Csúri* in *Volume 1*.

Northern Ireland at that time.[160] Likewise, prior to implementing the new legislation in *Northern Ireland*, the exact approach to be applied (based on the *New Zealand* model of conferencing) was subject to extensive review, piloting and evaluation prior to being rolled out on a national scale, so as to ascertain that what is being legislated for is actually achieving the outcomes aspired to.[161] Accordingly, the high rates of satisfaction and perceptions of fairness among conferencing participants stated in *Section 5.2.2* above are unlikely to be replicable elsewhere without testing the model applied in the local and national context.

Naturally, promoting a "what works" strategy is not a particularly novel recommendation, but the notion stems in particular from the fact that overall, research and evaluation in Europe on RJ in penal matters has been "very wide, yet not particularly deep".[162] Throughout Europe, based on the national reports received, research has focused primarily on descriptive inventory research, often in the context of pilot evaluations that have not been followed up on since. Research on recidivism, continuous evaluation of participant satisfaction, the perceptions of stakeholders and in-depth action research (in which practice is subject to parallel study) etc. are the exception rather than the norm once one strays from countries with a rich research tradition in the field,[163] like the *UK*, *Austria*, *Norway*, *Belgium* and the *Netherlands.*

Overall, there is a great need to promote in-depth research and evaluation in Europe. This has already been recognized internationally for some time, as Committee of Ministers Recommendation No. R (99) 19 closes with the statement that "*member states should promote research on, and evaluation of, mediation in penal matters.*" However, in practice this has not been the case everywhere in Europe. Some countries, like *France* for example, have comparably high numbers of mediations, however research into RJ has been very limited. "*The supporting role of the Council of Europe and the European Union cannot be ignored in the domain of restorative justice. [They] are offering important tools with respect to cooperation not only between practitioners and policymakers from different member states, but also between researchers*."[164] Reference should be made to Cost Action A21 Restorative Justice Developments in Europe, which undertook several activities all of which

160 Although thought has been devoted to doing so in recent years in *England and Wales*, see *Independent Commission on Youth Crime and Antisocial Behaviour* 2010. For a critical statement in this regard, see *Goldson* 2011.

161 See the report by *Dignan/Lowey* 2000 on the potentials for restorative justice in Northern Ireland. See also *Chapman* 2012; *Zinsstag/Chapman* 2012.

162 So stated by *Ivo Aertsen* at the second project conference in Gdansk in May 2013.

163 *Aertsen et al.* 2004, p. 80.

164 *Vanfraechem/Aertsen* 2010, p. 274.

aimed at evaluating RJ in terms of policy, practice, research and legislation in Europe.[165] In fact, the support from the European Commission for the study on which the publication at hand is based has indeed served to promote networking and exchange of ideas and views between practitioners, researchers and practitioners from 36 different countries. In future, though, EU Support should in particular go to countries that lack such a research tradition, and that are currently in the start-up phase of VOM or other restorative approaches in their countries (particularly many Eastern European countries).[166] Doing so would provide the means necessary to monitor and evaluate pilot projects right from the beginning, rather than only retrospectively.

There is equally a need for "research into research", especially in the context of RJ.[167] The confidentiality of restorative practices can indeed restrict access to the persons whose opinions and experiences matter the most when it comes to identifying what makes an outcome "successful", and sharing experiences with how best to develop research undertakings in certain contexts, for example the prison context, can be valuable in this regard. *Aertsen et al.*[168] refer to difficulties in designing samples, drawing control groups, self-reflection bias and other obstacles to sound, reliable research, that can more easily be overcome by drawing on experiences from others.

6. Summary and conclusions

The starting point for this study was that there has been a perceived increase over the past decades in Europe and indeed worldwide in the availability and use of practices that fall under the term restorative justice. The Greifswald study on Restorative Justice and Mediation in Penal Matters in Europe sought to investigate how this trend has continued and to compile an overall picture (to take stock) of what the landscape of RJ in Europe looks like today, to identify recurring problems that hinder RJ in achieving its full potential and to investigate how these obstacles may best be alleviated.

6.1 Taking stock of Restorative Justice in Europe

Overall, it can be said that all 36 countries covered in the study provide, in legislation or practice, forms of RJ in the context of resolving criminal conflicts.

165 For more information, see the website of the European Forum for Restorative Justice, http://www.euforumrj.org/projects/previous-projects/cost-action-a21-restorative-justice-developments-in-europe/.

166 *Vanfraechem/Aertsen* 2010, p. 274.

167 *United Nations* 2006, pp. 82 f.

168 *Aertsen et al*. 2004, pp. 82 ff.

The landscape is dominated by VOM, which is provided for on some scale in 35 out of 36 countries. However, the degree of actual service coverage varies substantially throughout Europe, with nationwide coverage of service provision only in place in *Austria*, *Belgium*, the *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Hungary*, the *Netherlands*, *Latvia* and *Norway*. All other countries reported that VOM services (not legislation) were limited to certain geographical areas where local partnerships and initiatives have been established. By contrast, conferencing is far more seldom in Europe, being available on a nationwide scale in only five countries (*Belgium*, *England and Wales* (with major reservations), *Ireland*, the *Netherlands* and *Northern Ireland*). Taking a step back and applying a maximalist perspective, 32 of 36 countries reported that their criminal justice legislation made provision for forms of community service, while 31 of 36 reporters stated that there are channels in place through which the making of reparation without a preceding restorative process can factor into decision-making in the criminal procedure (diversion, sentence mitigation, court ordered reparation like "reparation orders").

Regarding the grounds that are stated as being the central driving forces behind according reparation and restoration increased attention in the criminal process, there are a number of predominant and interconnected themes. The first relates to abolitionist thinking, in that the criminal justice system is an inappropriate forum for resolving conflicts between offenders and victims. Accordingly, in some countries (particularly those in which the first experiences with RJ have been made in Europe, like *Austria* and *Finland*) the focus was on providing an informal forum that better meets the needs of those affected by the crime. This ties in to a second impetus, namely that RJ is regarded as a means for improving the standing of victims in criminal cases in the context of strong victim's movements in some countries. In other jurisdictions, RJ came to be regarded as a promising element in a general shift in criminal justice thinking, away from retribution and punishment towards rehabilitation and reintegration, objectives to which restorative ideal can cater very well if implemented correctly due to its focus on positive reintegration. Such developments were particularly prominent in the field of juvenile justice. Likewise, juvenile justice reform in Europe has served to provide gateways into the criminal procedure, as the focus has increasingly been on diversion away from formal into informal processes and the use of rehabilitative and educational measures. The influence of international instruments and the drive for EU membership are further prominent factors that cannot be ignored. International standards are regarded as depicting "best practice" and thus provide the template for a criminal justice system that is "up to the standards" of Western society. Numerous countries, particularly in Eastern Europe, indicated that such instruments provided vital guidance to harmonizing their systems to western standards, and this also covered standards relating to RJ. As already stated in *Section 2* above, these factors are non-

exhaustive, and were never singular driving forces. Rather, there has indeed been a certain degree of overlap, as these factors are deeply interconnected.

The driving forces for reform will naturally have shaped the outcome of that reform, and thus how RJ has been connected with or placed alongside the criminal justice system. Juvenile and adult criminal justice reform has seen expansions in the powers of decision-makers throughout the criminal justice system to divert cases from prosecution, conviction and/or sentencing into alternative procedures and measures that bear superior reintegrative and rehabilitative potential than purely retributive intervention. Prosecuting agencies have seen expansions in their statutory discretion to divert criminal cases by dropping charges subject to certain conditions. In 34 of the 36 countries covered in this study, among such conditions we find the condition of having "made reparation" to or having "reconciled" with the victim, or having shown "effective repentance". Thus, where an offender has alleviated the harm caused by the offence (potentially through VOM or conferencing), either by his own initiative or upon the making of such a requirement by the prosecuting agencies, he can be released from criminal liability. Furthermore, 26 of 36 reporters stated that courts, too, have powers to divert cases on similar grounds, while a mitigation of sentence on the grounds of reparation having been made or reconciliation having been achieved (potentially through VOM or conferencing) is theoretically possible in 20 countries. 31 of 36 reports state that their courts are equipped with special sanctions or measures that reflect restorative justice thinking, most prominently community service (31 of 36, mostly with major reservations, see *Section 3.5* above), but also forms of court-ordered reparation like "reparation orders" and court-ordered restorative processes. Finally, only 50% of countries covered in the studies made any reference to the use of RJ in prison settings, with only a handful (particularly *Germany*, *Portugal*, and some cantons in *Switzerland*) making legislative provision that seeks to incorporate reparation and a focus on victims' needs into correctional programming. Overall, the big picture that remains is that the availability of RJ decreases the deeper one delves into the criminal procedure. There are only a few exceptions to this rule that provide access to VOM or conferencing regardless of the stage of criminal proceedings and regardless of offence and offender characteristics (the *Netherlands*, *Belgium*, *Denmark*, *Germany*, *Norway*, *Sweden* and *Finland*).

Generating a picture of RJ in terms of the quantitative role it assumes in criminal justice practice is a difficult task, as many countries face significant data shortages (see *Section 4*). The use of RJ in practice is difficult to measure, as statistics do not record mitigating factors in sentencing, or often only state the statutory provisions on which diversion is based, without stating what the offender was diverted into. Often the only sources available are descriptive research studies that are often outdated as no follow-up studies have been published. Overall, though, despite these shortcomings, the picture that remains is that – except for some countries like for instance *Belgium*, *Northern Ireland*,

Austria and *Finland* – RJ plays only a marginal role in most of Europe in practice, albeit with a slightly upward trend if one takes the "dark figure" of restorative action into account.

There is a vast and ever expanding pool of research and literature on the benefits and potentials of RJ – therefore the potential that RJ brings to the table is well-known RJ justice plays in the practice of the criminal justice system, by contrast, does little to underline this view. What has indeed also become clear is that there is great potential for RJ to gain a more prominent role in the criminal justice systems in Europe than is the case today in most countries. All countries covered in the study provide legislative access-points through which RJ can enter into the criminal procedure. Likewise, all countries can draw on experiences of their own with restorative justice services like VOM or conferencing, albeit to strongly differing degrees. Yet in practice, in most countries in Europe RJ plays only a peripheral role in the context of the criminal justice system.

However, what has stood out to us is the fact that there is a significant degree of overlap throughout Europe when one regards the reasons why the restorative justice movement is having difficulty establishing itself as a more than peripheral alternative or addition to the criminal justice system.

6.2 Conclusions

Restorative justice is not yet available to all offenders at all stages of the criminal procedure in all countries, as is recommended in Article 4 of Recommendation No. R. (99) 19. Rather, access is usually restricted along the lines of proportionality and public interest, as RJ enters into the system via diversionary pathways in most cases, or is a matter of discretion for decision-makers in the criminal procedure. It therefore tends to be restricted to less serious forms of offending from the outset, and whether or not it is applied lies in the hand of practitioners who are likely unaccustomed to what RJ entails and what benefits it can bear for victims, offenders, communities and society. As a consequence, many victims are implicitly regarded as having suffered too much to be eligible for an opportunity to receive reparation for the harm they have endured, or to achieve closure and healing, which appears rather paradoxical. Even more victims are excluded by the fact that there is a strong predominance of provision for young offenders and their victims, or rather: they are excluded because their assailant was too old. Experience has shown that VOM for instance can indeed be implemented in a fashion that achieves promising outcomes with adult offenders and their victims.

- *We therefore recommend that access to restorative justice not be restricted on grounds of offence severity and age. Instead, countries should seek to introduce restorative processes and practices as a generally available service that is offered to all victims and offenders.*

Decision-makers should be able to take the outcome from such processes into consideration in their decisions.

There is a need to provide forms of RJ that are promising for resolving conflicts between offenders and victims in cases of a greater severity, and that involve the community in a greater fashion than is the case with VOM. In this regard, conferencing has proven to be a viable and promising tool, particularly for young offenders. Recent experiences in Europe (*Northern Ireland*, *Ireland* and *Belgium*) have shown that positive outcomes can be achieved through conferencing in terms of satisfaction with processes and outcomes, perceptions of fairness, and re-offending. However, to date very few countries have sought to apply conferencing in Europe. The same applies to experiences with peacemaking circles.

- *We therefore recommend that countries seek to promote initiatives to introduce conferencing and peacemaking circles into their criminal justice systems.*

An often neglected stage of the procedure is the serving of prison sentences. Only rarely is the situation in theory and practice simultaneously such that RJ can come into play in correctional settings. This is regrettable, since prisons represent a large pool of yet "untapped conflict", and are at the same time increasingly coming to be regarded as institutions of rehabilitation in which restorative approaches could be promising elements in sentence planning and programming. Offenders who are in prison will usually have committed offences that made them ineligible for diversion, and thus for restorative practices. At the same time, RJ can be a viable means for resolving conflicts within prisons, either between prisoners or prisoners and staff.

- *We thus recommend that legislative provision be made that provides for the making of reparation and raising awareness of victims' needs as an element in sentence planning. Likewise, it is recommended to explore ways of reforming the penitentiary climate and culture using restorative practices.*

Another widely untouched source of potential for RJ is community service, which is only very rarely implemented or legislated for in a fashion that can be regarded as truly restorative in Europe today. In the majority of Europe, it is used as a substitute sanction for offences of a certain severity (in terms of the term of imprisonment defined by law), as an alternative sanction introduced as a stand-alone option as a means of avoiding custody particularly for young people, and/or as an educational/alternative measure as a condition for diversion from prosecution or court punishment. In most countries, it is to be regarded as a punitive sanction.

- *We recommend that initiatives and strategies be sought that seek to enhance the restorative value of community service by employing restorative processes to determine the work to be performed (for instance individualized project-based work), and/or that seek to allow the making of reparation to direct victims of crime through work.*

A recurring problem stated in the reports has been that there is a lack of political will to pass legislation and/or to implement or fund restorative justice initiatives, on the one hand because there is a lack of information on behalf of politicians and legislators, or because of a predominating punitive climate in society. Or both. There is, therefore, a need to generate pressure "bottom-up" on legislators to implement the aforementioned recommendations by establishing local initiatives that involve partnerships between the justice system and NGOs, universities and research institutes. Such endeavours need to be evidence based in their approach and subject to continuous evaluation. Likewise, they need to be linked to strategies for raising awareness of the benefits of RJ, for all involved, that extend from relevant criminal justice practitioners to the media to the general public, so as to generate public demand for RJ. Even where there is a political will to implement RJ on a wider scale, any legislative endeavours should be based on knowledge and experiences of "what works". Countries that have seen the best experiences with RJ, in terms of introducing and sustaining a network of nationwide coverage and yielding decent caseloads (for example *Germany*, the *Netherlands*, *France*, *Finland*, *Belgium* and *Austria*), provide a strong legislative basis for RJ. What these countries all have in common is that their legislation is based on years of experience with systems that have gradually grown from local initiatives to nationwide practices that have been subject to evaluation and adaptation. Therefore, a sound, evidence-based legislative basis will more likely be adequate for achieving the desired outcomes in its given context, and at the same time can increase faith in decision-makers to refer to it.

- *We thus recommend that restorative justice initiatives be conducted in a "what-works" ethos and subject to continuous monitoring and evaluation so as to optimize the outcomes achieved. Parallel, such projects should include strategies for building support for restorative justice at all levels. Legislation should be based on tested experiences and not in blind attempts of international or even interregional policy transfers.*

References:

Aertsen, I. (2005): Restorative prisons: a contradiction in terms? In: Emsley, C. (Ed.): The persistent prison. Problems, images and alternatives. Londen: Francis Boutle Publishers, pp. 196-213.

Aertsen, I., Daems, T., Robert, L. (2006) (Eds.): Institutionalizing Restorative Justice. Cullompton: Willan Publishing.

Aertsen, I., Mackay, R., Pelikan, C., Willemsens, J., Wright, M. (2004): Rebuilding community connections – mediation and restorative justice in Europe. Strasbourg: Council of Europe Publishing.

Albrecht, H. J., Kilchling, M. (Eds.) (2002): Jugendstrafrecht in Europa. Freiburg i. Br.: Max-Planck-Institut für ausländisches und internationales Strafrecht.

Allen, R., Stern, V. (2007): Justice Reinvestment – A New Approach to Crime and Justice. London: International Centre for Prison Studies. King's College London.

Barabás, T., Fellegi, B., Windt, S. (2010): Resolution of conflicts involving prisoners. Handbook on the applicability of mediation and restorative justice in prisons. National Institute of Criminology. Budapest.

Bateman, T. (2010): The Systemic Determinants of Levels of Child Incarceration in England and Wales. Unveröffentlichte Dissertation. Luton: University of Bedfordshire. Http://uobrep.openrepository.com/uobrep/bitstream/10547/1 34949/1/bateman.pdf.

Bergseth, K. J., Bouffard, J. A. (2007): The long-term impact of restorative justice programming for juvenile offenders. Journal of Criminal Justice 35, pp. 433-451.

Blaser, B., Dauwen-Samuels, T., Hagemann, O., Sottorff, S. (2008): Gemeinschaftskonferenzen. Ziele, theoretische Fundierung, Verfahrensweise und erste Ergebnisse eines Family-Group-Conferencing-Projekts für JGG-Verfahren in Elmshorn. TOA-Infodienst, No. 34, pp. 26-32.

Bonta, J., Jesseman, R., Rugge, T., Cornier, R. (2008): Restorative Justice and Recidivism: Promises made, promises kept? In: Sullivan, D., Taft, L. (Eds.): Handbook of Restorative Justice. Milton Park: Routledge, pp. 108-120.

Braithwaite, J. (1989): Crime, Shame and Reintegration. Cambridge University Press.

Braithwaite, J. (2002): Restorative justice and responsive regulation. Oxford: Oxford University Press.

Brookes, S. (2006): Female Offenders: A strategy for positive relationships. Available: http://www.pfi.org/cot/prison/offender/women/female-prisoner-policy-strategy-scotland-oct-2006.

Campbell, C., Devlin, R., O'Mahony, D., Doak, J., Jackson, J., Corrigan, T., McEvoy, K. (2006): Evaluation of the Youth Conference Service. NIO: Statistics and Research Report No. 12.

Cavadino, M., Dignan, J. (2006): Penal Systems: a comparative approach. London: SAGE.

Cavadino, M., Dignan, J. (2007): The Penal System: An Introduction. 4. Aufl., London: SAGE.

Chapman, T. (2012): Facilitating Restorative Conferences. In: Zinsstag, E., Vanfraechem, I. (Eds.): Conferencing and Restorative Justice. International Practices and Perspectives. Oxford: Oxford University Press.

Christie, N. (1977): Conflicts as Property. British Journal of Criminology 17 (1), pp. 1-15.

Clamp, K. (2014): Restorative Justice in Transition. New York: Routledge (to be published).

Council of Europe (Ed.) (1999): Recommendation No. R (1999) 19 of the Committee of Ministers to member states concerning concerning mediation in penal matters, 15 December 1999. Strasbourg.

Council of Europe (Ed.) (1999): Recommendation No. R (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, 15 September 1999. Strasbourg.

Council of Europe (Ed.) (2001): Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings 2001/220/JHA. Official Journal of the European Communities. L 82/1. 22 March.

Council of Europe (Ed.) (2003): Recommendation No. R (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, 24 September 2003. Strasbourg.

Council of Europe (Ed.) (2006): Recommendation No. R (2006) 2 of the Committee of Ministers to member states concerning the European Prison Rules, 11 January 2006. Strasbourg.

Council of Europe (Ed.) (2008): Recommendation No. R (2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject.

Council of Europe (Ed.) (2008): Recommendation No. R (2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008. Strasbourg.

Council of Europe (Ed.) (2009): The European Rules for Juvenile Offenders Subject to Sanctions or Measures. Strasbourg: Council of Europe Publishing.

Daly, K. (2004): Pile it on: more texts on restorative justice. Theoretical Criminology 8, pp. 499-507.

Daly, K., Hayes, H. (2001): Restorative Justice and Conferencing in Australia. Trends and Issues in Crime and Criminal Justice No. 186. Australian Institute of Criminology.

Dhondt, D., Ehret, B., Fellegi, B., Szegö, D. (2013): Implementing peacemaking circles in Europe: A European research project. European Forum for Restorative Justice Newsletter 14, pp. 8-11.

Dignan, J. (2005): Understanding Victims and Restorative Justice. Maidenhead: Open University Press.

Dignan, J., Lowey, K. (2000): Restorative Justice Options for Northern Ireland: A Comparative Review. Criminal Justice Review Research Report No 10, Belfast: HMSO.

Doak, J., O'Mahony, D. (2011): Mediation and restorative justice. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe: Current Situation and Reform Developments. 2nd edition. Mönchengladbach: Forum Verlag, pp. 547-621.

Doob, A. N., Tonry, M. (Eds.) (2004): Youth Crime and Youth Justice: Comparative and Cross-national Perspectives. Crime and Justice: A Review of Research. Vol. 31. Chicago, IL, London: University of Chicago Press.

Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.) (2011): Juvenile Justice Systems in Europe: Current Situation and Reform Developments. 2nd edition. Mönchengladbach: Forum Verlag Godesberg.

Dünkel, F., van Kalmthout, A., Schüler-Springorum, H. (Eds.) (1997): Entwicklungstendenzen und Reformstrategien im Jugendstrafrecht im europäischen Vergleich. Bonn: Forum Verlag Godesberg.

Edgar, K., Newell, T. (2006): Restorative Justice in Prisons: A Guide to making it happen. Winchester: Waterside Press.

European Forum for Restorative Justice (2008): Restorative Justice: An Agenda for Europe – Supporting the implementation of restorative justice in the South of Europe. Leuven: European Forum for Victim Offender Mediation and Restorative Justice.

Faber, M. (2014): Länderspezifische Unterschiede bezüglich Disziplinarmaßnahmen und der Aufrechterhaltung von Sicherheit und Ordnung im Jugendstrafvollzug. Mönchengladbach: Forum Verlag Godesberg.

Fattah, E. (1998): Some reflections on the paradigm of restorative justice and its viability for juvenile justice. In: Walgrave, L. (Ed.): Restorative Justice for

Juveniles. Potentialities, risks and problems. Leuven: Leuven University Press, pp. 389-401.

Fellegi, B., Szegõ, D. (2013): Handbook for Facilitating Peacemaking Circles. Budapest: P-T Mũhely.

Gavrielidis, T. (2007): Restorative Justice Theory and Practice – Addressing the Discrepancy. Helsinki: European Institute for Crime Prevention and Control (HEUNI).

Gelber, C. (2012): Opferbezogene Vollzugsgestaltung, Erfahrungen mit dem Täter-Opfer-Ausgleich im deutschen und belgischen Strafvollzug. MschrKrim 95, pp. 142-145.

Gelber, C., Walter, M. (2013): Opferbezogene Vollzugsgestaltung – Theoretische Perspektiven und Wege ihrer praktischen Umsetzung. BewHi 60, pp. 5-19.

Goldson, B. (2011): Time for a Fresh Start. Youth Justice 11, pp. 3-27.

Hagemann, O. (2003): Restorative Justice in Prison? In: Walgrave, L. (Ed.): Repositioning Restorative Justice. Willan Publishing, pp. 221-236.

Hagemann, O. (2009): "Gemeinschaftskonferenzen" in Elmshorn – The First German Family Group Conferencing Project in Criminal Matters. In: Hagemann, O., Schäfer, P., Schmidt, S. (Eds.): Victimology, Victim Assistance and Criminal Justice: Perspectives Shared by International Experts at the Inter-University Centre of Dubrovnik. Hochschule Niederrhein, Mönchengladbach, Germany, pp. 233-243.

Hartmann, A. (1995): Schlichten oder Richten: Der Täter-Opfer-Ausgleich und das (Jugend-)Strafrecht. München: Fink.

Hartmann, A., Haas, M., Geyer, J., Kurucay, P. (2012): Medation and Restorative Justice in Prison Settings (MEREPS). Ergebnisse eines europäischen Forschungsprojekts. Bremen: Institut für Polizei- und Sicherheitsforschung, Hochschule für Öffentliche Verwaltung.

Hayes, H., Maxwell, G., Morris, A. (2006): Conferencing and Restorative Justice. In: Sullivan, D., Tifft, L. (Eds.): Handbook of Restorative Justice – A Global Perspective. London: Routledge, pp. 91-104.

Hazel, N. (2008): Cross-national comparison of Youth Justice. London: Youth Justice Board.

Horsfield, P. (2015): Jugendkriminalpolitik in England und Wales. Mönchengladbach: Forum Verlag Godesberg.

Independent Commission on Youth Crime and Antisocial Behaviour (2010): Time for a Fresh Start. London: The Police Foundation.

Johnstone, G. (2007): Restorative Justice and the Practice of Imprisonment. Prison Service Journal. Nov. 2007 (174), pp. 15-20.

Junger-Tas, J., Decker, S. H. (Eds.) (2006): International Handbook of Juvenile Justice. Dordrecht: Springer.

Junger-Tas, J., Dünkel, F. (Eds.) (2009): Reforming Juvenile Justice. Heidelberg: Springer.

Latimer, J., Dowden, C., Muise, D. (2001): The effectiveness of restorative justice practices: a meta-analysis. Ottawa: Research and Statistics Division, Department of Justice Canada.

Latimer, J., Dowden, G., Muise, D. (2005): The Effectiveness of Restorative Justice Practices: A Meta-Analysis. The Prison Journal 85:2, pp. 127-144.

Liebmann, M. (2007): Restorative Justice – How it works. London: Jessica Kingsley Publishers.

Liebmann, M. (2008): Restorative Justice. In: Goldson, B. (Ed.): Dictionary of Youth Justice. London: SAGE, pp. 301-303.

Lilles, H. (2001): Yukon sentencing circles and Elder Panels. Criminology Aotearoa/New Zealand 16, pp. 2-4.

Lyness, D., Tate, S. (2011): Northern Ireland Youth Re-Offending: Results from the 2008 Cohort. Belfast: NI Youth Justice Agency.

Marshall, T. F. (1999): Restorative Justice – an overview. London: HMSO.

Mastropasqua, I., et al. (2010): Restorative Justice and Crime Prevention – presenting a theoretical exploration, an empirical analysis and the policy perspective. Italian Department for Juvenile Justice.

Maxwell, G., Liu, J. H. (Eds.) (2007): Restorative Justice and Practices in New Zealand – Towards a Restorative Society. University of Wellington, Institute of Policy Studies.

Maxwell, G., Morris, A. (1993): Family, victims and culture: Youth justice in New Zealand. Wellington: Social Policy Agency and Institute of Criminology, Victoria University of Wellington.

Maxwell, G., Morris, A., Hayes, H. (2008): Conferencing and restorative justice. In: Sullivan, D., Taft, L. (Eds.): Handbook of Restorative Justice. Milton Park: Routledge, pp. 91-107.

McCold, P., Wachtel, T. (2002): Restorative Justice theory validation. In: Weitekamp, E., Kerner, H.-J. (Eds.): Restorative Justice: Theoretical Foundations. Cullompton: Willan Publishing, pp. 110-142.

Mestitz, A., Ghetti, S. (Eds.) (2005): Victim-Offender Mediation with Youth Offenders in Europe – An overview and comparison of 15 countries. Dordrecht: Springer.

Miers, D. (2001): An International Review of Restorative Justice. London: Home Office.

Miers, D., Aertsen, I. (Eds.) (2012): Regulating restorative justice – a comparative study of legislative provision in European countries. Frankfurt: Verlag für Polizeiwissenschaft.

Miers, D., Aertsen, I. (2012a): Restorative justice – a comparative analysis of legislative provision in Europe. In: Miers, D., Aertsen, I. (Eds.): Regulating restorative justice – a comparative study of legislative provision in European countries. Frankfurt: Verlag für Polizeiwissenschaft, pp. 511-548.

Miers, D., Willemsens, J. (2004): Mapping Restoravie Justice – developments in 25 European Countries. Leuven: European Forum for Victim Offender Mediation and Restorative Justice.

Moore, D., O'Connell, T. (1993): Family conferencing in Wagga Wagga: A communitarian model of justice. In: Alder, C., Wundersitz, J. (Eds.): Family Conferencing and juvenile justice: the way forward or misplaced optimism? Canberra: Australian Institute of Criminology, pp. 45-86.

Muncie, J., Goldson, B. (Eds.) (2006): Comparative Youth Justice. London: SAGE.

O'Mahony, D. (2008): Restorative Youth Conferencing. In: Goldson, B. (Ed.): Dictionary of Youth Justice. Collumpton: Willan Publishing, pp. 303-305.

O'Mahony, D. (2011): Northern Ireland. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe: Current Situation and Reform Developments. 2nd edition. Mönchengladbach: Forum Verlag Godesberg, pp. 957-989.

O'Mahony, D., Chapman, T., Doak, J. (2002): Restorative Cautioning – A Study of Police Based Restorative Cautioning Pilots in Northern Ireland. Belfast: Northern Ireland Office.

O'Mahony, D., Doak, J. (2004): Restorative Justice – Is more better? The Experience of Police-led Restorative Cautioning Pilots in Northern Ireland. Belfast: Northern Ireland Office.

O'Mahony, D., Doak, J. (2009): Restorative Justice and Youth Justice – Bringing Theory and Practice Closer Together in Europe. In: Junger-Tas, J., Dünkel, F. (Eds.): Reforming Juvenile Justice. Heidelberg: Springer, pp. 165-182.

O'Mahony, D., Doak, J., Clamp, K. (2012): The politics of youth justice reform in post-conflict societies – mainstreaming restorative justice in Northern Ireland and South Africa. Northern Ireland Legal Quarterly 63(2), pp. 269-290.

Pali, B., Pelikan, C. (2010): Building Social Support for Restorative Justice: Media, Civil Society, and Citizens. European Forum for Restorative Justice.

Pelikan, C., Trenczek, T. (2008): Victim Offender Mediation and restorative justice – the European landscape. In: Sullivan, D., Taft, L. (Eds.): Handbook of Restorative Justice. Milton Park: Routledge. pp. 63-90.

Pranis, K., Stuart, B., Wedge, M. (2003): Peacemaking circles, from crime to community. St. Paul: Living Justice Press.

Rieger, L. (2001): Circle peacemaking. Alaska Justice Forum 17 (4):1, pp. 6-7.

Robert, L., Peters, T. (2003): How restorative justice is able to transcend the prison walls: a discussion of the "restorative detention" project. In: Weitekamp, E., Kerner, H.-J. (Eds): Restorative justice in context. Collumpton: Willan Publishing, pp. 93-122.

Roche, K. (2006): The institutionalization of restorative justice in Canada: effective reform or limited and limiting add-on? In: Aertsen, I., Daems, T., Robert, L. (Eds.): Institutionalizing Restorative Justice. Cullompton: Willan Publishing, pp. 167-193.

Rössner, D., Wulf, R. (1984): Opferbezogene Strafrechtspflege. Leitgedanken und Handlungsvorschläge für Praxis und Gesetzgebung. Herausgegeben vom Arbeitskreis "Täter-Opfer-Ausgleich" im Auftrag der Deutschen Bewährungshilfe e. V., Bonn: Deutsche Bewährungshilfe.

Schütz, H. (1999): Die Rückfallhäufigkeit nach einem Außergerichtlichen Tatausgleich bei Erwachsenen. Österreichische Richterzeitung, pp. 161-166.

Shapland, J., et al. (2008): Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes. London: Ministry of Justice.

Shapland, J., Robinson, G., Sorsby, A. (2012): Restorative Justice in Practice – Evaluating what works for victims and offenders. Abingdon Oxon: Routledge.

Sherman, L. W., Strang, H. (2007): Restorative Justice: the Evidence. London: The Smith Institute.

Stern, V. (2005): Prisons and Their Communities: Testing a New Approach. London: International Centre for Prison Studies. King's College London.

Strickland, R. A. (2004): Restorative Justice. New York: Peter Lang.

Stuart, B., Pranis, K. (2008): Peacemaking circles – reflections on principal features and primary outcomes. In: Sullivan, D., Taft, L. (Eds.): Handbook of Restorative Justice. Milton Park: Routledge, pp. 121-133.

Sullivan, D., Taft, L. (2008) (Eds.): Handbook of Restorative Justice. Milton Park: Routledge.

Törzs, E. (2013): Restorative justice models and their relevance to conflicts in inter-cultural settings. Deliverable No. 3.1 prepared for the project "ALTERNATIVE" (Developing alternative understandings of security and

justice through restorative justice approaches in intercultural settings within democratic societies).

Umbreit, M. S. (1999): Avoiding the Marginalization and "McDonaldisation" of Victim-Offender-Mediation: A Case Study in Moving Toward the Mainstream. In: Bazemore, G., Walgrave, L. (Eds.): Restorative Juvenile Justice – repairing the harm of youth crime. Monsey: Willow Tree Press, pp. 213-234.

Umbreit, M., Coates, R. B. (2001): The Impact of Victim Offender Mediation. Two Decades of Research. In: Umbreit, M. (Ed.): The Handbook of Victim-Offender Mediation. An Essential Guide to Practice and Research. San Francisco: Jossey-Bass, pp. 161-177.

Umbreit, M. S., Coates, R. B., Vos, B. (2008): Victim-Offender Mediation: an evolving evidence-based practice. In: Sullivan, D., Taft, L. (Eds.): Handbook of Restorative Justice. Milton Park: Routledge, pp. 52-62.

United Nations Economic and Social Council (Ed.) (2002): Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. No. 2002/12 of 24 July.

United Nations Office on Drugs and Crime (Ed.) (2006): Handbook on restorative Justice Programmes. Vienna: United Nations Office on Drugs and Crime.

van Ness, D. W., Morris, A., Maxwell, G. (2001): Introducing Restorative Justice. In: Morris, A., Maxwell, G. (Eds.): Restorative Justice for juveniles: Conferencing, mediation and circles. Oxford, UK: Hart Publishing, pp. 3-12.

van Ness, D. W., Strong, K. H. (1997): Real justice. Pipersville, PA: The Piper's Press.

van Ness, D. W., Strong, K. H. (2010): Restoring Justice – An Introduction to Restorative Justice. 4th edition. Providence, NJ: LexisNexis Anderson Pub.

Vanfraechem, I., Aersten, I. (2010): Empirical research on restorative justice in Europe: prespectives. In: Vanfraechem, I., Aertsen, I., Willemsens, J. (Eds.) (2010): Restorative Justice Realities – Empirical Research in a European Context. The Hague: Eleven, pp. 267-278.

Vanfraechem, I., Aertsen, I., Willemsens, J. (Eds.) (2010): Restorative Justice Realities – Empirical Research in a European Context. The Hague: Eleven.

Walgrave, L. (2008): Restorative Justice, Self-Interest and Responsible Citizenship. Cullompton: Willan.

Walgrave, L. (2008a): Restorative Justice: An alternative for Responding to Crime? In: Shoham, S. G., Beck, O., Kett, M. (Eds.): International Handbook of Penology and Criminal Justice. Boca Raton: CRC Press.

Walther, J. (2002): Möglichkeiten und Perspektiven einer opferbezogenen Gestaltung des Strafvollzuges. Herbolzheim: Centaurus Verlag.

Willemsens, J. (2008): Restorative Justice: an Agenda for Europe – The role of the European Union in the Further Development of Restorative Justice. Leuven: European Forum for Restorative Justice.

Wright, M. (1991): Justice for Victims and Offenders: A Restorative Response to Crime. Bristol, PA: Open University Press.

Zehr, H. (1990): Changing Lenses. Scottsdale: Herald Press.

Zinsstag, E., Chapman, T. (2012): Conferencing in Northern Ireland: Implementing Restorative Justice at the Core of the Criminal Justice System. In: Zinsstag, E., Vanfraechem, I. (Eds.): Conferencing and Restorative Justice. International Practices and Perspectives. Oxford: Oxford University Press, pp. 173-188.

Zinsstag, E., Teunkens, M., Pali, B. (2011): Conferencing – a way forward for restorative justice in Europe. Leuven: European Forum for Victim Offender Mediation and Restorative Justice.

Zinsstag, E., Vanfraechem, I. (Eds.) (2012): Conferencing and Restorative Justice. International Practices and Perspectives. Oxford: University Press.

About the authors:

Ivo Aertsen is Professor of Criminology at the Faculty of Law and Head of Leuven Institute of Criminology, Belgium.

Skirmantas Bikelis is senior researcher at the Criminal Justice Research Department of the Law Institute of the Ministry of Justice in Vilnius, Lithuania.

Igor Bojanić is Professor of Criminal Law at the Faculty of Law, Josip Juraj Strossmayer University of Osijek, Croatia.

Michele Burman is Professor of Criminology and Co-Director of the Scottish Centre for Crime and Justice Research (SCCJR) at the University of Glasgow, Scotland, UK.

Robert Cario is Professor of Criminology at the University of Pau and Co-Director of the Unit Jean Pinatel Comparative Criminal Sciences (UJP/ CRAJ), France.

Dobrinka Chankova is Professor of Criminal Law at the Faculty of Law of South-West University "Neofit Rilsky", Bulgaria.

Natalia Chlonova is mediator, senior researcher and lecturer at the Department of Criminology and Tort Law of the Siberian Federal University in Krasnoyarsk, Russia.

Kerry Clamp is senior researcher and lecturer in Criminology at the University of Western Sydney, Australia.

Cláudia Cruz Santos is Associate Professor at the Faculty of Law of the University of Coimbra, Portugal.

András Csúri is senior researcher and lecturer at the Institute for Penal Law and Criminology of the University of Vienna, Austria.

Jonathan Doak is Professor at Durham Law School and Director of the Centre for Criminal Law and Criminal Justice of Durham University, UK.

Claudio Domenig is lawyer, mediator and researcher. Currently he works in the youth public prosecutor's office in Basel, Switzerland.

Frieder Dünkel is Professor at the Faculty of Law at the University of Greifswald and Head of the Department of Criminology, Germany.

Katja Filipčič is Assistant Professor of Criminal Law and Criminology at the Faculty of Law, University of Ljubljana, and senior researcher at the Institute of Criminology in Ljubljana, Slovenia.

Roberto Flor is Assistant Professor of Criminal and International Criminal Law at the Legal Science Department of the University of Verona, Italy.

Esther Giménez-Salinas i Colomer is Professor of Criminal Law for the Esade-Url's Law School in Barcelona. She was for many years rector of Ramon Llull University in Barcelona, Spain.

Jaan Ginter is Professor of Criminal Law and Criminology and Dean of the Faculty of Law at the University of Tartu, Estonia.

Sofia Giovanoglou is senior researcher at the Department of Criminal Law and Criminology of the Aristotle University of Thessaloniki, Greece.

Roland Gombots is a sociologist, social worker and researcher. Currently he works with the "Arbeiter-Samariter-Bund" in Vienna, Austria.

Joanna Grzywa-Holten is senior researcher at the Department of Criminology at the University of Greifswald, Germany.

Philip Horsfield is senior researcher at the Department of Criminology at the University of Greifswald and freelance translator, Germany.

Jenny Johnstone is senior researcher and lecturer in Law and Director of Postgraduate Research Programmes at Newcastle University, UK.

Roman Koval is Founder and Head of Board of the Ukrainian Institute of Peace and Common Ground, Kiev, Ukraine.

Ilona Kronberga is researcher and expert in Criminal Justice at the Centre for Public Policy Providus in Riga, Latvia.

Tapio Lappi-Seppälä is the Director of the National Research Institute of Legal Policy in Helsinki, Finland.

Gordana Lažetić-Bužarovska is Professor in Criminal Law at the Faculty of Law of the "Iustinianus Primus" University in Skopje, Macedonia.

Jenny Maria Lundgaard is researcher and lecturer at the Norwegian Police University College in Oslo, Norway.

David O'Mahony is Professor of Criminology and Criminal Justice at the School of Law of the University of Essex, UK.

Linda Marklund is a mediator, researcher and lecturer at the Centre for Conflict Mediation in Stockholm. She was a project manager for Sweden's largest peer mediation program and coordinator for victim-offender-mediation in the North of Sweden.

Elena Mattevi is researcher at the Faculty of Law of the University of Trento, Italy.

Natalia Nikitina is mediator, social worker, researcher and lecturer at the Department of Criminology and Tort Law of the Siberian Federal University in Krasnoyarsk, Russia.

Andrea Păroşanu is researcher in European projects, mainly in the fields of juvenile justice and restorative justice. She also works as a mediator, facilitator and mediation trainer.

Christa Pelikan is senior researcher at the Institute for the Sociology of Law and Criminology in Vienna, Austria.

Lorenzo Picotti is Professor of Penal Law at the University of Verona, Italy.

Nataliya Pylypiv is the National Human Rights Officer at the UN Human Rights Monitoring Mission in Ukraine. She is also lecturer and consultant at the Institute of Leadership and Management of the Ukrainian Catholic University and at the School of Social Work of the National University "Kyiv-Mohyla Academy".

Anabela Miranda Rodrigues is Professor of Penal Law at the University of Coimbra and director of "Centro de Estudos Judiciários", the national training school for magistrates of Portugal.

Samantha Salsench is PhD Student at the Faculty of Law of the Ramon Llull University in Barcelona, Spain.

Hajrija Sijerčić-Čolić is Professor of Penal Law at the University of Sarajevo, Bosnia and Herzegovina.

Petr Škvain is lawyer, researcher and lecturer in criminal law at the Institute of State and Law of the Charles University in Prague, Czech Republic.

Lara Toro is research assistant at the Faculty of Law of the Ramon Llull University in Barcelona, Spain.

Gintautas Sakalauskas is the senior researcher at the Department of Criminology of the Law Institute of the Ministry of Justice of Lithuania and lecturer at the Faculty of Law, University of Vilnius.

Nikolaj Shchedrin is Professor and the Head of Department of Criminology at the Law Institute of the Siberian Federal University in Krasnoyarsk, Russia.

Milan Škulić is Professor and Vice-Dean at the Faculty of Law, University of Belgrade, Serbia.

Füsun Sokullu-Akinci is Professor of Criminal Law and Criminal Procedure Law at the University of Istanbul, Faculty of Law and also Director of the Criminal Law and Criminology Research Centre in Istanbul, Turkey.

Anette Storgaard is Professor of Criminal Law and Criminology at the Law School of the University of Aarhus, Denmark.

Miroslava Vráblová is Assistant Professor of Criminal Law and Criminology and Vice-Dean of the Faculty of Law, University of Trnava, Slovakia.

Diane van Drie works at the Organisation "Horizon" for youth people in Need and she is PhD-Student at the Willem Pompe Institute for Criminal Law and Criminology of Utrecht University, The Netherlands.

Sanneke van Groningen is psychologist at the Polikliniek Leger des Heils Gelderland in Arnhem and also lecturer and researcher at the Willem Pompe Institute for Criminal Law and Criminology of Utrecht University, The Netherlands.

Ido Weijers is Professor in Juvenile Criminal Justice at the Willem Pompe Institute for Criminal Law and Criminology of Utrecht University, The Netherlands.

Victor Yurkov is senior researcher at the Max-Planck-Foundation for International Peace and the Rule of Law, Heidelberg, Germany.

Wojciech Zalewski is Professor of Penal Law and Criminology and Vice-Dean of the Faculty of Law of the University of Gdańsk, Poland.

Reihenübersicht

Schriften zum Strafvollzug, Jugendstrafrecht und zur Kriminologie

Hrsg. von Prof. Dr. Frieder Dünkel, Lehrstuhl für Kriminologie an der Ernst-Moritz-Arndt-Universität Greifswald

Bisher erschienen:

Band 1
Dünkel, Frieder: Empirische Forschung im Strafvollzug. Bestandsaufnahme und Perspektiven.
Bonn 1996. ISBN 978-3-927066-96-0.

Band 2
Dünkel, Frieder; van Kalmthout, Anton; Schüler-Springorum, Horst (Hrsg.): Entwicklungstendenzen und Reformstrategien im Jugendstrafrecht im europäischen Vergleich.
Mönchengladbach 1997. ISBN 978-3-930982-20-2.

Band 3
Gescher, Norbert: Boot Camp-Programme in den USA. Ein Fallbeispiel zum Formenwandel in der amerikanischen Kriminalpolitik.
Mönchengladbach 1998. ISBN 978-3-930982-30-1.

Band 4
Steffens, Rainer: Wiedergutmachung und Täter-Opfer-Ausgleich im Jugend- und Erwachsenenstrafrecht in den neuen Bundesländern.
Mönchengladbach 1999. ISBN 978-3-930982-34-9.

Band 5
Koeppel, Thordis: Kontrolle des Strafvollzuges. Individueller Rechtsschutz und generelle Aufsicht. Ein Rechtsvergleich.
Mönchengladbach 1999. ISBN 978-3-930982-35-6.

Band 6
Dünkel, Frieder; Geng, Bernd (Hrsg.): Rechtsextremismus und Fremdenfeindlichkeit. Bestandsaufnahme und Interventionsstrategien.
Mönchengladbach 1999. ISBN 978-3-930982-49-3.

Band 7
Tiffer-Sotomayor, Carlos: Jugendstrafrecht in Lateinamerika unter besonderer Berücksichtigung von Costa Rica.
Mönchengladbach 2000. ISBN 978-3-930982-36-3.

Band 8
Skepenat, Marcus: Jugendliche und Heranwachsende als Tatverdächtige und Opfer von Gewalt. Eine vergleichende Analyse jugendlicher Gewaltkriminalität in Mecklenburg-Vorpommern anhand der Polizeilichen Kriminalstatistik unter besonderer Berücksichtigung tatsituativer Aspekte.
Mönchengladbach 2000. ISBN 978-3-930982-56-1.

Band 9
Pergataia, Anna: Jugendstrafrecht in Russland und den baltischen Staaten.
Mönchengladbach 2001. ISBN 978-3-930982-50-1.

Band 10
Kröplin, Mathias: Die Sanktionspraxis im Jugendstrafrecht in Deutschland im Jahr 1997. Ein Bundesländervergleich.
Mönchengladbach 2002. ISBN 978-3-930982-74-5.

Band 11
Morgenstern, Christine: Internationale Mindeststandards für ambulante Strafen und Maßnahmen.
Mönchengladbach 2002. ISBN 978-3-930982-76-9.

Band 12
Kunkat, Angela: Junge Mehrfachauffällige und Mehrfachtäter in Mecklenburg-Vorpommern. Eine empirische Analyse.
Mönchengladbach 2002. ISBN 978-3-930982-79-0.

Band 13
Schwerin-Witkowski, Kathleen: Entwicklung der ambulanten Maßnahmen nach dem JGG in Mecklenburg-Vorpommern.
Mönchengladbach 2003. ISBN 978-3-930982-75-2.

Band 14
Dünkel, Frieder; Geng, Bernd (Hrsg.): Jugendgewalt und Kriminalprävention. Empirische Befunde zu Gewalterfahrungen von Jugendlichen in Greifswald und Usedom/Vorpommern und ihre Auswirkungen für die Kriminalprävention.
Mönchengladbach 2003. ISBN 978-3-930982-95-0.

Band 15
Dünkel, Frieder; Drenkhahn, Kirstin (Hrsg.): Youth violence: new patterns and local responses – Experiences in East and West. Conference of the International Association for Research into Juvenile Criminology. Violence juvénile: nouvelles formes et stratégies locales – Expériences à l'Est et à l'Ouest. Conférence de l'Association Internationale pour la Recherche en Criminologie Juvénile.
Mönchengladbach 2003. ISBN 978-3-930982-81-3.

Band 16
Kunz, Christoph: Auswirkungen von Freiheitsentzug in einer Zeit des Umbruchs. Zugleich eine Bestandsaufnahme des Männererwachsenenvollzugs in Mecklenburg-Vorpommern und in der JVA Brandenburg/Havel in den ersten Jahren nach der Wiedervereinigung.
Mönchengladbach 2003. ISBN 978-3-930982-89-9.

Band 17
Glitsch, Edzard: Alkoholkonsum und Straßenverkehrsdelinquenz. Eine Anwendung der Theorie des geplanten Verhaltens auf das Problem des Fahrens unter Alkohol unter besonderer Berücksichtigung des Einflusses von verminderter Selbstkontrolle.
Mönchengladbach 2003. ISBN 978-3-930982-97-4.

Band 18
Stump, Brigitte: „Adult time for adult crime" – Jugendliche zwischen Jugend- und Erwachsenenstrafrecht. Eine rechtshistorische und rechtsvergleichende Untersuchung zur Sanktionierung junger Straftäter.
Mönchengladbach 2003. ISBN 978-3-930982-98-1.

Band 19
Wenzel, Frank: Die Anrechnung vorläufiger Freiheitsentziehungen auf strafrechtliche Rechtsfolgen.
Mönchengladbach 2004. ISBN 978-3-930982-99-8.

Band 20
Fleck, Volker: Neue Verwaltungssteuerung und gesetzliche Regelung des Jugendstrafvollzuges.
Mönchengladbach 2004. ISBN 978-3-936999-00-6.

Band 21
Ludwig, Heike; Kräupl, Günther: Viktimisierung, Sanktionen und Strafverfolgung. Jenaer Kriminalitätsbefragung über ein Jahrzehnt gesellschaftlicher Transformation.
Mönchengladbach 2005. ISBN 978-3-936999-08-2.

Band 22
Fritsche, Mareike: Vollzugslockerungen und bedingte Entlassung im deutschen und französischen Strafvollzug.
Mönchengladbach 2005. ISBN 978-3-936999-11-2.

Band 23
Dünkel, Frieder; Scheel, Jens: Vermeidung von Ersatzfreiheitsstrafen durch gemeinnützige Arbeit: das Projekt „Ausweg" in Mecklenburg-Vorpommern.
Mönchengladbach 2006. ISBN 978-3-936999-10-5.

Band 24
Sakalauskas, Gintautas: Strafvollzug in Litauen. Kriminalpolitische Hintergründe, rechtliche Regelungen, Reformen, Praxis und Perspektiven.
Mönchengladbach 2006. ISBN 978-3-936999-19-8.

Band 25
Drenkhahn, Kirstin: Sozialtherapeutischer Strafvollzug in Deutschland.
Mönchengladbach 2007. ISBN 978-3-936999-18-1.

Band 26
Pruin, Ineke Regina: Die Heranwachsendenregelung im deutschen Jugendstrafrecht. Jugendkriminologische, entwicklungspsychologische, jugendsoziologische und rechtsvergleichende Aspekte.
Mönchengladbach 2007. ISBN 978-3-936999-31-0.

Band 27
Lang, Sabine: Die Entwicklung des Jugendstrafvollzugs in Mecklenburg-Vorpommern in den 90er Jahren. Eine Dokumentation der Aufbausituation des Jugendstrafvollzugs sowie eine Rückfallanalyse nach Entlassung aus dem Jugendstrafvollzug.
Mönchengladbach 2007. ISBN 978-3-936999-34-1.

Band 28
Zolondek, Juliane: Lebens- und Haftbedingungen im deutschen und europäischen Frauenstrafvollzug.
Mönchengladbach 2007. ISBN 978-3-936999-36-5.

Band 29
Dünkel, Frieder; Gebauer, Dirk; Geng, Bernd; Kestermann, Claudia: Mare-Balticum-Youth-Survey – Gewalterfahrungen von Jugendlichen im Ostseeraum.
Mönchengladbach 2007. ISBN 978-3-936999-38-9.

Band 30
Kowalzyck, Markus: Untersuchungshaft, Untersuchungshaftvermeidung und geschlossene Unterbringung bei Jugendlichen und Heranwachsenden in Mecklenburg-Vorpommern.
Mönchengladbach 2008. ISBN 978-3-936999-41-9.

Band 31
Dünkel, Frieder; Gebauer, Dirk; Geng, Bernd: Jugendgewalt und Möglichkeiten der Prävention. Gewalterfahrungen, Risikofaktoren und gesellschaftliche Orientierungen von Jugendlichen in der Hansestadt Greifswald und auf der Insel Usedom. Ergebnisse einer Langzeitstudie 1998 bis 2006.
Mönchengladbach 2008. ISBN 978-3-936999-48-8.

Band 32
Rieckhof, Susanne: Strafvollzug in Russland. Vom GULag zum rechtsstaatlichen Resozialisierungsvollzug?
Mönchengladbach 2008. ISBN 978-3-936999-55-6.

Band 33
Dünkel, Frieder; Drenkhahn, Kirstin; Morgenstern, Christine (Hrsg.): Humanisierung des Strafvollzugs – Konzepte und Praxismodelle.
Mönchengladbach 2008. ISBN 978-3-936999-59-4.

Band 34
Hillebrand, Johannes: Organisation und Ausgestaltung der Gefangenenarbeit in Deutschland.
Mönchengladbach 2009. ISBN 978-3-936999-58-7.

Band 35
Hannuschka, Elke: Kommunale Kriminalprävention in Mecklenburg-Vorpommern. Eine empirische Untersuchung der Präventionsgremien.
Mönchengladbach 2009. ISBN 978-3-936999-68-6.

Band 36/1 bis 4 (nur als Gesamtwerk erhältlich)
Dünkel, Frieder; Grzywa, Joanna; Horsfield, Philip; Pruin, Ineke (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments. Vol. 1-4.
2nd revised edition.
Mönchengladbach 2011. ISBN 978-3-936999-96-9.

Band 37/1 bis 2 (Gesamtwerk)
Dünkel, Frieder; Lappi-Seppälä, Tapio; Morgenstern, Christine; van Zyl Smit, Dirk (Hrsg.): Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich. Bd.1 bis 2.
Mönchengladbach 2010. ISBN 978-3-936999-73-0.

Band 37/1 (Einzelband)
Dünkel, Frieder; Lappi-Seppälä, Tapio; Morgenstern, Christine; van Zyl Smit, Dirk (Hrsg.): Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich. Bd.1.
Mönchengladbach 2010. ISBN 978-3-936999-76-1.

Band 37/2 (Einzelband)
Dünkel, Frieder; Lappi-Seppälä, Tapio; Morgenstern, Christine; van Zyl Smit, Dirk (Hrsg.): Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich. Bd.2.
Mönchengladbach 2010. ISBN 978-3-936999-77-8.

Band 38
Krüger, Maik: Frühprävention dissozialen Verhaltens. Entwicklungen in der Kinder- und Jugendhilfe.
Mönchengladbach 2010. ISBN 978-3-936999-82-2.

Band 39
Hess, Ariane: Erscheinungsformen und Strafverfolgung von Tötungsdelikten in Mecklenburg-Vorpommern.
Mönchengladbach 2010. ISBN 978-3-936999-83-9.

Band 40
Gutbrodt, Tobias: Jugendstrafrecht in Kolumbien. Eine rechtshistorische und rechtsvergleichende Untersuchung zum Jugendstrafrecht in Kolumbien, Bolivien, Costa Rica und der Bundesrepublik Deutschland unter Berücksichtigung internationaler Menschenrechtsstandards.
Mönchengladbach 2010. ISBN 978-3-936999-86-0.

Band 41
Stelly, Wolfgang; Thomas, Jürgen (Hrsg.): Erziehung und Strafe. Symposium zum 35-jährigen Bestehen der JVA Adelsheim.
Mönchengladbach 2011. ISBN 978-3-936999-95-2.

Band 42
Annalena Yngborn: Strafvollzug und Strafvollzugspolitik in Schweden: vom Resozialisierungszum Sicherungsvollzug? Eine Bestandsaufnahme der Entwicklung in den letzten 35 Jahren.
Mönchengladbach 2011. ISBN 978-3-936999-84-6.

Band 43
Johannes Kühl: Die gesetzliche Reform des Jugendstrafvollzugs in Deutschland im Licht der European Rules for Juvenile Offenders Subject to Sanctions or Measures (ERJOSSM).
Mönchengladbach 2012. ISBN 978-3-942865-06-7.

Band 44
Maryna Zaikina: Jugendkriminalrechtspflege in der Ukraine.
Mönchengladbach 2012. ISBN 978-3-942865-08-1.

Band 45
Stefanie Schollbach: Personalentwicklung, Arbeitsqualität und betriebliche Gesundheitsförderung im Justizvollzug in Mecklenburg-Vorpommern.
Mönchengladbach 2013. ISBN 978-3-942865-14-2.

Band 46
Immo Harders: Die elektronische Überwachung von Straffälligen. Entwicklung, Anwendungsbereiche und Erfahrungen in Deutschland und im europäischen Vergleich.
Mönchengladbach 2014. ISBN 978-3-942865-24-1.

Band 47
Mirko Faber: Länderspezifische Unterschiede bezüglich Disziplinarmaßnahmen und der Aufrechterhaltung von Sicherheit und Ordnung im Jugendstrafvollzug.
Mönchengladbach 2014. ISBN 978-3-942865-25-8.

Band 48
Andrea Gensing: Jugendgerichtsbarkeit und Jugendstrafverfahren im europäischen Vergleich. Mönchengladbach 2014. ISBN 978-3-942865-34-0.

Band 49
Moritz Philipp Rohrbach: Die Entwicklung der Führungsaufsicht unter besonderer Berücksichtigung der Praxis in Mecklenburg-Vorpommern Mönchengladbach 2014.
ISBN 978-3-942865-35-7.

Band 50/1 bis 2 (nur als Gesamtwerk erhältlich)
Frieder Dünkel, Joanna Grzywa-Holten, Philip Horsfield (Eds.): Restorative Justice and Mediation in Penal Matters. A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries. Vol. 1 bis 2.
Mönchengladbach 2015. ISBN 978-3-942865-31-9.