



# EUROPEAN RESEARCH ON RESTORATIVE JUVENILE JUSTICE

VOLUME I

## Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe: Snapshots from 28 EU Member States





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# Foreword

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In 2009, the International Juvenile Justice Observatory launched the European Council for Juvenile Justice (ECJJ) - a network of juvenile justice institutions and experts from 28 Member States of the European Union. Over the past few years, the ECJJ has developed very sound research and policy papers, and promoted influential capacity-building activities for justice professionals.

The European Model for Restorative Justice with Juveniles illustrates the advantages of a restorative approach to child offending. The development of the model is based on a comprehensive review of current practice of restorative justice throughout Europe. The model puts a strong emphasis on both children's rights, including the best interest of the child, and victims' rights. Moreover, it's influenced by the rich history of mediation and social pedagogy in Europe.

The past years' setbacks in the economic conditions in Europe have resulted in greater income inequality, exclusion and poverty. Family stress and an increase in domestic violence, as well as lack of future prospects may drive children and young people into risky behaviours. Evidence shows that a large number of children who commit an offense have a history of exposure to violence and abuse. Many suffer from depression and distress, which is likely to be exacerbated by punitive responses.

Restorative justice promotes a clear shift in the way we perceive a criminal offense and respond to it. It moves us away from retributive punishment and seeks to address the underlying causes and consequences of offending. Its overall aim is to repair the harm caused by wrongdoing. Depending on the individual circumstances and the harm caused, restorative justice processes can be adapted and implemented in various contexts and through various models, such as mediation, conciliation, conferencing and sentencing circles.

Child sensitive restorative justice promotes the child's rehabilitation and reintegration into his or her community. It may bring together the victim, the young offender, the child's parents or guardians, child protection and justice professionals, the school and the community. By focusing on healing, mutual respect and strengthening relationships, restorative justice may be introduced to children who are victims, witnesses or offenders and promoted at all stages of the criminal justice process.

The benefits of restorative justice for children and young people are numerous. Children who participate in restorative processes show fewer tendencies towards anti-social behaviour in the community and at home. Participation in restorative justice processes gives children an understanding of the consequences of their acts on others and an opportunity to take responsibility. Research in Europe and in other regions reveals that victims report lower levels of fear and post-traumatic stress symptoms after a restorative justice process. By meeting face to face and hearing a young offenders' story, they are far more likely to forgive the young person and put the incident behind them. This study shows that at least 85% of victims that have participated in a restorative justice process express satisfaction.

Restorative justice is also a crucial alternative measure to ensure that children's deprivation of liberty is a measure of last resort. Not only does it reduce the risk of secondary re-victimization and violence during the criminal justice proceedings and while deprived of liberty, but it also reduces the risk of stigmatization of the child in the community. Children who participate in community-based restorative justice processes have lower recidivism rates. They are also more likely to complete their education and increase their chances of becoming active and productive members of society.

Moreover, restorative responses can significantly reduce the immense personal and societal costs incurred by punitive approaches. A study in England found that £9 expenditure in the criminal justice system was saved for every £1 spent on restorative justice.

This study shows that many European countries have a long tradition of mediation and conflict resolution approaches when addressing criminal and other harmful acts. Significant standards adopted by the Council of Europe on child justice and the policy framework of the European Union provide a sound foundation for diversion, alternative non-custodial measures and restorative justice for children. Despite these firm commitments and proven benefits, however, restorative justice still plays a marginal role and far too few children and young people in Europe benefit from restorative justice processes.

I am confident that the European Model for Restorative Justice with Juveniles and its accompanying toolkit will provide a significant contribution to the development of effective legislation, policy and capacity building to strengthen children's protection and access to restorative justice across the region.

**Marta Santos Pais**

**Special Representative of the United Nations Secretary-General on Violence against Children**

# 1. Introduction

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*Frieder Dünkel, Philip Horsfield, Andrea Păroșanu*

The report at hand constitutes the first of three publications stemming from a project initiated and conducted by the European Council for Juvenile Justice in 2014 titled “European Model for Restorative Justice with Juveniles”.<sup>1</sup> Overall, the project essentially seeks to identify and promote strategies for a wider, more adequate and effective implementation of restorative justice measures for juvenile offenders in the countries of the European Union. Three project outcomes are planned.<sup>2</sup> The first, the publication at hand, is dedicated to taking stock of restorative justice in the European Union and to identifying best practices of restorative justice with young offenders in the 28 EU Member States. The second phase of the project is dedicated to drafting the European Model for Restorative Justice with Juveniles, which highlights effective strategies for applying restorative justice measures. The publication at hand forms a pivotal part of the basis for that model. Finally, turning to the third outcome, the Restorative Justice Model aims to provide the basis for a “toolkit for the implementation of restorative practices” in the various countries of the European Union. The design of the toolkit includes methods to be used by restorative justice professionals as well as professionals in the field of criminal justice in order to implement and apply restorative practices more effectively in their countries.

## 1. Contextual background

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. Victim-offender mediation, restorative conferencing and other reparative measures attribute greater consideration to the needs of victims and the community, and research has repeatedly highlighted its reintegrative potential

1 The European Council for Juvenile Justice (ECJJ) was launched by the International Juvenile Justice Observatory (IJJO) in 2009. As a network of juvenile justice institutions including public administration, civil society and universities as well as experts from the European Union, the council aims at assisting European institutions and policy makers in developing initiatives on research, capacity building and advocacy work in the field of juvenile justice. The International Juvenile Justice Observatory (IJJO), founded in 2002, is an international Foundation of Public Interest, activities of which include research, cooperation, technical assistance, training and advocacy in the juvenile justice field. The IJJO seeks to defend the rights of children and juveniles in the legal system as well as those at risk of social exclusion, to improve juvenile justice systems and policies and to guarantee the implementation of international standards.

2 Overall, the project is coordinated by *Prof. Tim Chapman*, University of Ulster, United Kingdom. The further research and expert’s team is composed of *Maija Sisko Gellin*, Finnish Forum for Mediation; *Prof. Dr. Ivo Aertsen*, and *Monique Anderson*, Leuven Institute of Criminology, Belgium. The team is working in particular on selecting the most effective restorative justice practices with juveniles, and developing a European Model for Restorative Justice with juveniles as well as the realisation of a toolkit for professionals.

for both victims and offenders, and the promising preventive effects such interventions can have on recidivism.<sup>3</sup>

There has been 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). There is, however, no clear-cut definition of what RJ actually is.<sup>4</sup> Simplifying somewhat, restorative justice is the term that has come to be used to describe processes and practices that seek to employ a different approach to resolving conflicts. RJ regards the criminal justice system as an inappropriate forum for resolving criminal offences, as it does little to actually put right the conflict between the victim and the offender, and the offender and the community against whose laws he or she has trespassed.<sup>5</sup> Rather than regarding crimes as conflicts between offenders and the state, RJ seeks to give the conflict back to the true stakeholders.<sup>6</sup> The aim is to repair the harm that has been caused, ideally by means of an informal process in which victims and offenders, and other participants potentially, voluntarily and actively participate in reflecting on the offence, and come to an agreement on how the harm that has been caused can be repaired and prevented from reoccurring in the future.<sup>7</sup> The most commonly known examples are victim-offender mediation and forms of conferencing (which involve a wider range of participants). From a wider perspective, in practice RJ is understood by some to cover practices that seek to effect the delivery of reparation, regardless of whether victim and offender have actually met or special process was involved. This would include forms of community service (in which reparation is made to society at large), but also reparation panels or reparation orders.

The values reflected in restorative thinking are indeed not entirely new. In fact, they can be traced back to indigenous cultures and traditions all over the world.<sup>8</sup> 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*.<sup>9</sup> The gradual spreading of RJ in the context of responding to 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.<sup>10</sup>

In most of the European Union, restorative justice has primarily (but by no means exclusively) come

3 See for instance *Latimer/Dowden/Muise* 2005; *Bergseth/Bouffard* 2007; *Sherman/Strang* 2007; *Shapland et al.* 2008; *Shapland/Robinson/Sorsby* 2012.

4 For a more detailed look at the contextual and conceptual background of restorative justice, see *Section 1.1* in *Chapter 32* of this volume.

5 *O’Mahony/Doak* 2009, p. 165 f.; *Doak/O’Mahony* 2011, p. 1,717; *Strickland* 2004, p. 3.

6 *Willemsens* 2008, p. 8.

7 *Van Ness/Strong* 2010, p. 43.

8 *Hartmann* 1995; *Liebmann* 2008, p. 302.

9 See for instance *Maxwell/Liu* 2007; *Roche* 2006; *Zehr* 1990; *van Ness/Morris/Maxwell* 2001; *Maxwell/Morris* 1993; *Moore/O’Connell* 1993.

10 *Roche* 2006; *Daly/Hayes* 2001, p. 2.

into play in 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. Systems for responding to juvenile delinquency have increasingly sought to employ a more educational approach with a focus on providing alternative processes (diversion so as to avoid stigmatization) and alternative measures (to seek to positively influence the offender with the aim of social reintegration).<sup>11</sup> In the context of juvenile justice reform, the reintegrative, educational prospects of restorative outcomes and the alternative processes they can entail have come to be regarded as promising means for achieving this.

Throughout Europe, the number of countries that have actually introduced RJ into the juvenile justice context over the past few decades is perceived to have been increasing continuously. A recent comparative study by the University of Greifswald (funded by the European Commission within the Specific Programme Criminal Justice 2007-2013) titled “Restorative Justice and Mediation in Penal Matters”, covering a total of 36 European countries, revealed that manifestations of restorative justice have indeed emerged all over the continent, with all 36 reports indicating that respective restorative provisions or initiatives were in place.<sup>12</sup> Research into the field of restorative justice has increased almost exponentially, and international standards and instruments (both for adult and juvenile offenders) from the European Union, the Council of Europe and the United Nations have increasingly been devoted to RJ over the last 15 years.

First and foremost, the general principles of Committee of Ministers Recommendation Rec (99) 19 concerning mediation in penal matters<sup>13</sup> highlight that mediation should be available at all stages of the criminal proceedings (Art. 4) and that mediation services should be generally available (Art. 3). Another important principle refers to the free consent of the parties, which mediation should be based on (Art. 1). Neither the victim nor the offender should be coerced by unfair means to give their consent to mediation (Art. 11). Council of Europe Recommendation No. R. (2006) 2 concerning the European Prison Rules<sup>14</sup> underlines the use of restoration and mediation in order to resolve conflicts among and with prisoners (Rule 56.2) and when making complaints or requests to the competent authority (Rule 70.2). Finally, 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 emphasizes the benefit of restorative justice interventions such as victim-offender mediation or family group conferencing to the victim (Art. 46). For juveniles in particular, Council of Europe Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice<sup>15</sup> and Council of Europe Recommendation No. R. (2008) 11 on European Rules for Juvenile Offenders Subject to

11 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; *Dünkel* 2013; 2015.

12 See *Dünkel/Grzywa-Holten/Horsfield* 2015. The Greifswald study provides the foundation for the report at hand, and is described in more detail below and in *Chapter 32* of this volume. For further comparative overviews, 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; *Miers/Aertsen* 2012.

13 *Council of Europe* 1999.

14 *Council of Europe* 2006.

15 *Council of Europe* 2003.

Sanctions or Measures<sup>16</sup> both make specific reference to restoration and reparation. Council of Europe Recommendation No. R. (2003) 20 points out the enhancement of alternatives to formal prosecution, by taking into account the principle of proportionality and the free admission of responsibility (Art. 7). The recommendation furthermore places emphasis on the provision of more innovative and effective responses when dealing with more serious and violent offences, and encourages the use of mediation as well as reparation to the victim in appropriate cases (Art. 8). Basic Principle 12 of the “European Rules for Juvenile Offenders Subject to Sanctions or Measures” once more recommends that mediation and other restorative interventions should be available at all stages of criminal procedure, including the stage of serving sentence. Rule 122.2 furthermore underlines the preference of mediation and restorative measures when resolving conflicts with and among prisoners, as also pointed out in the European Prison Rules. Finally, the Council of Europe (2010) Guidelines on Child Friendly Justice point out the promotion of alternatives to judicial proceedings, in particular mediation, diversion and alternative dispute resolution (No. 24).<sup>17</sup>

Despite this boom in restorative justice initiatives, research and standards in the European Union and beyond, the findings presented by *Dünnkel/Grzywa-Holten/Horsfield* (2015) mirror those from other comparative studies<sup>18</sup> into the matter: in the vast majority of European countries, restorative justice plays only a marginal quantitative role in juvenile justice practice. While in some countries – like *Austria, Belgium, Finland, Germany, the Netherlands* and *Northern Ireland* among others– nationwide restorative justice strategies have been established that play a more prominent, sometimes actually considerable role in juvenile justice practice, in most of Europe this is not the case.

That being said, it would be wrong to claim that this state of affairs was due to a lack of effort. After all, localized initiatives for providing restorative justice services for victims and offenders, like mediation or conferencing for instance, have been reported to be in place in virtually every EU and non-EU European states. The question thus arises as to why provision is so limited, what the reasons are for RJ’s lack of practical relevance for the context of responding to juvenile offending and how these factors can be effectively addressed. The publication at hand aims to shed some light on these questions.

16 *Council of Europe* 2008.

17 *Council of Europe* 2010. Further relevant standards include Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings (*Council of Europe* 2001, since replaced by the 2012 directive) and 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 (*United Nations Economic and Social Council* 2002).

18 See *Footnote 12* above.

## 2. Aims and methodology

The primary objective of this study is to map out and “inventorize” the restorative justice landscape in the European Union today, to identify factors that have proven to pose decisive challenges and obstacles to implementing restorative justice measures effectively and to subsequently identify promising solutions (“good practices”) to these common problems by drawing on the positive experiences that have been made in other countries.

These aims are congruent with those formulated in the Greifswald research study by *Dünkel/Grzywa-Holten/Horsfield*, which provides the foundation for both the snapshots and the comparative analysis contained in this publication. Said 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. The study covered 36 countries and jurisdictions, including some Non-EU-member states such as *Croatia, Norway, Serbia, Switzerland* or *Turkey*. Each country delivered a national report on the state of affairs in restorative justice in penal matters in theory and practice according to a common report structure. On the basis of these reports, the research team drew together a snapshot of the European restorative justice landscape, identified key challenges and stated recommendations for how best overcome those challenges based on European experiences.

The same methodology was applied in the study at hand: short country reports (or “snapshots”) were compiled on the 28 Member States of the European Union according to a common report structure so as to facilitate comparability (see below). Due to the differences between the juvenile justice systems of *Northern Ireland, England/Wales* and *Scotland*, who each have their own, there are a total of 30 snapshots. 28 of these snapshots provide short summaries of the national reports from *Dünkel/Grzywa-Holten/Horsfield* (2015).<sup>19</sup> Additionally, the list of EU countries was completed with reports on *Cyprus, Luxembourg* and *Malta* compiled by *Frieder Dünkel* and *Andrea Păroşanu* respectively.

The 30 snapshots, the 36 full national reports from *Dünkel/Grzywa-Holten/Horsfield* as well as the comparative analysis from said publication formed the basis for the subsequent analysis, the aims of which have already been described above. Accordingly, the same conceptual framework was applied to both studies,<sup>20</sup> in that they sought to measure not only process-oriented restorative practices (like VOM, conferencing and circles), but also manifestations in (juvenile) criminal justice systems that facilitate the making of reparation to victims and the community at large (for instance via reparation orders, to a certain degree community service<sup>21</sup> and the possibility for criminal justice decision makers

19 In this introductory chapter and in the comparative analysis in *Chapter 32*, unless otherwise stated, when reference is made to a country in *italics*, it implies reference to the national report from that country in *Dünkel/Grzywa-Holten/Horsfield* 2015 and its respective author(s), and/or to the snapshot on that country contained in this volume. A list of references for each national report can be found at the end of this chapter.

20 For a more detailed description of the conceptual framework of both studies, see *Section 1.2* in *Chapter 32* of this volume.

21 The degree to which community service can be regarded as “restorative” is subject to debate that is described in *Section 2.2.2.4* of *Chapter 32* of this volume.

to take reparation and achieved reconciliation into consideration) that adherents to a narrow definition of restorative justice would not consider restorative due to the lack of a restorative process. While this argumentation is totally understandable, simply omitting all forms of reparation the making of which is not the result of an encounter between victim and offender would essentially mean shining light on only one side of the coin. As the aim was to take stock of restorative justice, it appeared sensible to present a complete a picture as possible and to let each reader decide for him/herself. The focus is thus not only on reparation that is delivered as a consequence of a facilitated agreement between the parties, but rather on the making of reparation *per se*, possibly (and ideally) via restorative processes.

**Table 1: Countries for which snapshots have been compiled for this study**

Austria	Italy
Belgium	Latvia
Bulgaria	Lithuania
Croatia	Luxembourg
Cyprus	Malta
Czech Republic	The Netherlands
Denmark	Northern Ireland
England/Wales	Poland
Estonia	Portugal
Finland	Romania
France	Scotland
Germany	Slovenia
Greece	Slovakia
Hungary	Spain
Ireland	Sweden

### 3. Structure of the snapshots

The snapshots are divided into four sections. The first section is dedicated to the forms of restorative justice that are available as well as their legal basis. Reference is made to restorative justice interventions such as victim-offender mediation, conferencing or (peace-making/sentencing) circles as well as to measures which include restorative elements, such as reparation schemes and to a certain extent community service. At the same time, the contextual factors for the development of restorative justice interventions were taken into account in this section, as were the motors for reform and the role of international standards. This section also provides information on whether the restorative measures for juveniles are used as part of, as an alternative to or independently from the criminal justice system. Likewise, section 1 of the snapshots also describes the stages of the procedure at which RJ can gain access (pre-court level, court level, or post-sentencing level while serving prison sentences) and the respective relevant decision-makers. Furthermore, the consequences of successful restorative justice interventions for the criminal process are presented (case dismissal, sentence mitigation, early release from custody).

Section 2 focuses on the organizational framework for delivering restorative measures. Hereby, services or agencies responsible for practically delivering restorative justice services for juveniles were analysed, as well as the actors responsible for coordinating the measures. The status of mediators, whether they work as full-time or part-time professionals, volunteers or public servants was another point of interest. The qualifications mediators or facilitators must have to be eligible for delivering restorative services as well as possible specialization in youth matters played a further role. Finally, the costs of restorative justice interventions were taken into account, i. e. whether it is a service free of charge for the parties.

The third section of the snapshots is devoted to highlighting the use of restorative justice in practice. Are there any statistical data – either official statistics or research studies – that can give insight into the quantitative role that RJ plays in juvenile justice practice? Does RJ play a marginal or a more central role in practice? Are there discernible upward or downward trends in such practice, and are there any plausible explanations for them?

Finally, evaluations of and research into RJ measures and central challenges were the focus of Section 4, so as to identify good practices in the field of RJ for juveniles. Relevant findings from national research and evaluation, including descriptive research, action research, recidivism analyses, and participant satisfaction surveys are briefly compiled. Likewise, this closing section of the snapshots aimed to identify key obstacles and challenges with regard to the further development and more widespread application of RJ interventions for juveniles, e. g. in terms of the legislative framework, organizational implementation in practice, inter-institutional cooperation, perceptions of key-stakeholders, the general public, economic restraints, etc. The study aimed at identifying promising solutions to these problems, and how they have been addressed.

## 4. Structure of this publication

The remainder of this publication is structured as follows. *Chapters 2 to 31* provide brief accounts of restorative justice in the context of juvenile justice in the 30 European juvenile justice jurisdictions covered in the study. All snapshots are structured in accordance with the aforementioned outline. *Chapter 32* is then devoted to drawing this information together to provide a current overview of the European landscape of restorative justice in juvenile penal matters, and to identify recurring obstacles and hindrances for implementing RJ in a fashion that achieves the desired quantitative and qualitative outcomes. Subsequently, we address approaches in the European Union that can be deemed “good practices” for overcoming these obstacles, and draw up respective recommendations. In doing so, special reference is made to three European RJ models in particular (*Belgium, Finland and Northern Ireland*) that, each for their own reasons, are generally regarded as particularly promising and effective strategies in this regard.

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# 2. Austria<sup>22</sup>

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*Roland Gombots, Christa Pelikan*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Austria, victim-offender mediation (called *Tatausgleich*) has already been legally provided for juveniles since 1988 and for adults since 2000. Prior to legal implementation, victim-offender mediation had been first introduced as a pilot project for juveniles in 1985. The positive outcome of this project as well as great interest among criminal justice professionals and the wider public led to the incorporation of victim-offender mediation related provisions in the Juvenile Justice Act (1988). This reform was driven in particular by juvenile judges, together with public prosecutors in the field of juvenile justice, as well as by the Probation Service Association (Association for Probation and Social Work) – now ‘NEUSTART’.

Juvenile justice reform and the introduction of victim-offender mediation were strongly influenced by (and need to be placed against the backdrop of) a general search for new approaches to responding to youth crime, as well as international experiences with diversion. Furthermore, at the theoretical level, *Nils Christie’s* concept of the “re-appropriation of conflicts” was particularly significant and influenced the Vienna Institute for the Sociology of Law and Criminology (IRKS), which disseminated the concept at the policy level. These ideas and proposals contributed to the creation of the first pilot project for juveniles. Accompanying research was conducted right from the moment the pilot project had been established and had taken up operation.

The positive experiences gained through the pilot project, its legal implementation and favorable organizational structure (Association for Probation and Social Work) as well as the strong support from relevant academics and professionals led to the nationwide extension of victim-offender mediation for juveniles. The Austrian experience became a good practice example for other countries and is reflected in the Council of Europe recommendation on mediation in penal matters elaborated in 1999.

Victim-offender mediation can be conducted as a diversionary measure at the pre-court or the court-level. It is predominantly used by prosecutors to waive prosecution. The legal requirements that have to be met so that a case can be diverted include that there is no serious culpability on the part of the suspect, that the facts and circumstances of the case have been adequately clarified, and that the maximum punishment prescribed by law for the offence does not exceed five years of imprisonment. One prerequisite for mediation is that the suspect is willing to assume responsibility for the act

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22 The snapshot provides a summary of a report by *Roland Gombots* and *Christa Pelikan*, see *Gombots/Pelikan* 2015, and was compiled by *Andrea Păroșanu*.

committed. In cases involving juvenile suspects, the victim does not need to approve victim-offender mediation. The legal consequences of mediation are essentially in the hands of the prosecutor, but when an agreement has been reached in the course of victim-offender mediation, dropping the charge is the most common course of action.

## 2. Organisational framework for delivering restorative justice measures

The public prosecutor and/or the courts have the discretion to refer a case to mediation, and in practice it is the prosecutor who assumes the central gatekeeping role. Cases are referred to a unit of the private association NEUSTART, which functions as an autonomous body under the Ministry of Justice. NEUSTART is the central provider of mediation services in Austria. Its headquarters is based in Vienna, and there are nine regional offices across the country.

VOM-services comply with high quality standards, as the training for mediators is very comprehensive and detailed. It includes both initial and follow-up training, which last four years in total and comprise theoretical and practical elements. It is predominantly in-service training with special courses provided throughout the four-year period. After this period trainees can be accredited as certified mediators. Almost all fully accredited mediators work full-time in the field of victim-offender mediation. A small number also work as probation officers.

To become a mediator in penal matters, a person must hold a degree either in social work, law, psychology, sociology or a similar field. The responsibilities, rights and obligations of mediators are stipulated in the Law on Probation Services. Training is provided by the victim-offender mediation units of NEUSTART, and is accompanied by continuous exchange of experiences and concurrent research. Mediators apply a wide range of methodological approaches in delivering their services, which are always adapted to the individual case at hand. The work of mediators is characterized by close cooperation with prosecutors and judges.

## 3. The use of restorative justice in practice

Statistical data on the implementation of victim-offender mediation are collected by NEUSTART. In 2010, the total number of newly opened (offender's) cases was 7,467 – 1,286 juveniles and 6,181 adults. Since the introduction of victim-offender mediation for juveniles in 1985, case numbers increased continuously up until 1997 (2,727 juvenile offenders). This was followed by a period of stagnation (with only minor fluctuations) up until the beginning of the 2000s (2,164 juvenile offenders), and a subsequent significant decline from 2004 onwards from 1,610 cases in 2004 to 1,286 in 2010.

In 2009, all cases of 'diversion with intervention' (which includes victim-offender mediation) accounted for 23% of all young persons that came to the attention of the public prosecutor; 11% were convicted by

the courts and for the greatest share, the charge was suspended or the case was dismissed without any further intervention.<sup>23</sup>

Regarding the types of offences for which victim-offender mediation is conducted, the majority of offences committed by juveniles and adults are such against physical integrity (e. g. assault/battery, etc.). In 2010, according to NEUSTART-statistics, this category of offences accounted for 65% of all offences committed by juveniles participating in mediation. 19% involved property-related offences (e. g. theft, fraud) and 10% were offences against personal freedom (e. g. threatening behaviour, stalking, etc.).

When observing the victim-offender-relationship within the dispute, various types of conflicts appear, as NEUSTART-statistics show. In 2010, for juveniles, situational conflicts (e. g. conflicts arising out of a brief encounter in a special situation: brawls or fights in public places or related to traffic situations) accounted for the largest share (57%). The parties knew each other in 19% of cases, followed by conflicts at school (12%), family conflicts (6%) and partnership conflicts (2%).

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

Various research studies on victim-offender mediation have been conducted. At this point, it needs to be emphasized that accompanying research has played a significant role since the very beginning, and has made vital contributions to the successful establishment of victim-offender mediation in Austria.

Evaluation of the accompanying research of the first pilot project for juvenile offenders showed very positive results, in particular concerning the participation rates in mediation and the high rates to which agreements were reached that led to a discharge of the case by the prosecutor. About 90% of young offenders and even 96% of victims agreed to participate. The vast majority of cases referred to victim-offender mediation (75%) resulted in an agreement that was subsequently fulfilled.<sup>24</sup>

Comparative research regarding the practice of victim-offender mediation in the Austrian province Styria and the Federal State Baden-Württemberg in Germany brought results to light that strongly mirror those from the accompanying research mentioned above. Overall, when looking at the willingness of the parties to participate and the parties’ satisfaction with both the mediation procedure and the outcome of mediation, the Austrian findings were more favourable. In Austria, 93% of offenders and 92% of victims were willing to participate, compared to 72% of offenders and 74% of victims in Germany. Mediation resulted in an agreement in 85% of cases in Austria – in Germany the respective share was only 75%. For Austria, 87% of victims reported to be satisfied, whereas this only applied to 65.5% of victims in Germany.<sup>25</sup>

23 See *Bruckmüller/Pilgram/Stummvoll* 2011.

24 See *Pelikan/Pilgram* 1988.

25 See *Kilchling/Löschnig-Gspandl* 1998.

Qualitative research focusing on recidivism of young and adult offenders (over a period of three years) was conducted in 1998 and covered 361 victim-offender mediation cases and 7,952 court cases. The study revealed that the recidivism rate for the mediation cases was 14%, while 33% of offenders who had been convicted to a fine went on to reoffend within three years.<sup>26</sup>

A further study focusing on reconviction showed that, within a period of 2.5 to 3.4 years, only 16% of young and adult offenders were reconvicted, regardless of the outcome of mediation. 14% of offenders who had come to a mediation agreement were reconvicted, compared to 21% among mediation cases that had resulted in a negative outcome (i. e. no agreement). In comparison with results from general statistics on reconviction, the study revealed distinctly lower reconviction rates after mediation (15%) compared to reconviction rates following the imposition of a court-ordered sanction (41%). Regarding the outcome of victim-offender mediation, NEUSTART records show that more than two thirds of all cases have been successful. 78% of all cases have been dropped by the prosecutors, which indicates that negative outcomes were also positively taken into account in some cases.<sup>27</sup>

Besides these research studies, further important evaluation studies focusing on the impact of victim-offender mediation in cases of partnership violence have been conducted in Austria.<sup>28</sup> A large proportion of mediations involve adult offenders, specifically also often in cases of partnership violence, while for juveniles cases of partnership violence do not play such a significant role in VOM practice.

In recent years, a certain degree of standstill has been observable in the development of restorative justice in Austria. There is the prevailing impression that there has been a loss of interest in this mode of reacting to crime since (and perhaps due to) its strong and truly impressive beginnings.

However, it can be emphasized positively that victim-offender mediation is available nationwide and functions on the basis of longlasting practical experiences. NEUSTART mediators are well trained and provide rather sophisticated methods for dealing with different types of conflicts and different constellations of persons affected by those conflicts. The use and implementation of these methods has been quite well researched.

Recently, a pilot project involving the use of restorative conferencing in various contexts has been conducted (2012 to 2014). Evaluative research of this project is being performed by the The Institute for Criminal Law and Criminology at the University of Vienna. The project aims to assist young offenders with their re-integration into society and to help them draw on the resources of the family and social network. One of the three pilot projects includes victims and their supporters (so-called “reparation conferences”). The project has been carried out within the probation-section of NEUSTART.

26 See *Schütz* 1999, p. 166 ff.

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# 3. Belgium<sup>29</sup>

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*Ivo Aertsen, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The roots of restorative justice in Belgium go back to first mediation initiatives with juveniles in the late 1980s. In Belgium, restorative justice mainly takes the form of victim-offender mediation, both in juvenile justice and in adult criminal law. In the juvenile justice system, since 2006 conferencing has also been structurally provided for nationwide. Conferences involve a larger number of participants from the victim's and the offender's side, but also from the municipality (police officers, social workers, teachers etc.). Furthermore, peace-making circles have been introduced at an experimental local level. Interestingly, the developments in Belgium have been strongly influenced and supported by academics of the Catholic University of Leuven, by promoters like *Tony Peters* and *Lode Walgrave* and their teams.

The Belgian juvenile justice system is a welfare oriented system based on the idea of education and protection of juveniles as expressed in the Youth Justice Act of 1965 in its latest reform of 2006.<sup>30</sup> This orientation is in harmony with the philosophy of restorative justice. Whereas the law of 1965 emphasised offender rehabilitation without explicitly mentioning mediation and restorative justice measures, the law reform of 2006 has kept the welfare orientation and expanded restorative justice measures considerably. The Youth Justice Act 2006 clearly prioritises restorative justice options, mainly in the form of mediation and conferencing. Generally, the legal approach aims at assisting the young offender to assume responsibility and to take the victim's rights into account, which is considered to be a more appropriate and effective response than the previous youth protection model. Through this new legal framework, restorative justice programmes with juveniles have been implemented widely and mandatorily in every judicial district all over the country.<sup>31</sup>

29 This snapshot is based on a report by *Ivo Aertsen*, University of Leuven/Belgium, see *Aertsen 2015*, and was compiled by *Frieder Dünkel*.

30 See *Christiaens/Dumortier/Nuytiens 2011*, p. 99 ff.; due to the welfare approach the age of criminal responsibility is 18, with a few exceptions enabling the transfer to adult courts for juveniles aged 16 or 17. Overall, *Christiaens/Dumortier/Nuytiens (2011)* provide a comprehensive account of Belgian juvenile justice in terms of the reform history, the legislative framework, practice and research.

31 In adult criminal law and procedure mediation and restorative justice measures have been implemented on a nation-wide basis since 1994, when the diversionary model of penal mediation (dismissal of cases by the prosecutor) and in 2005 the court based "mediation for redress" model for more serious crimes were introduced in the law, each after a successful model phase in some districts, see *Aertsen 2015*, p. 49 f.

In Flanders, an interesting structure has been introduced: a special fund that enables juveniles to pay compensation to their victims. This fund is available – within the context of a mediation process – to juveniles who have no financial means to reimburse the victims for the damages. The offender is allowed to undertake voluntary work for a non-profit organisation for a limited number of hours, for which he is paid by the fund. These earnings are then passed on to the victim.<sup>32</sup>

Regarding restorative justice at the prison level, interesting experiments have been developed in Belgium with mediation-oriented meetings between prisoners and their victims on the one hand, and the development of a nation-wide fund from which prisoners are paid for voluntary work (within the prison setting) so as to enable them to pay compensation to their victims, on the other. Belgium is one of the few countries to have implemented such structures at the prison level as a nation-wide strategy.

## 2. Organisational framework for delivering restorative justice measures

Mediation is most often used when diverting a case. Police and public prosecutors as well as the court are the main gatekeepers. Mediation can be organised under the administrative structure of the municipalities, under the authority of the public prosecutor and the so-called ‘houses of justice’, or by independent NGOs. Much emphasis is placed on professionalising the work of mediators. Most mediation is offered by employees of NGOs, in close cooperation with juvenile or criminal justice authorities. The NGOs also supervise the compensation funds mentioned above.

## 3. The use of restorative justice in practice

In terms of the use of restorative justice in juvenile justice practice, the available statistics show that there was a strong increase in the numbers of juveniles referred to mediation from 2005 (1,620) to 2009 (4,050), followed by a slight drop up until 2012 (3,244). The annual number of juveniles who participate in conferencing, which is much more complex and time consuming than mediation, is at around 100 cases per year in the Flemish community (2012: 108) and about 40-50 in the French community (2011: 45).<sup>33</sup>

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Belgium, numerous research studies (general or evaluative) have been conducted on restorative justice measures. The majority of them deal with mediation and conferencing, often as Ph.D. research with theoretical and implementation-related issues. Evaluative studies have been performed that cover

32 For similar structures in some German federal states, see the snapshot on Germany by *Dünkel/Păroşanu* with further references.

33 See *Aertsen* 2015, p. 70.

the functioning of the compensation fund, mediation at the police level and the reasons for the limited application of the conferencing model. One interesting result from Belgian mediation research is that only about 25% of the mediation processes actually involved a face-to-face meeting (direct encounter) between victim and offender, i. e. was “restorative” in a strict sense.

Belgian studies on recidivism rates have yet to be published, but the results from surveys on the satisfaction of participating victims have been positive, as have the rates to which offenders fulfil the commitments stemming from mediation or conferencing.<sup>34</sup>

Looking at the general development of restorative justice in Belgium, since their implementation, restorative justice measures have been increasingly used in the criminal justice system and in juvenile justice in particular. Encouraging experiences are also being made in prisons with so-called victim-offender meetings and with the compensation of victims through the victim compensation fund (based on voluntary work of the prisoners).

Belgium is one of the few countries worldwide where restorative justice is available for all types of crime, at all stages of the criminal justice process, for both minors and adults, and for crimes of all degrees of severity. Moreover, restorative justice is well established by law, available throughout the whole country and relatively well funded by federal and regional governments.

Due to the absence of an integrated national data recording system for all types of restorative justice programmes, we can only estimate the total number of cases dealt with annually to be about 13,500 mediation cases and about 150 conferences per year. Although the number of mediation cases might seem rather large for a small country (with a population of less than 11 million), it is also clear that the potential of mediation and conferencing, in terms of the quantitative role they play in practice, is far from being fully tapped. Observations in the field and various research reports have revealed important obstacles to referring cases to restorative justice programmes in an effective and efficient way. Restorative justice in Belgium cannot yet be considered to be a service to which all persons involved in or affected by crime have equal access. This is an important limitation, notwithstanding the legal frameworks which, for juveniles, stipulate that mediation and conferencing have to be considered systematically and by priority.

34 See in detail *Aertsen* 2015, p. 74-80 with further references.

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# 4. Bulgaria<sup>35</sup>

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*Dobrinka Chankova, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Bulgaria, restorative justice measures have been introduced in the criminal law system in recent years. Among the factors promoting this development, we find the desire to align national legislation with international standards, as well as the influence of American and European agencies and NGOs aiming at strengthening civil society and thereby also supporting the notion of mediation. Beside these grass-roots movements, support has also come from academia and later on from policy makers. Prior to EU membership in 2007, national legislation had to be brought into accordance with the *acquis communautaire*, which accelerated judicial reform.

The “National Strategy for the Support and Compensation of Crime Victims” was adopted in 2006, emphasizing the use of mediation for victims in criminal proceedings. The adoption of the EU Directive on the rights, the support and protection of victims is expected to further promote and accelerate the use of restorative justice, especially mediation, in Bulgaria. Furthermore, “The Strategy to Continue the Judicial Reform in the Conditions of Full EU Membership 2010” made victim-offender mediation a high priority. Other documents, such as the “Concept of State Policy on Juvenile Justice 2011”, emphasized the priority of restorative justice measures over punishment. Finally, the newly adopted “Updated Strategy for the Continuation of Judicial System Reform 2014” underlines the urgent necessity for restorative justice to be more widely implemented and resorted to in Bulgarian criminal justice.

Victim-offender mediation is the most prominent form of restorative justice, and has been implemented in Bulgaria in recent years. However, its use is limited to adult offenders – as it stands today, juvenile offenders cannot take part in victim-offender mediation. Some interventions for juveniles with a potentially restorative character have however been introduced, and experiments with restorative justice in prison settings are underway.

The legal basis for victim-offender mediation is provided by the Mediation Act, adopted in 2004. Being a general and rather short law, additionally further soft law acts with more detailed provisions have been elaborated in order to implement the Mediation Act in practice (see *Section 2*). The Mediation Act provides regulations for all kinds of mediation, including mediation in penal matters. Until now,

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<sup>35</sup> This snapshot is based on a report by *Dobrinka Chankova*, see *Chankova 2015*, and was compiled by *Andrea Păroșanu*.

victim-offender mediation for adult offenders can only be used at the court level, not at the pre-trial level. Although the current Criminal Code does not refer explicitly to victim-offender mediation, its use is allowed in cases of complainant's crimes. Reforms of the new Criminal Code and the Code of Criminal Procedure are underway, which shall also extend the use of mediation.

Concerning young offenders, a few measures with a restorative character can be found in the Juvenile Delinquency Act 1958, such as delivering an apology to the victim, making reparation for the damage through work if possible, participation in educational programmes, consultation for rehabilitative purposes and community service.<sup>36</sup> These measures are only partly restorative, as the procedures used to achieve the outcomes are not fully restorative (not achieved through victim-offender mediation, do not involve the victim etc.). They also lack the fundamental restorative principle of voluntariness, for they are imposed by the Local Commissions for Combating Juvenile Delinquency.

Furthermore, for juvenile offenders the Criminal Code provides for diversion in cases of offences that do not represent a great social danger, involving the imposition of educational measures instead of prosecuting further under the Juvenile Delinquency Act.

Regarding restorative justice at the prison level, currently there is no legal basis within the Execution of Punishments and Detention in Custody Act 2009 to apply restorative schemes in prison settings or after release from prison. Nevertheless, some pilot projects on victim-offender mediation, conflict resolution in prisons and restorative measures as conditions for early release have been carried out in recent years in some Bulgarian prisons for adult inmates. There are currently proposals to amend the Act so as to provide a legislative basis for introducing restorative measures in prison settings. Regarding juveniles, who serve their prison sentences in corrective homes, there are no legal provisions on the use of restorative justice at this level. However, there are some initiatives by staff to involve juveniles in conflict resolution training programs while serving sentence.<sup>37</sup>

## 2. Organisational framework for delivering restorative justice measures

As mentioned in *Section 1*, victim-offender mediation is not yet applicable to juvenile offenders. However, future reforms may extend its use to cover younger offenders, so the organisational framework of mediation is presented here in brief. The Mediation Act contains only few provisions on the practical implementation and organizational framework of mediation. The Minister of Justice released the "Training Standards for Mediators", the "Procedural and Ethical Rules of Conduct" and the "Rules Pertaining to the Unified Register of Mediators" in 2005. These documents serve to provide more detail as regards the implementation of mediation in all fields, including victim-offender mediation. However, in 2007 these documents were replaced by ordinance N2 of 2007 on the Conditions and Procedure

<sup>36</sup> Kanev/Furtunova/Roussinova/Bekirska 2011, p. 131 ff. The latter source provides a comprehensive overview of juvenile justice in Bulgaria in terms of reform developments, theory and practice.

<sup>37</sup> <http://www.gdin.bg> (in Bulgarian).

for Approval of Organisations Providing Training for Mediators, on the Training Requirements for Mediators, on the Procedure for Entry, Removal and Striking of Mediators from the Unified Register of Mediators, and on the Procedural and Ethical Rules of Conduct for Mediators, issued by the Minister of Justice. The Unified Register for Mediators comprises all certified mediators according to the Training Standards for Mediators. Training courses with a length of about 60 academic hours are provided by universities and NGOs. Mediators work on a voluntary basis. The National Association of Mediators is responsible for coordinating and networking activities.

The Local Commissions for combating Juvenile Delinquency are responsible for the implementation of the educational measures with restorative potential mentioned under *Section 1* (such as apology, reparation of the damage through work, community service) that can be ordered against juvenile offenders. These commissions include representatives of administration, police, specialised local agencies and experts.

Apologies are made to the victims directly. Damage reparation through work is monitored by the Secretary of the Local Commission or a Commission member. Community service for juveniles shall not exceed 40 hours, and adequate work shall be assigned (or at least designated) by the Mayor of the Municipality in which the juveniles resides.

### 3. The use of restorative justice in practice

In Bulgaria, there are no nationwide programmes or initiatives on restorative justice – restorative measures like VOM are carried out only at the local level. Accordingly, there are no statistical data available at the national level.

The European Project “Victim-Offender Mediation at the Post-Sentence Stage” – coordinated by the French Federation “Citoyens et Justice” in cooperation with partners from Bulgaria, Italy, Spain and France – promoted the use of mediation at all stages of the criminal procedure. Statistical data are available for the number of cases resolved through restorative justice within this project.<sup>38</sup> At Varna Regional Court, which was involved in the project, instructions for mediation were issued in 84 cases. An agreement was reached in 14 of these cases. As a result, in 12 cases the complaint was dropped, while in the remaining two cases the agreement was approved by the court.

Concerning the use of educational measures with restorative elements for juveniles, the data of the National Statistics Institute reveal that the share of these measures in the practice of the Juvenile Commissions and the courts is rather low.<sup>39</sup> These measures do not play a significant role in the commissions’ and courts’ decision-making practices.

38 See *Citoyens et Justice* 2011.

39 Website of the National Statistical Institute: [www.nsi.bg](http://www.nsi.bg).

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

Several studies conducted in the year 2000 revealed a positive attitude towards victim-offender mediation in society as well as among law-enforcement authorities as well as a readiness to use it.<sup>40</sup>

The European projects “Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern Europe” (2004-2005) and “Restorative Justice Developments in Europe” (2002-2006) aimed at assessing the situation of restorative justice and victim-offender mediation and promoting their implementation in several countries, including Bulgaria. European-wide networks among practitioners, policy makers and researchers were established in order to exchange on research, legislation, practice and policy in the field of restorative justice.

In 2005, a sociological survey concerning the applicability of victim-offender mediation was carried out.<sup>41</sup> The study involved 100 criminal justice professionals (judges, prosecutors, investigating magistrates and lawyers) from several cities. When asked for their opinion on which authority should be responsible for deciding whether cases are adequate for VOM, 35% of the respondents stated that all of the authorities mentioned above should have a gatekeeping role, depending on the stage of the proceedings. 20% felt that the investigating magistrate should make such decisions, 19% opted for the courts, 15% for the prosecutor and 11% for the police. The survey also revealed that the majority of respondents preferred the use of victim-offender mediation at an earlier stage, at any stage of the pre-trial proceedings or right after receiving the preliminary information.

Restorative justice including victim-offender mediation is still used only to a limited extent. Current legislation could be modified to be more favourable for mediation to be used, especially by expanding its scope to include juvenile offenders. It is equally important that future legislation introduce diversionary measures that should also have strong restorative elements.

The retributive approach is given more emphasis than the restorative approach, both in terms of the legislative framework and its implementation in practice. Judges and other legal professionals tend to be rather reluctant towards restorative justice developments, as they are often viewed as undermining the authority of the state and lawyer’s interests.

In the context of the challenging transitional period, linked to difficult economic conditions, citizens have to cope with their everyday lives. This situation is reflected in rather low levels of civil activism and reveals a need for ongoing awareness-raising. Mainly various NGOs active in the field of restorative justice and academics promote the further development and implementation of restorative justice in Bulgaria.

There is a need for appropriate state funding in order to provide sustainable and enhanced restorative

40 Chankova 2002, cited in Chankova 2015, p. 219.

41 Chankova 2006, p. 43 ff.

justice practices with the aim of delivering better services to victims and offenders. The functioning of these services cannot be based only on the activities NGO and volunteer. Their personal investment needs to be met in kind by the state.

Furthermore, providing ongoing training of mediators as well as of criminal justice professionals such as judges, prosecutors, police officers, lawyers, probation and prison staff in restorative justice is of particular importance in this regard.

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# 5. Croatia<sup>42</sup>

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*Igor Bojanić, Andrea Păroşanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The most significant form of restorative justice in Croatia is victim-offender mediation. It is applied under the term “out-of-court-settlement”, mainly at the pre-trial level for juvenile and young adult offenders as a diversionary measure provided by the Juvenile Courts Act (JCA). The JCA regulates measures and sanctions regarding juveniles (14 to 17 years) and young adults (18 to 20 years).<sup>43</sup>

Restorative justice gained importance in Croatia in the context of harmonizing the national legal system with international standards and recommendations, especially relating to aspects regarding victims, mediation, restorative justice, efficiency of the justice system and juvenile justice. Reforms in the field of juvenile justice sought to incorporate restorative elements into the JCA.

Principally, restorative measures are possible at all stages of criminal proceedings, but play the greatest role at the pre-trial level when applying the principle of opportunity. Certain differences exist between adults and juveniles in this regard, most prominently in terms of the conditions that can be imposed.

Regarding young offenders, the public prosecutor for juveniles can waive criminal prosecution if the offender has committed an offence punishable by imprisonment for up to five years or a fine, and apply certain obligations. Special obligations which can be imposed on juveniles are categorized as “educational measures”. The prosecutor subject the young offender to certain conditions, for instance to apologize to the victim, to participate in “out-of-court-settlement” (mediation) and to compensate or correct the harm caused by the offence.

Furthermore, the prosecutor can order juvenile offenders to work for humanitarian organizations or communally and ecologically significant services (community service), or other obligations like participating in a rehabilitation programme or undergoing psycho-social treatment. The young offender has to give his/her consent to these conditions. In case the conditions have been fulfilled, the public prosecutor may decide not to institute criminal proceedings.

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<sup>42</sup> The snapshot was compiled by *Andrea Păroşanu* and provides a summary of two reports by *Igor Bojanić, Bojanić* 2011 (on juvenile justice in Croatia) and 2015 (on restorative justice in Croatia).

<sup>43</sup> Regarding juveniles aged 14 and 15 years, only educational measures (including special obligations) can be imposed.

At the court level, the Juvenile Council of the court can decide to terminate proceedings regarding all kinds of offences when it deems imposing a sanction or measure unnecessary. In doing so, the Council takes the juvenile's behaviour since the offence into account, including conciliation with the victim, apologies, working in the interest of the victim, etc.

Furthermore, the court also has to consider the behaviour of the young offender when choosing to apply an educational measure, especially in terms of whether efforts have been made to repair the damage. The court, like the prosecutor at the pre-court level, may also impose a special obligation as an educational measure, such as an apology to the victim, repairing the harm caused by the offence or community service for up to 60 hours, which reflect notions of restorative justice to a certain extent.

At the post-sentencing stage, the Imprisonment Execution Act states that prisoners should receive support with compensating the damage caused by their offending as well as with reconciling with the victim. Thus, at least at the theoretical level, restorative justice does indeed have its place at the prison level.

## 2. Organisational framework for delivering restorative justice measures<sup>44</sup>

Regarding victim-offender mediation ("out-of-court-settlement") with young offenders, mediation services operate in the cities Zagreb, Osijek and Split. These services are subjected to the local Centres of Social Care. The establishment of the three mediation services was the result of the project "Alternative Interventions for Juvenile Offenders – Out-of-Court-Settlement" by the Ministry of Health and Social Care, the State Attorney's Office and the Faculty of Education and Rehabilitation Sciences of the University of Zagreb, which started in the year 2000. During the project, 24 professionals were trained in mediation in a three-year-course by the Austrian NGO "Neustart Graz". Besides the elaboration of a mediation model for juveniles, the project led to the creation of the Association for Out-of-Court-Settlements in Croatia in 2003.

Mediators are staff of the Ministry of Health and Social Care, often with a professional background in social work, law, psychology or social pedagogy, and have received special mediation training.

Since 2001, the State Attorney's Office has released guidelines on the implementation of the model mediation project. These include certain case selection criteria, such as a high degree of certainty that the young offender committed the offence, the victim should be a physical person, juvenile and young adult offenders need to give their consent to mediation, the offence is punishable with up to five years in prison or a fine, and the offence should not be a petty offence. The guidelines also point out that being a repeat young offender does not constitute grounds for exclusion from mediation.

44 For an insightful look at the organisational structures for mediation in Croatia, see *Žižak* 2010. See this source also for information on the legislative basis of mediation for juvenile offenders.

Regarding the mediation process, the public prosecutor first decides whether the case should be referred to mediation, i. e. whether the legal preconditions are met, and then transfers the case to an associate, e. g. social worker or pedagogue for closer assessment of the case. If the case is deemed suitable for mediation, the associate refers the case to the mediation service. Mediation, as an “ordered obligation”, must be completed within a period of three months. Mediation is based on the principle of voluntariness of both parties.

During the mediation session, in addition to victim, offender and mediator, the juvenile’s parents or other close family members are also invited to participate and provide support. Where mediation has been successful, the mediator sends a respective report to the prosecutor who in turn decides whether or not to prosecute further.

### 3. The use of restorative justice in practice

In Croatia, roughly 3,000 to 3,500 offences are committed by juvenile offenders annually. 35-45% of all juvenile offender cases are terminated by the public prosecutor based on the principle of conditional opportunity, thus by diverting the case. Mediation accounts for more than 10% of all cases in which special obligations are ordered by the prosecutor when applying the principle of opportunity. In the period from 2004 to 2011, a total of 1,111 cases involving young offenders were referred to mediation. Mediation cases have been on the rise in recent years, the same applies to community service.

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

Until now, the mediation service in Zagreb has been the subject of two evaluation studies. The first covered the period from 2001 to 2006 and included 175 cases of young offenders. The main objectives of the study were to evaluate fulfilment of criteria for case referral, the outcomes and success of mediation, and the parties’ satisfaction with the mediation process.

The vast majority of the parties agreed to participate in mediation (96% of suspects and 94% of victims). Most offences were property related (60%), and 25% were offences against the person. There were no petty offences in the sample. The majority were first-time offenders (94%). Most offenders were aged 14 to 17 years (60%), 40% were young adults aged between 18 and 20 years.

In 86% of the cases, the public prosecutor decided not to prosecute further. Regarding the duration of the mediation process (from case referral up until completion of mediation), in half of the cases (49%) mediation lasted approximately one month, in one third (32%) between one and three months, and in 14% of the cases between three and six months.

Mediation was successful in 88% of the cases, out of which in 92% of cases the agreement was

successfully completed. Concerning the contents of the reached agreements, the most common element was the making of an apology followed by financial compensation (58%), only an apology in 26% of cases and only financial compensation in 6% of cases. Further agreements included returning property, humanitarian work, drug addiction treatment, a symbolic gift, etc.

In terms of recidivism, within a three year follow-up period, only 9.7% of suspects reoffended, mainly in drug abuse related offences. This is less than the average rate among juveniles, which lies at about 30%. The evaluation revealed a high degree of satisfaction among victims (95%) and suspects (94%).

Another evaluation study, carried out from 2006 to 2009, included 209 suspects and revealed results similar to those from the first evaluation study. 90% of the mediation cases resulted in an agreement between victim and offender and 86% of those agreements were completed successfully. The authors, however, also came to the conclusion that further evaluations of victim-offender mediation in Croatia using multi-variate methodology are in dire need.

The evaluation studies revealed that promising results have been achieved in mediation with young offenders since the development of the mediation model. However, the infrastructure for delivering victim-offender mediation services is limited, as only three services are in operation throughout the country. The creation of further mediation centres (also to be extended for adult offenders) is thus clearly necessary, as are adequate funding and the provision of professional training.

At the pre-trial level, mediation can only be conducted in case of offences with a maximum penalty of imprisonment of five years or a fine. An extension of eligibility criteria to include further offences is an issue worthy of closer consideration. Also, at the court level, the notion of mediation could be attributed more significance, as well as at the post-sentencing stage, for example when considering early release or during after-care of released persons.

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# 6. Cyprus<sup>45</sup>

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*Frieder Dünkel*

## 1. Forms of restorative justice interventions and their legal basis

Since 2006, the age of criminal responsibility in the Cypriot juvenile justice system has been set at 14. Prior to the 2006 reform, it had been at 10 years like in England and Wales. For children aged between 10 and 12 there was a rebuttable presumption of non-responsibility (conditional responsibility).<sup>46</sup> The Cypriot Juvenile Offenders Law is from 1946 with only one amendment in 1972.<sup>47</sup> Although a level of minimum procedural protection exists through the Constitution of the Republic of Cyprus, the Criminal Procedure Law and scattered legal provisions found in other pieces of legislation, amongst them the Juvenile Offenders Law, it is widely agreed that a major law reform is necessary in order to meet international human rights standards.

The upper age limit of juvenile justice is 16,<sup>48</sup> but “young age” is seen as a mitigating circumstance also for young adults up to the age of 20 and even beyond.<sup>49</sup>

There is no real juvenile justice system in the sense of youth courts, nor is there a division of competences among judges, although Article 2 of Cap. 157 of the Juvenile Offender Law provides for juvenile courts. However, in reality that “means any member of a District Court when sitting to hear charges against children or young persons.”<sup>50</sup> Court judges sentencing adults also deal with juveniles and *vice versa*.

45 The snapshot was prepared by Frieder Dünkel and is based on a report by Antonios S. Stylianou prepared for a IJJO-project on Foster Care in the EU-member states (2015), furthermore on some general information given by responses to a questionnaire of the Council of Europe on principles of public prosecution as regards juvenile justice under [http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP\\_5\\_Question\\_Chypre.pdf](http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP_5_Question_Chypre.pdf); see also *Mittleton* 2014 and some Comments of the Committee of the Rights of the Child, see below; for aspects of juvenile delinquency in Cyprus, see *Kapardis* 2013.

46 See *Mittleton* 2014, p. 11.

47 See *Stylianou* 2015, p. 78.

48 Cyprus is thus in violation of the Children’s Rights Convention, which stipulates a separate juvenile justice system for juveniles, defined as “children” below the age of 18, see Art. 40 (3) CRC.

49 See *Mittleton* 2014, p. 13.

50 See *Stylianou* 2015, p. 78.

In terms of the sanctions that can be applied to juveniles, it has to be noticed that, up until the age of 15, juveniles are sentenced according to the Juvenile Offenders Law, while 16 and 17 year-old juveniles are treated as adults and sentenced according to the general Criminal Law.

The measures for juveniles according to Art. 12 of the Juvenile Offenders Law are:

- a) dismissing the case,
- b) imposing probation,
- c) committing the offender to the care to a relative or other fit person,
- d) sending the offender to a reform school and
- e) ordering the offender to pay a fine or to restore the damages. Only as a last resort:
- f) imprisonment can be imposed.

A probation order (one to three years of supervision) may be combined with community service or conditions of vocational or other training. Such training measures, however, require the consent of the juvenile.<sup>51</sup> In addition to the classic probation order, the court can also impose a prison sentence and suspend execution if it does not exceed three years.

Diversion programmes and victim-offender mediation (VOM) have not yet been introduced<sup>52</sup> and other restorative elements are only marginal. Compensation of victims or reparation of damages is theoretically possible (see above), but the practice seems to be very reluctant.

A review of a report presented to the Committee on the Rights of the Child of 2012 indicated that only 38% of juvenile cases go to court, i. e. a majority of cases (minor crimes) are dismissed by the prosecutor.<sup>53</sup> Imprisonment should be<sup>54</sup> and is used very exceptionally. During the period from 2003-2008, on average, 36 juveniles were sent to prison each year. This number dropped to an average of only 4 in the period from 2009-2011.<sup>55</sup>

The statistics presented by *Stylianou* are of limited value as they refer to only a few disposals. They indicate that the mainly used sanction of the juvenile court is “guardianship” (i. e. the committing of the offender to the care to a relative or another fit person; 2010: 194 out of 263 cases = 74 %), whereas suspended imprisonment accounted for only 5 %.<sup>56</sup>

The separation of juveniles and adults in the one state prison of Cyprus is not fully guaranteed, although

51 See *Stylianou* 2015, p. 85.

52 See *Stylianou* 2015, p. 90.

53 See *Committee for the Rights of the Child* under <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12207&LangID=E>.

54 See *Stylianou* 2015, p. 85.

55 See *Committee for the Rights of the Child* under <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12207&LangID=E>.

56 Calculated according to the data presented by *Stylianou* 2015, p. 88 f. Unconditional imprisonment is included under “others” (2 % of all decisions). Decisions including restorative elements are not presented (probably non-existent).

a special block for juveniles under 18 and another one for under-21-year-old young adults should have been established.<sup>57</sup> In August 2012 a new modern children's block was intended to be opened adjacent to the prison to provide for greater separation from the adult prison. The situation is not really clear as the Cyprus Office of the Commissioner for Children's Rights in November 2012 urgently recommended establishing separate departments for young offenders with educational and vocational training and involvement in creative activities as a tool to prevent tendencies of violence.<sup>58</sup>

One has, however, to consider that juvenile delinquency is not a real problem in Cyprus, and that the absolute numbers of juveniles appearing in court per year are rather small. *Kapardis* reported between 478 and 170 juveniles reported to the police for "serious" offences (regularly burglary and theft or criminal damage of at least 794 €) per year for the period from 2000 to 2011.<sup>59</sup> There is no clear trend towards increasing juvenile crime, neither in official crime statistics nor in self-report data.<sup>60</sup>

## 2. Organisational framework for delivering restorative justice measures

There are no specific institutions providing for restorative justice measures, i. e. an organisational infrastructure is lacking. On the local community level there are working Juvenile Committees of the Social Welfare Departments (dealing with minors under 16 and also with juveniles in need of care under the age of criminal responsibility), which could "regulate" minor delinquency cases in a restorative way.

## 3. The use of restorative justice in practice

In Cyprus, there are no official statistics that provide data on the use of restorative justice elements in juvenile cases. Practice of reparation orders seems to be very limited.

## 4. Evaluation of restorative justice measures ("good practices") and challenges

As there is no practice of restorative justice measures, likewise no empirical evaluation research exists. The Government is plans to introduce a new Juvenile Justice Act in 2015 and in this context will also consider restorative justice measures.

57 See the *Committee for the Rights of the Child* in its review report from 30 May 2012 under <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12207&LangID=E>.

58 See *Office of the Commissioner for Children's Rights* 2012, p. 12.

59 See *Kapardis* 2013, p. 173 f.; there is no trend of increasing or decreasing numbers. The highest number of juveniles was registered in 2006, the lowest in 2011.

60 See *Kapardis* 2013, p. 173 ff.,

## Literature:

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- Mitleton, C. (2014): *Lawyers' perspectives on Juvenile Justice in Cyprus*. Portsmouth: University of Portsmouth, Department of Psychology.
- Office of the Commissioner for Children's Rights (2012): *Ending violence against Children in Custody. Findings from research with children and young people. Cyprus Country report*. [https://www.google.de/webhp?sourceid=chrome-instant&rlz=1C1PRFB\\_enDE494DE495&ion=1&espv=2&ie=UTF-8#q=juvenile%20offenders%20law%20cyprus](https://www.google.de/webhp?sourceid=chrome-instant&rlz=1C1PRFB_enDE494DE495&ion=1&espv=2&ie=UTF-8#q=juvenile%20offenders%20law%20cyprus).
- Stylianou, A. S. (2015): Cyprus. In: IJJO (Ed.): *BAAF – Alternatives to custody. Foster Care in the EU-member states*. Bruxelles, S. 70-95. (in preparation).

# 7. Czech Republic<sup>61</sup>

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*Petr Škvain, Andrea Păroşanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The roots of restorative justice in the Czech Republic go back to the early 1990s when, in the aftermath of political change, reforms in the legal system took place. Restorative elements were introduced into legislation and at the institutional level. The Mediation and Probation Service was established in 2001, which further accelerated the implementation of victim-offender mediation in the country.

An important promoting factor for developing alternative measures and restorative justice approaches was the work of the NGO *Association for the Development of Social Work in Criminal Justice* (SPJ) since 1994 (since 2012, it has operated under the name “RUBIKON centre”). The activities of the NGO were inspired by the academic circle.<sup>62</sup> SPJ implemented projects to develop out-of-court mediation as well as the concept of probation and mediation, which were then later integrated into the criminal justice legislation.

Restorative justice interventions have their legal basis in the Criminal Code, the Code of Criminal Procedure, the Probation and Mediation Act and the Juvenile Justice Act. Furthermore, the Victims of Crime Act, which came into effect recently in 2013, includes restorative elements aiming at supporting victims of crime.

Victim-offender mediation is the main form of restorative justice. Further restorative elements can be found in interventions such as diversionary conciliation, community service, reparation orders and specific approaches in the field of juvenile justice.

Conciliation in the context of diversion was introduced in 1995 when amending the Code of Criminal Procedure. Conciliation involves an encounter between victim and offender before the public prosecutor or judge, without a mediator or facilitator being involved. Beside the reparation of civil claims, its applicability covers less serious offences with a maximum of five years imprisonment. Conciliation is

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61 The snapshot is based on a report by *Petr Škvain* on restorative justice in penal matters, see *Škvain 2015*, and was compiled by *Andrea Păroşanu*.

62 In 1993, academic *Helena Válková* held lectures called “Social Work and Criminal policy” at Charles University, Prague. This course resulted in the initiative to establish the NGO SPJ by students and lecturers.

based on active victim involvement. It is also applicable in cases of young offenders. The prosecutor has the discretion to propose conciliation if the victim and offender give their consent.

A diversionary measure with restorative elements is the so-called “conditional discontinuance of criminal prosecution”, which can also be applied to juveniles. The public prosecutor or the court can decide to conditionally discontinue criminal prosecution, with the consent of the accused, as provided by the Code of Criminal Procedure. This kind of diversion is possible in case of misdemeanour offences and requires the making of financial or immaterial reparation to victims as a precondition.

Reparation orders can be imposed by the (youth) courts as an ancillary sanction, as provided by the Criminal Code. Such a ‘conduct order’ can be issued when the court decides to waive punishment and the offender is subjected to a probationary period. Reparation is to be considered in the large sense and does not only include financial reparation, but also apologies to the victim for instance.

Community service, introduced in 1995 in the Criminal Code, can be ordered for misdemeanour offences. The work shall be carried out to the benefit of a welfare institution. The law does not provide the possibility to direct the work to the benefit of the victim, nor is it carried out voluntarily by the offender. Key restorative principles are hence not incorporated.

Regarding mediation, cases deemed appropriate for victim-offender mediation can already be referred at the pre-trial level by police, as an exception from the principle of legality. Furthermore, the public prosecutor can refer a case to mediation at this stage of the criminal proceedings. Offender and victim may request victim-offender mediation, but it is in the hands of the police or the public prosecutor to make the ultimate decision. There are no legal restrictions for cases suitable for victim-offender mediation it is up to the court to decide whether a case is appropriate or not. Most often, victim-offender mediation is used at the court level in the form of conciliation to divert the case.<sup>63</sup>

Special measures for young offenders aged 15 to 18 are provided by the Juvenile Justice Act.<sup>64</sup> A special form of diversion called “abandonment of criminal prosecution” allows the public prosecutor at the pre-court level or the court to discontinue criminal proceedings in cases of petty offences (up to three years imprisonment) when there is no public interest in prosecution. Further requirements have to be fulfilled, too (for example reparation/restoration has been made, or a probation programme has to be successfully completed).

At the pre-court level, the public prosecutor may also order educational measures which can include restorative elements. The young offender must consent to educational measures, which may include reparation in a broader sense, e. g. a letter of apology to the victim, reparation of damage, and meeting the victim in person in order to apologize while being supervised by a mediator. After successful reparation, the prosecutor can decide to waive prosecution.

These measures can also be applied at the court level, and the court has the discretion to decide

63 *Pelikan/Trenczek* 2006, p. 70.

64 See *Válková/Hulmáková* 2011 for a comprehensive overview of issues relating to juvenile justice in the Czech Republic in theory and practice.

whether punishment shall be waived after successful completion of the measures. Furthermore, in case of successful reparation, which can be also achieved through victim-offender mediation, a young offender's sentence may be mitigated.

Regarding restorative justice at the prison level, if a convicted person has made reparation to the victim, a mandatory condition for early release is then met according to the Criminal Code. Furthermore, victim-offender mediation is not excluded by law and thus principally possible. Offenders willing to meet the victim can contact the Probation and Mediation Service for assistance including mediation services before or after (early) release.

## 2. Organisational framework for delivering restorative justice measures

Mediation is most often used when diverting a case. Police and public prosecutors as well as the court have the main gatekeeping functions, while the Probation and Mediation Service, the victim and the offender may also request or influence mediation. The Probation and Mediation Service within the Ministry of Justice includes the head office, eight managers' offices and 78 independent probation and mediation services in all judicial districts. Currently there are 405 probation officers and probation assistants and 26 employees and the national head office. Mediation is delivered by specially trained probation officers (mediators). Probation officers (mediators) must hold a master's degree in social sciences and have undergone a basic training course of 12 months. Mediation services are free of charge to the parties, as they are delivered by the state funded Probation and Mediation Service. Concerning conciliation, it can be proposed by the public prosecutor or judge with the consent of victim and offender. Conciliation is a facilitated dialogue aiming at material reparation. Requirements for conciliation are that the committed act is a misdemeanour, the offender has confessed and has made reparation, which is possible in the broad sense, and has paid an adequate amount into the crime victims' fund. Successful conciliation leads to diversion from prosecution. Conciliation may also include victim-offender mediation, aiming at diverting a case from criminal proceedings.

## 3. The use of restorative justice in practice

The Probation and Mediation Service publishes statistical data on the use of victim-offender mediation (since 2005) and other measures with restorative elements.

Data on victim-offender mediation concerning the year 2012 indicate that there were a total of 1,200 mediated cases. In addition, 5,308 cases considered as "indirect mediation" were carried out. These cases included activities with restorative elements, such as victim counselling or conditions related to alternative measures.

Another study on "The Role of Mediation within the Criminal Justice System", carried out by the Institute of Criminology and Social Prevention in Prague, provides more detailed information concerning mediation in practice in the years 2005 to 2007. The data provided by the study refer to all age groups.

During this period, 1,878 mediation cases were registered, out of which 408 were juvenile cases (21.7%). 420 mediation cases (22.4%) were conducted with 22 to 29 year-olds and 289 cases (15.1%) with 19 to 21 year-old offenders.<sup>65</sup> Regarding the result of mediation, 1,498 cases (79.8%) ended in successful mediation, which comprised an agreement on reparation. No agreement was reached in 361 cases and no information was available on 19 cases.<sup>66</sup> 82.7% of all cases were made up by bodily harm-related offences, mostly of a negligible nature, and property-related offences (mostly theft).

In practice, the conditional discontinuation of criminal proceedings plays a major role in the (youth) criminal justice system. Other measures containing restorative elements (such as conciliation, abandonment of criminal prosecution) play a marginal role and are applied seldom. This is shown by statistical data available from the Ministry of Justice. Concerning all age groups, in 2011 there were 3,692 cases of conditional discontinuation of criminal proceedings and only 143 cases of conciliation. It has to be noted that the statistical data do not clearly point out the number and proportion of restorative measures within all criminal cases being diverted or sentenced.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

An evaluation of victim-offender mediation as part of the above mentioned study “The Role of Mediation within the Criminal Justice System” was conducted by the Institute of Criminology and Social Prevention in the years 2008 and 2010. The first phase of the study aimed at assessing stakeholders’ perspectives on the mediation process and public awareness of mediation, while the second phase sought to analyse recidivism rates after mediation.<sup>67</sup>

50 victims and 39 offenders participated in the survey of the institute. The majority of offenders responded that their main motivations to participate in mediation included the desire to reach an agreement on reparation towards the victim, to accelerate the whole criminal process, to receive a milder sanction and to apologize personally to the victim. Regarding their perception of the victims’ participation, 71% of the offenders believed that receiving financial compensation was the motivating factor for their victims to participate in the process. About two thirds of the victims found that the offenders showed sincere regret for their behaviour, while simultaneously 59% of the victims deemed that their offenders’ motivation to participate was driven by the hope of receiving a milder sentence.

96% of victims and 97% of offenders were satisfied with the mediator’s work and found it either very good or quite good. Regarding the outcome of the mediation process, nine out of ten victims and offenders were satisfied with it. 84% of victims and 95% of offenders stated they would participate in mediation again. For the majority of victims (about three quarters) it was very important to meet the offender and to talk about the incident.

65 See Rozum *et al.* 2009, cited in Škvain 2015, p. 176.

66 Rozum *et al.* 2009, cited in Škvain 2015, p. 176.

67 Rozum *et al.* 2009; Rozum *et al.* 2010 cited in Škvain 2015, p. 177.

In terms of recidivism rates, 311 participants of mediation in the year 2005 were analysed, based on data from the Criminal Register. Most of the offenders were first-time offenders, representing a share of 79.4%. 12.9% of offenders had committed several offences before participating in mediation, and 7.7% had one prior conviction. In about two thirds of the cases, diversion in the context of conditional discontinuance of the criminal proceedings either at pre-court or court level was applied, especially in the case of young (adult) offenders aged 15 to 30 years. 25.4% of surveyed persons re-offended in the following four years after mediation. Out of these persons, 75% re-offended within two years.

Looking at general development, since their implementation restorative justice measures have been increasingly used in the criminal justice system. However, they play only a limited role, as has become clear for the context of diversion. Diversionary measures, especially the discontinuation of criminal proceedings, are preferred by judicial authorities as they are easier to apply. This is also to be seen in the context of a lack of knowledge of both the benefits and the availability of restorative justice services.

Initiatives to promote restorative justice interventions, such as family group conferencing or community reparation groups, are being undertaken by the Probation and Mediation Service in cooperation with NGOs.

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- Válková, H., Hulmáková, J. (2011): Czech Republic. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments. 2<sup>nd</sup> ed., Mönchengladbach: Forum Verlag Godesberg, p. 253-305.



# 8. Denmark<sup>68</sup>

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*Anette Storgaard, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

Victim-offender mediation (VOM), which is the main form of restorative justice available in Denmark, was first carried out experimentally at the end of the 1980s. It was further developed throughout the 1990s, based on restorative justice theory. In the year 2010, victim-offender mediation was established as a nationwide programme in Denmark. VOM does not replace or guide the criminal procedure – even in cases in which it is successful, mediation is “only” a supplement to the formal justice system.

A further measure that includes certain restorative elements is community service, which is provided by the Criminal Code and meant to be an alternative to unconditional prison sentences.

The legal framework for VOM is laid down in the Code on Victim-Offender Mediation (*Lov om konfliktråd i anledning af en strafbar handling*, Nr. 467 of 12 June 2009). The Code on VOM, which entered into effect on 1 January 2010, includes eight sections. It is a very general piece of legislation that does not go into very much detail. VOM can take place at the pre-trial stage as well as during the execution of sentences. The Code does not state anything specific about eligible types of offences, so there is no restriction in Denmark on what kinds of offences can in theory be referred to VOM. Thus, VOM can be used for all types of offences with varying degrees of gravity. The comments to the Code on VOM refer to the positive experiences with the experimental initiatives and that VOM should not be limited to certain types of offences. Cases should, however, involve an identified victim and mediation is not suitable in so-called victimless offences.

In case of juvenile offenders below the age of 18, the parents are also required to agree to the mediation process. In principle, VOM can also take place if the ‘offender’ has not reached the age of criminal liability (15 years). The underlying reason for the inclusion of juveniles who are not yet criminally liable is seen in crime prevention aspects. Furthermore, as required by the Code on VOM (§ 2), the offender needs to have confessed to the crime or to the main surrounding facts.

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68 The snapshot is based on a report on restorative justice in penal matters by *Anette Storgaard*, see *Storgaard 2015*, and was compiled by *Andrea Păroșanu*. Reference is also made throughout, in particular with regard to the juvenile justice system in Denmark, to *Storgaard 2011*.

The Code on VOM does not refer to the legal consequences of successfully completing the mediation process. The preparatory report and comments to the Code on VOM, however, refer to a section of the Criminal Code (§ 82 no. 11) that provides for a mitigation of sentence if the offender has made efforts to make reparation. Although the consequences are not legally regulated, it might be assumed that the courts should take successful mediation into account as a mitigating factor. In practice, it is however not clear to which extent the courts regard mediation agreements as a mitigating factor when sentencing. At the prison level, the preparatory report to the Code on VOM states that the Prison and Probation Service shall be informed about successful mediation.

## 2. Organisational framework for delivering restorative justice measures

During the experimental phase, the Crime Prevention Council was responsible for initiating and coordinating the VOM pilot schemes. Since the enactment of the Code on VOM, mediation programmes have been organized by the police (§ 1 Code on VOM). Suitable cases are selected by the police and referred to a coordinator, who is appointed by the police in every police district. Mediators are not full-time professionals, but have another main job. They are paid a sum of 200 Euros per case regardless of the outcome of the mediation process.

VOM is State funded through the police budget, thus the parties do not have to pay for mediation. Usually, the parties meet in public places – mediating a case in a police station is the exception. The police are also responsible for providing training courses for mediators. They begin with a one-week training programme and subsequently attend further courses. This rather basic training has to be seen in the context that, with the nationwide implementation of VOM, many mediators had to be trained as quickly as possible.

Concerning the mediation process, the mediator may allow a third party to participate in the mediation session. Defense lawyers in the actual cases, however, are excluded from attending VOM. In case the victim is not able to participate in mediation, e.g. he/she is severely injured, another person may substitute the victim. The parties have to consent freely to the mediation process.

## 3. The use of restorative justice in practice

In Denmark, there are no official statistics providing data on the use of VOM. However, there are some evaluations that give insight into the implementation of VOM in practice, concerning both adult and young offenders.

A quantitative and qualitative evaluation study of the second pilot phase from 1998 to 2002 concerning three police districts showed that police selected 1,430 cases as adequate for mediation. Out of these cases, in 360 cases the parties agreed to participate and the cases were referred to the VOM coordinator. Finally, mediation was conducted in 150 cases. The study revealed that more than 50% of victims and

more than 90 % of offenders were male. More than 50% of the mediation cases were minor violence cases, followed by burglary (less than 10%). To a small extent, also more serious crimes such as robbery were included.

A recent evaluation study concerning the years 2010 and 2011 – the first years of the nationwide implementation of VOM – revealed an increase in case numbers. In 2010, 341 VOM cases were deemed suitable for VOM and in 2011 the number increased to 595. There was no restriction on categories of offences – thus even more serious offences such as (attempted) homicide (eight cases) and rape (nine cases) were included. However, 500 out of about 1,000 cases concerned mainly minor assault.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

Concerning experiences with VOM, reference shall be made to the evaluation studies including all age groups mentioned in *Section 3* above.

The first evaluation study on the second phase of the VOM pilot project showed that about 80 % of victims and offenders found that VOM had been a successful or very successful process. About 50% of the victims stated that mediation to a large or to some extent reduced their fear about what happened. 70% of the participating victims reported that mediation had an impact on the behaviour of the offenders and that they changed their view on the offence throughout the process. 70-80% of the responding offenders stated that mediation had given them the opportunity to apologize to the victim and show that they regretted their offending behaviour.<sup>69</sup>

The later evaluation report concerning the years 2010 and 2011 demonstrated that, similar to the prior study, about 80% of offenders and 74% of victims reported overall satisfaction with the VOM process.<sup>70</sup> Between half and two thirds of victims and offenders felt very satisfied after the mediation process. More than 80% of both victims and offenders as well as 85% of mediators found VOM had been successful or very successful.<sup>71</sup>

The enactment of the Code on VOM in 2010 led to the implementation of a nationwide provision of VOM in Denmark. As VOM is not linked to diversion, successful mediation can only have an impact as a mitigating factor in sentencing. It can be hoped that in the future mediation agreements come to be taken into consideration in a more systematic fashion while sentencing. In Denmark, VOM has been provided to serve as a supplement to the criminal justice system, and not as an alternative or a replacement.

69 See *Henriksen 2003*, cited in *Storgaard 2015*, p. 198 f.

70 The qualitative part of the evaluation study was carried out in the first three and a half months of 2011 and included 102 cases found suitable for VOM.

71 See *Hansen 2012*, cited in *Storgaard 2015*, p. 199.

Further challenges can be seen in the elaboration of more in-depth VOM training courses for mediators, as the current courses just provide basic training.

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Storgaard, A. (2015): Denmark. In: Dünkel, F., Grzywa-Holten, J., Horsfield, P. (Eds.): *Restorative Justice and Mediation in Penal Matters – A stocktaking of legal issues, implementation strategies and outcomes in 36 European countries*. Mönchengladbach: Forum Verlag Godesberg, p. 183-202.

# 9. England and Wales<sup>72</sup>

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*Jonathan Doak*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

Since the mid-1990s, legislative, policy and practice developments in the field of juvenile justice in England<sup>73</sup> have increasingly focussed on restorative justice approaches, so that currently, a rather diverse range of restorative justice measures (or at least, such that are marketed under that label, as shall become clear) are available at both the pre-court (diversionary) level and the court sentencing level.

At the pre-court level, the Crime and Disorder Act 1998 placed the long-standing tradition of **police cautioning of juveniles** (aged 10-17) on a statutory footing. Originally implemented as the restrictive “Final Warning Scheme”, and since reformed in 2012<sup>74</sup> to “re-allow” repeat cautioning, essentially the legislation allows the police to divert cases by informally or formally cautioning young perpetrators of minor or mediumly severe offences. A caution traditionally implies that the offender is formally reprimanded, usually at the police station. However, the legislation does not prohibit the police from (and in some cases obliges them to) linking such cautions to locally provided “interventions” that address the causes of offending. In practice, such interventions have increasingly included restorative measures. On the one hand, there have been experiences with “Restorative Cautioning” schemes, in which specially trained police officers engage in a restorative meeting with the offender (and the victim where the latter so desires) with the purpose of showing the offender his/her responsibility for the offence and achieving some form of reparation. On the other hand, restorative practices can enter into the process via partnerships between the juvenile justice authorities, police and the providers of local services (local referral schemes etc.). Some partnerships go so far as to create **informal** out-of-court tariffs (see for instance *Triage*<sup>75</sup> schemes) within the context of the discretion of the police to take “no

72 This snapshot is a summary of a report written by *Jonathan Doak*, see *Doak* 2015, and was compiled by *Philip Horsfield*.

73 For simplicity, England and Wales shall hereafter be collectively referred to as England.

74 By the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

75 See for instance *Bateman* 2012, p. 267 ff., *Home Office* 2012, p. 9 ff.

further action” and issue “informal cautions”. Young first time offenders and/or young offenders who have committed minor offences can be referred to these schemes – which strongly rely on the use of restorative practices – rather than to the formal cautioning system. They thus function as a form of “diversion from formal diversion”.

A more recent development relating to the policing of juveniles is the new ‘**Youth Restorative Disposal**’ which allows for a quick form of ‘street justice’ based on restorative principles for cases of minor offending. Under this scheme, specially trained police officers can hold young offenders to account “on the spot” or immediately after the offence, often including a direct encounter with the victim. The aim is to come to an agreement straight away on how the harm can be put right there and then or in the near future.<sup>76</sup>

At the other end of the diversionary spectrum, prosecuting agencies can issue so-called “Youth Conditional Cautions” (YCCs). YCCs were introduced by the Criminal Justice and Immigration Act 2008 and serve as an additional level of diversion for cases of 16 and 17 year-olds that would otherwise be sent to court. This form of caution implies that the police engage in a restorative-based process with the offender who is then subject to certain conditions that facilitate the offender’s rehabilitation and the making of reparation. Failure to fulfil the conditions results in a reappraisal of the case.

Moving on to the level of court sentencing, the Crime and Disorder Act 1998 introduced “**Reparation Orders**” as an alternative to merely repressive intervention on the one hand (f. ex. fines, short sentences to detention) and mere “slaps on the wrist” (discharges) on the other. Reparation orders require young offenders (aged 10 to 17) to make specific reparation either to individual victims or to the community, for example by writing a letter of apology, offering compensation to the victim, repairing criminal damage, cleaning graffiti or picking up litter.

Only one year later, the Youth Crime and Criminal Evidence Act 1999 made legislative provision for so called “**Referral Orders**” as a mandatory court response for all young offenders without prior convictions who plead guilty, unless an absolute discharge or immediate detention are more suitable given the severity of the offence.<sup>77</sup> Such orders entail the referral of a young offender to a community Youth Offender Panel which can also include the victim. The Panel then reflects on the offence and its consequences and decides together on the appropriate course of action in the form of a plan, which can provide reparation to the victim or community and include interventions to address the young person’s offending.

<sup>76</sup> See also *Rix et al.* 2011; *Easton/Piper* 2012; *Arthur* 2010.

<sup>77</sup> See *Dignan* 2011.

## 2. Organisational framework for delivering restorative justice measures

The **Youth Restorative Disposal**<sup>78</sup> offers an alternative to dealing with low-level, anti-social and nuisance offending through arrest and formal criminal justice processing. Under the scheme, which has no statutory basis of its own, trained police officers may respond to a reported minor offence by using their discretion to hold to account young people who have committed certain minor offences. The majority of YRDs take place in the immediate aftermath of the offence, possibly on the street, at the scene of the crime (e. g., in the case of a retail theft a shop may be used), or in the offender's home. The form of the disposal varies; it may amount to a simple 'telling off' by a police officer, but will often include a direct encounter with the victim. In a minority of cases, mediation or conferencing may be arranged for a future date. In either event, a plan may then be put in place which may involve the young person apologising to the victim or taking some other measures to put right the harm caused by the offence. There is, however, no means of enforcing outcome agreements and no further sanction can then be applied to the young person. Youth Restorative Disposals can only be used for a first offence and both the victim and the young person must agree to the matter being dealt with in this way. Any future offence reverts to an established criminal justice measure. Serious crimes, such as weapons, sexual and drug offences are excluded from the scheme.

Cautioning is one area of police practice that has undergone considerable change in recent times. The 'simple' police caution that was used in England basically involved a police officer warning the offender about his behaviour, and about potential prosecution in the event that he or she should reoffend. Simple cautions are still widely used by the police, but the practice differs significantly with the notion of '**restorative cautioning**' which grew rapidly at the turn of the century, and is now widely used throughout England and Wales. The process is usually facilitated by a trained police officer and often involves the use of a script or agenda that is followed as part of the 'Wagga Wagga' model of police-led conferencing. In essence, the restorative caution aims to reintegrate the offender by focusing on how they can put the incident behind them, for example by repairing the harm through a variety of means, including offering an oral or written apology or paying compensation for stolen or damaged property. All forms of caution will remain on the criminal records of young offenders until they turn 18.

**Youth Conditional Cautions**<sup>79</sup> are currently available for 16 and 17-year old young offenders. They are ordered by the Crown Prosecution Service in cases that, due to the seriousness of the offence and the offending history of the perpetrator, are on the cusp of being charged in court. They thus serve as an additional level of diversion between the formal cautioning system and the courts. YCCs enable the police to engage with the offender in a restorative-based process as an alternative to prosecution with a number of conditions attached. These conditions should be aimed at either rehabilitating the offender and / or ensuring that he or she makes reparation to the victim or the wider community. The victim may be consulted in relation to the nature of these conditions – particularly where they entail some form of reparation. Participation in mediation or conferencing provided by local services may form an

78 See also Rix *et al.* 2011; Easton/Piper 2012; Arthur 2010.

79 See *Department for Children, Schools and Families/Ministry of Justice* 2010; *Director of Public Prosecutions* 2010.

element of these conditions, or the conditions themselves may represent the outcome of such a process. Offenders will typically be cautioned in the police station in the presence of a solicitor and in the case of a young person an appropriate adult. During the meeting, the police officer must explain the effect of the caution and its conditions to the offender. In particular, the offender must be warned about the consequences of failure to observe the conditions. The offender will then be asked to sign an official document which sets out details of the offence, consent to the caution and to the attached conditions.

Moving to the court sentencing level, the youth courts' primary sentencing option is the **Referral Order**. The aim of the Referral Order was to provide the young person with opportunities to make restoration to the victim, take responsibility for the consequences of their offending and achieve reintegration into the law-abiding community.<sup>80</sup> 10 to 17 year old offenders who admit guilt and are convicted of an imprisonable offence for the first time are referred to a so-called Youth Offender Panel comprising two volunteers from the local community along with one professional drawn from the local Young Offender Team (YOT).<sup>81</sup>

Panel volunteers must be over the age of 18 and receive training and expenses. Parents are required to attend the panel meeting if the young person is under the age of 16, and victims may also attend the hearing and participate in the discussions. Government guidelines state that young people should not have legal representation at panel meetings, as this may hinder their full involvement in the process, but if a solicitor is to attend they may do so as a 'supporter'. Meetings are usually held within a few weeks of the original court hearing, and typically take place in community venues or at the offices of the Youth Offending Team.

The panel will generally ask the young person a number of questions about what happened and why, and will probe the question as to what might be done to prevent it happening again. Young offenders will be encouraged to assume responsibility for their behaviour and to reflect upon the harm caused to the victim and/or the community generally. The panel has to decide on an agreed plan which can provide reparation to the victim or community and include interventions to address the young person's offending. This can include victim awareness, counselling, drug and alcohol interventions and forms of victim reparation.

The length of the order can be anything from 3-12 months, and should be based on the seriousness of the offence. However, panels are free to determine the nature of intervention necessary to prevent further offending by the young person. The young person must agree to the plan. If they refuse, they will be referred back to the court for sentencing. Once a plan is agreed it is monitored by the Youth Offending Team; the young person will usually be asked to attend a number of review meetings followed by a final meeting once all the elements of the agreement have been completed. Panels have the power to refer the young person back to court for sentencing if the agreement is not being kept.

<sup>80</sup> *Home Office* 2002.

<sup>81</sup> YOTs are multi-agency teams tasked with helping to prevent young people from re-offending. Each Youth Offender Team (YOTs) typically comprises representatives from the police, probation service, social services, health, education, drugs and alcohol misuse services and housing authorities. They are funded and co-ordinated by local government.

Where a youth court does not impose a Referral Order, depending on the seriousness of the offence(s), sentencing the offender to a Reparation Order is among the options available (as are absolute and conditional discharges, fines, Youth Rehabilitation Orders and Detention and Training Orders). The reparation to be made should be proportionate to the seriousness of the offence, but should not exceed a total of 24 hours in aggregate, over a period of three months. Young offenders must consent to the order. If the victim does not wish to receive reparation directly, reparative measures may be undertaken to the benefit of the wider community. The court will appoint a responsible officer who will supervise the young person as they complete the requirements of the order. The supervisor will alert the court if the young person fails to comply with the terms of the order.

### 3. The use of restorative justice in practice

Data published by the Ministry of Justice reveals that referral orders comprised one third of all juvenile sentences in 2010/11. There is some evidence, since their introduction in 2002, that there has been a corresponding decline in the use of both reparation orders and conditional discharges; reparation orders and conditional discharges were issued in just over 3% of cases in 2010/11.<sup>82</sup>

Regarding the use of restorative practices in the context of police cautioning, the available data allow no discernment between those cautions that involve restorative elements and those that do not. This is not least due to the fact that there are no clear statutory regulations at the national level, and that provision of the processes and services needed to incorporate such restorative elements is rightly dependent on local circumstances. Accordingly, data on such practices cannot be centrally recorded in a uniformly codified fashion.

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

While the data situation remains rather limited, there has been a significant amount of evaluation research in England. The Referral Order, for instance, was subject to evaluation by *Newburn et al.*<sup>83</sup> They measured high levels of satisfaction among offenders in terms of fairness, the overall experience, being treated with respect, that their plan or contract was ‘useful’ and that it should help them stay out of trouble. However, the research also uncovered very low rates of victim participation (13% of meetings). In practice, it was much more commonplace for reparation to be directed towards the ‘the community’, rather than to individual victims (only 7% of all contracts entailed the making of direct reparation to the victim). They also pointed to the danger of ‘tactical’ pleading by offenders.<sup>84</sup> On a positive note, it

<sup>82</sup> Ministry of Justice 2011a; see further *Cap Gemini Ernst & Young* 2003.

<sup>83</sup> *Newburn et al.* 2002.

<sup>84</sup> *Cap Gemini Ernst & Young* 2003.

is nonetheless clear that the referral order scheme has integrated certain restorative principles into the youth justice system, and that the potential is there.

*Dignan's* 2002 research grants us a useful insight into the operation of reparation orders in the youth justice system.<sup>85</sup> While the participation of victims was supposed to be voluntary, in some cases it was found that victims were not being consulted. To some extent, this was attributable to the fact that victims need to be identified, contacted and consulted, which requires courts to co-operate with the criminal justice agencies in granting adjournments, which they are often reluctant to do.<sup>86</sup> *Dignan* argues that, Reparation Orders cannot be regarded as 'truly restorative' since the sanction is coercively imposed by the court, rather than arrived at through some form of dialogue or consensus.<sup>87</sup> He observed that a substantial majority of reparation orders (80%) had no impact on the direct victim, and almost two-thirds of orders (63%) contained reparation directed at the community rather than the victims.

The new Youth Restorative Disposal has been subject to a recent evaluation.<sup>88</sup> Shoplifting (52%), assault (22%) and criminal damage (19%) were the main offences dealt with by the measure. Overall, the research suggests that it can be an effective and swift response to minor offending by young people. The vast majority of victims and offenders offered the opportunity to participate in a YRD chose to do so. The officers interviewed stated that this was because they had explained the consequences of the alternative course of action (i. e.a formal police record), and that most victims simply wanted an apology and some form of assurance that the young person would not do the same thing again. The YRD was also popular with police officers because they felt that it offered a proportionate response and was perceived to have a positive impact on young offenders and victims. Some officers, however, commented that the lack of any enforcement mechanism was an important weakness within the scheme. In most cases, the disposal normally entailed not much more than a simple verbal apology to the victim at the scene of the incident; very few cases are referred to Youth Offending Teams or involve any further intervention.

The use of restorative cautioning by the police was subject to an intense evaluation based in the Thames Valley area from 1998-2001.<sup>89</sup> The study revealed high levels of general satisfaction among the parties. They felt to have been treated fairly, that the encounter had helped the offender to understand the consequences of his/her actions and to induce a sense of shame in them. Over half of the participants reported gaining a sense of closure and felt better because of the restorative session, and four-fifths saw holding the meeting as a good idea. Indeed, almost a third of offenders entered into a formal written reparation agreement at the restorative caution. Within a year, the vast majority of these had been fulfilled and only three remained completely unfulfilled. However, some victims and offenders felt inadequately prepared for the process, or to have been pressured into it. Some two-fifths of offenders

85 *Dignan* 2002.

86 *Dignan* 2002, p. 79.

87 *Dignan* 2005, p. 111.

88 See *Rix et al* 2011.

89 *Hoyle et al.* 2002. During this period, 1,915 restorative conferences took place at which victims were present. In a further 12,065 restorative cautions, victims were not present, but the cautioning officer attempted to input some form of victim perspective into the proceedings.

reported feeling stigmatised as a 'bad person' and some officers appeared to pressurise offenders into apologising or making reparation. Overall, though, restorative cautioning represented a significant improvement over traditional cautioning, was very popular among police and was more effective in terms of reducing recidivism. There was also some evidence that it had other beneficial effects especially in terms of helping improve police/community relations.

Overall, the juvenile justice landscape in England as it stands today bears highly promising prospects for restorative justice to play a more central role in how offending by young offenders is responded to. The reform of the police cautioning system and the inclusion of informal restorative practices at that level (either via restorative police cautioning or police referrals into informal settings) bears great potential. In fact, the combined effects of this reform of police cautioning and the bottom-up development of local informal diversion schemes may well have contributed significantly to a strong overall down-tariffing tendency in England that ranges all the way to the top of the sentencing tariff.<sup>90</sup> Overall, though, what is needed is more stability (either legislative or economic) to be provided so as to be able to provide these restorative outlets in a sustainable fashion (funding for local services etc.).

Notwithstanding the positive tone of a consultation paper published by the new coalition government in 2010,<sup>91</sup> the government now appears to have backtracked somewhat and have reverted to using much more cautionary language concerning the future of RJ.<sup>92</sup> While the tone of its latest policy paper is broadly supportive of RJ as a concept, proposals for legislative reform seem somewhat vague and the prospect of any radical reorientation of the criminal justice system is not likely to be forthcoming in the short or medium term. This apparent change of heart may be a reaction to the political perception that RJ is seen as something of a soft option among the public at large. In terms of the future, it appears that the government will continue to adopt tough-on-crime rhetoric, and is unlikely to pursue the use of restorative justice in relation to more serious offences, particularly those involving adults.<sup>93</sup> Given the current financial climate, it is also likely that constraints within public spending mean that radically different mechanisms are unlikely to be established within the short-term.

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90 See Allen 2011; on *down-tariffing* see Haines 2008, p. 351.

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# 10. Estonia<sup>94</sup>

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*Jaan Ginter, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

Restorative justice has emerged in Estonia in the context of a top-down reform, characterized by the establishment of a legal framework for the implementation of restorative justice measures. Legal reforms were undertaken in order to promote diversion, reduce caseloads within the criminal justice system and decrease incarceration rates.

First, the measure of victim-offender mediation (conciliation) was introduced in the Juvenile Sanctions Act in 1998.<sup>95</sup> This measure could be used when the prosecutor or court decided to waive prosecution or punishment and refer the case instead to a Juvenile Committee.

Further criminal law reforms in 2002 and 2004 introduced damage reparation in the context of diversion as well as community service as an alternative sanction to imprisonment, which however is not a fully restorative measure.

A 2007 amendment to the Code of Criminal Procedure provided mediation in the context of diversion for adult offenders, in that it serves as grounds to waive criminal proceedings upon request of the prosecutor and approval from the court. Conciliation between victim and offender can be applied either as part of the criminal proceedings or independently from those proceedings. The reform of the Code of Criminal Procedure took international standards into account, such as the Council Framework Decision from 2001 on the standing of victims in criminal proceedings as well as Committee of Ministers Recommendation No. R (99) 19 concerning mediation in penal matters (as a policy suggestion).

For young offenders, mediation as an alternative measure to sentencing is provided by the Juvenile Sanctions Act for juveniles between 14 and 18 years. For young offenders who are criminally liable, mediation can be used when the juvenile has committed a criminal offence or a misdemeanour and the prosecutor or court decides that a sentence is not necessary and therefore criminal proceedings may be dropped. Instead, the case will be referred to the Juvenile Committee which decides whether an

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<sup>94</sup> The snapshot is a summarized version of a report on restorative justice in penal matters by *Jaan Ginter*, see *Ginter* 2015, and was compiled by *Andrea Păroșanu*.

<sup>95</sup> *Ginter/Sootak* 2011, p. 399 ff. For reference to primarily juvenile justice related matters see also *Ginter/Sootak* 2011.

alternative measure, among which is mediation (conciliation), shall be applied. The Conciliation Service is in charge of implementing conciliation, the process of which is based on the Conciliation Procedure Regulation.

Community service can be ordered as a substitute sanction in place of prison sentences of up to two years. In doing so, one day of detention corresponds to two hours of community work. The work can be performed in order to repair the damage caused, to support the local community, in favour of elderly people, people with disabilities or other vulnerable persons, etc.

At the prison level, a few localized programmes with restorative elements have been implemented for prisoners.

## 2. Organisational framework for delivering restorative justice measures

The Conciliation Service, a public service since 2003, is in charge of organizing mediation (conciliation) procedures. The Service is also responsible for implementing and monitoring the fulfilment of agreements reached through mediation. The regional availability of conciliation services is ensured by the Social Insurance Board, in accordance with the Victim Support Act. The provisions in the Conciliation Procedure Regulation define the conciliation process.

Concerning the mediation process, the parties are contacted by the mediator (conciliator) and, within one month after case referral, the first meeting takes place. Mediation is conducted with both victim and offender face-to-face. Within two months after the first meeting, an agreement shall be reached. Afterwards, after a further five days, the mediator informs the prosecutor about the course of the process, the discussions held, the outcome of the process and the conduct of the parties. In case one party withdraws his/her consent, the prosecutor will be informed that the process has been terminated and of the reasons for such failure. The costs for the mediation procedure are covered by the state budget.

Mediators are specially trained employees of the Victim Support Department of the Social Insurance Board, which appoints mediators for the envisaged conflict resolution procedures. Mediator training comprises two three-day modules, whereby the second module takes place after six months of practical experience as a mediator. In 2010, 24 out of 26 victim support officers had been specially trained as mediators.

Furthermore, the victim support services play a role in the provision of psychological assistance to victims and the payment of state compensation to victims of crime, as regulated by the Victim Support Act.

### 3. The use of restorative justice in practice

Statistical data on the implementation of mediation in practice are available at Statistics Estonia.<sup>96</sup> Since the introduction of mediation (conciliation) in 2007 for adults, the case numbers concerning adults have increased significantly. In 2007, 31 successful mediation cases (out of 35 initiated cases) were registered. In 2009 the case numbers rose to 193 successful mediations, and increased furthermore to 364 cases in 2010 and 483 in 2011. The highest number was reached in 2012 with 747 successful mediations, decreasing slightly in 2013 to 708 cases. A study on 461 mediation processes that ended between February 2007 and July 2010 showed that the vast majority of cases (N = 422) had involved violent crimes, especially cases of family violence.<sup>97</sup> The data underlines that mediation has gained importance in the context of diversion in the field of adult criminal justice. In 2007, mediation cases accounted for only 2% of all cases dropped due to the principle of opportunity. By 2010, the proportion had increased to 8%.<sup>98</sup>

However, regarding juveniles, mediation is only rarely applied by the Juvenile Committees. Out of 1,798 Juvenile Committee cases in 2001, mediation took place only in 20 cases. In 2012, the number dropped to four mediation cases out of 2,653 cases before Juvenile Committees.<sup>99</sup>

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

According to the study mentioned above in *Section 3*, the one-year recidivism rate for offenders who participated successfully in mediation was 12%, compared to a rate of 18% among offenders whose cases were dropped due to the principle of opportunity on other grounds.<sup>100</sup>

Regarding the fulfilment of obligations, another study revealed that the rate of fulfilment of mediation agreements was very high. Within a period of two years, there was only one case in which the agreement was not completed.<sup>101</sup> In only 15 cases (4%), the conditions of the agreement were not fulfilled by the offender. The findings of these studies demonstrate positive experiences with mediation.

Concerning the low use of mediation by Juvenile Committees, committees have voiced concerns that

96 See the website of Statistics Estonia under [http://pub.stat.ee/px-web.2001/Dialog/varval.asp?ma=JU004&ti=TERMINATED+PROCEEDINGS+IN+OFFENCES+BY+BASE+FOR+TERMINATION+AND+DEGREE+OF+OFFENCE&path=../I\\_Databas/Social\\_life/07Justice\\_and\\_security/03Crime/&lang=1](http://pub.stat.ee/px-web.2001/Dialog/varval.asp?ma=JU004&ti=TERMINATED+PROCEEDINGS+IN+OFFENCES+BY+BASE+FOR+TERMINATION+AND+DEGREE+OF+OFFENCE&path=../I_Databas/Social_life/07Justice_and_security/03Crime/&lang=1).

97 See *Klopets/Tamm* 2010, cited in *Ginter* 2015, p. 236.

98 See *Klopets/Tamm* 2010, cited in *Ginter* 2015, p. 235.

99 See <http://www.entk.ee/sites/default/files/AEK%202011%20%28EHIS%29.pdf>.

100 See *Klopets/Tamm* 2010, cited in *Ginter* 2015, p. 237.

101 See *Leps* 2009.

mediation is insufficiently regulated. Furthermore, a lack of qualified mediators was stated.<sup>102</sup> Mediator training primarily focusses on mediation involving adult offenders and their victims. In Estonia, there is a need to develop specific training courses focussing on mediation with juveniles in order to appropriately address the needs of this age group. The promotion of mediation applied by the Juvenile Committees should be a matter of priority.

Overall, the legal framework and the institutional infrastructure for mediation, the main form of restorative justice in Estonia, are in place. The provisions were elaborated in alignment with the EU Council Framework Decision of 2001.

The main challenges for the future are to improve and extend mediator training courses, especially so that they also include specific training in juvenile matters. Furthermore, there is a need to continuously assess the perceptions of the participants in mediation and the preventive effects it can have on rates of reoffending. Subjecting the outcome of mediation processes to more in depth, detailed analysis would better serve to identify suitable cases for mediation and to widen and better fulfil the potential of mediation in Estonia.

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102 See *Tamm* 2008.

# 11. Finland<sup>103</sup>

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*Tapio Lappi-Seppälä, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

Victim-offender mediation, which is the most important form of restorative justice in Finland, was introduced on an experimental basis in 1983 and became a nationwide practice during the 1990s. Mediation was inspired by abolitionist thinking in the 1970s and restorative justice theory as well as experiences from New Zealand and North America.<sup>104</sup> It was intended not to integrate mediation too closely into the criminal justice system and to provide it as an alternative to criminal justice. The practice soon became prominent in other fields, for instance in schools or with families.

At the beginning of the 2000s, mediation was available for 80% of the population in Finland. In 2006, the Mediation Act came into effect in order to ensure equal access to mediation for every citizen and to safeguard sufficient state funding for mediation services. Further aims of the legal enactment were to organize national management, supervision and monitoring and enhance more uniform mediation procedures.

The Mediation Act led to the establishment of mediation services throughout the country and was a decisive factor for the wider use of mediation in the years that followed. The new law introduced more detailed instructions on the handling of juvenile cases. The law can be characterized as a rather flexible law that is not too formal.

Victim-offender mediation can be applied as a diversionary measure at pre-court or court level or is a ground for sentence mitigation. It may be initiated at any stage of the criminal proceedings. Non-prosecution as a form of diversion is possible when punishment is deemed unnecessary and the offender has reconciled with the victim or has undertaken other reparative actions. Non-prosecution is most widely applied to juvenile offenders. As well, mediation is most suitable for young offenders. The parents or legal guardians have to give their consent in case a child or juvenile below the age of 18 is likely to be a party to mediation. Young persons below the age of 18 may have their parents or

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103 The snapshot is a summary of two reports by *Tapio Lappi-Seppälä*, see *Lappi-Seppälä* 2011 and 2015, and was compiled by *Andrea Păroșanu*.

104 See *Grönfors* 1989.

guardians present during mediation meetings if they wish. With respect to children below the age of 15, the parents have the right to participate in mediation.

If mediation is successful, in cases involving complainant's offences, prosecution will be dropped or investigations will be closed by the police. For non-complainant's offences, it remains at the discretion of the prosecutor to drop the charge. In coming to a respective decision, the prosecutor considers whether further prosecution seems unnecessary due to reconciliation having been achieved, and assesses whether dropping prosecution would violate important public or private interests. If the prosecutor takes the case to the court despite successful mediation, the court can also divert the case, or mitigate sentence according to general sentencing rules.

Currently, localised pilot projects involving prisoners convicted for violent offences are running in two prisons.

Besides mediation, damage compensation and the State compensation system play a role in meeting the needs of victims.

## 2. Organisational framework for delivering restorative justice measures

The Ministry of Social Affairs is generally responsible for the organization and supervision of mediation services. The provincial governments are in charge of operating mediation services in their region, either in co-operation with municipal authorities or with other public or private partners. Mediation offices are publicly funded.

Furthermore, the Advisory Board on Mediation in Criminal Cases, established by the Mediation Act, monitors and evaluates developments in mediation and fosters co-operation between mediation and other activities. The Board comprises representatives from social welfare and justice, the court system, the prosecution service, the police, State Provincial offices, mediation services and organizations. Furthermore, the Finnish Forum for Mediation, set up in 2003, is a volunteer organization including in its board representatives from all fields of mediation, such as mediation in schools, family, workplace, etc.

Mediators work on a voluntary basis. Usually, they work in social services and conduct mediation outside their working hours. In terms of their qualifications, mediators are required to have attended a short training course. In principle mediation, courses comprise a total of 30 hours and also cover basics of criminal and tort law, as well as compensating practices. Mediators carry out about 10 cases per year on average.

General guidelines provide information on the suitability of cases for mediation. In principle, any type of offence can be eligible for mediation. However, the guidelines differentiate between "more suitable" and "less suitable" offences. The Mediation Act makes a few limitations in terms of case suitability.

First, violence in close relationships should only be mediated upon referral by the police or a prosecutor. Second, if violence in close relationships has been repeated or there has already been a previous, unsuccessful mediation process, then mediation should not take place. Further, if the victim is below the age of 18 and in specific need of protection due to his/her young age, mediation is forbidden (which refers to sexual offences against children).

Mediation can be initiated by the parties involved, yet in practice it is either the police or the prosecutor who refer cases to mediation. The Mediation Act stipulates that the parties must attend mediation proceedings in person. There are no formal time limits regarding the length of the mediation process. Usually the prosecutor sets a time limit when making the referral, which ranges between two and three months.

### 3. The use of restorative justice in practice

Statistics on mediation are provided by the National Institute of Health and Welfare. In 2012, there were a total of 8,472 referrals to victim-offender mediation (involving adults and juveniles). Mediation was actually conducted in 7,957 cases (which includes some cases that had been started in the previous year). Agreements were reached in 6,681 cases. 7% of initiated cases were interrupted. Since the Mediation Act came into effect, cases referred to mediation have increased by 35%.

17% of mediation cases (n = 2,053) included juvenile offenders (15 to 17 year-olds) and 12% of cases (n = 1,516) were attributable to children below the age of criminal responsibility. Young persons below the age of 21 accounted for 41% of all mediation cases (n = 5,105).

In 2011, about half of the mediation cases involved assault and battery (56%) and about a quarter concerned minor property offences (26%). The majority of offences were non-complainant's offences. The overwhelming majority of cases are referred to mediation by the police. In 2012, the police referred 82% of cases, while 14% were assigned to mediation by prosecutors. A very small proportion of cases were initiated by the parties (1%) and social welfare authorities (2%).

In terms of the outcome of successful mediations, in 2012, 39% of the agreements included financial compensation and 4% involved compensation through work. A large share of agreements comprised symbolic compensation, such as an apology (35%), withdrawing from claims (12%) and the promise not to repeat the behaviour (10%).

The number of mediators has remained quite stable in recent years. In 2012, a total of 1,279 mediators were registered as being active and a further 213 were in reserve (meaning that they have not received a case during the year). The average caseload per mediator was 6.6 cases in 2012.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Finland, several empirical surveys on mediation have been conducted, including the experiments carried out in the late 1980s.<sup>105</sup> They reveal overall positive results on the perceptions of victim-offender mediation among participants and central stakeholders.

Regarding the experiences of participants with mediation, *Iivari* (2010) carried out a survey including 952 participants in mediation from October 2007 until March 2008.<sup>106</sup> The study showed that about 90% or more of victims and offenders found that mediation was useful, the atmosphere had been safe and trustful, and mediators had been impartial and acted professionally. More than 80% felt relieved after mediation and more than 70% stated that mental harms had been addressed.

The study by *Iivari* (2010) furthermore explored the perceptions of police and prosecutors on mediation, after the implementation of the legal framework for mediation in 2006. Results showed that the new law on mediation provided more clarification and increased the officials’ readiness to refer cases to mediation. Professionals with previous experiences with mediation seemed to be more open to refer more serious offences.

Concerning recidivism rates, a study by *Mielityinen* (1999) revealed that reoffending rates were generally lower in the group of offenders participating in mediation (56%) than in the control group (62%).<sup>107</sup> However, the impact of selection processes has to be considered, as those participating voluntarily in mediation have already shown signs of pro-social attitudes.

In general, victim-offender mediation has been well implemented and applied in practice, based on positive experiences made with pilot projects which led to the nationwide implementation of mediation. The legal enactment of the Mediation Act was another promoting factor for expanding the organizational infrastructure and providing equal access to mediation in every region in Finland. In particular, there are significantly high mediation caseloads involving young offenders. The further development of mediation and restorative justice in Finland relies on professionals continuing to accord attention to mediation, and it seems that legal practitioners acknowledge the social dimensions of mediation.

105 See for sources *Grönfors* 1989; *Järvinen* 1993; *Iivari* 2000. See also *Iivari* 2010a for a comprehensive overview on empirical research on restorative justice in Finland.

106 *Iivari* 2010.

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# 12. France<sup>108</sup>

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*Robert Cario, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The roots of restorative justice in France date back to the early 1980s, when first victimological research was presented and the role of the victim in the criminal procedure was discussed. In 1986, the nationwide network of the Association for the Support of Victims was created (*Institut National d'Aide aux Victimes et de Médiation, INAVEM*). Thus, the idea of mediation had its footing in the victim's movement. However, the first projects on mediation were developed within the framework of offender rehabilitation, i. e. by the association for probation called *Comité de Liaison des Associations de Contrôle Judiciaire, CLCJ*). The first pilot projects took place in Paris, Valence, Strasbourg and Bordeaux as of 1983. Mediation and reparation were incorporated into the practice of criminal justice upon the initiative of some practitioners, and later into the Criminal Procedure Act in 1993 (*Code de Procédure Pénale, CPP*). In the years thereafter, European Union initiatives and the Council of Europe's recommendations supported the expansion of restorative justice in France. A recent reform law of 15 August 2014 widened the scope of restorative justice measures to all stages of the criminal procedure, including the stage of sentence execution (see Art. 10-1 CPP).

Victim-offender mediation is the main form of restorative justice in France. Other measures that are sometimes presented as restorative (for example community service orders, suspended sentences combined with reparation orders) largely fail to consider the needs of victims and/or relatives and their aspirations to participate.

The French juvenile justice system is based on the idea of education as expressed in the *Ordonnance* of 1945.<sup>109</sup> This orientation is in harmony with the philosophy of restorative justice.<sup>110</sup> Amazingly, however, measures such as mediation, family group conferencing etc. have had only a minor impact on juvenile law and practice.

108 This snapshot is primarily based on a report written by *Robert Cario*, University of Pau/France, see *Cario* 2015, and was compiled by *Frieder Dünkel*.

109 See *Cario* 1999, p. 251 ff; *Castaignède/Pignoux* 2011.

110 See *Cario* 1999, p. 136 ff.

The *Ordonnance* after the general reform in the year 1993 further widened the scope of mediation at all stages of the criminal procedure and decision making. So Art. 12-1 of the *Ordonnance* of 1945 stipulates that the prosecutor, the judge of instruction as well as the deciding judge in court are entitled to propose to the juvenile a measure or activity of reparation in favour of the victim or society as a whole (such as a community service order). The juvenile judge can also decide to discharge a case without any judicial response (concerning educational measures, “*dispense de mesure*”, Art. 8 al. 10 – 2 of the *Ordonnance*). Art. 8 states a case can be discharged “if the rehabilitation of the juvenile offender has been achieved, the victim has been compensated and the disturbed peace in society has been restored”. Whereas in adult criminal law there are several sentencing or disposal options that reflect restorative thinking (such as reparation orders or the community service order that was introduced in 1983 and that can also be applied in juvenile cases), one specialty of juvenile justice legislation is the sentence of supervised liberty (“*liberté surveillée d’épreuve*”, Art. 8 al. 8 of the *Ordonnance* of 1945), a measure which can be imposed on a juvenile offender by the juvenile judge or court. It involves supervision by the probation service, and one element of the measure can be to repair the damages of the victim.

Thus, in theory, a wide range of restorative measures is accessible, including in particular mediation. However, it has to be noticed that mediation in penal matters in France remains an instrument of disguised repression, in the sense that it replaces (in procedures against adults as well as juveniles) the former institution of “diversion without any sanction” (“*classements sans suite*”) (which is practised in 8 out of 10 police hearings in practice) and thus can be said to contribute to “net-widening”-effects.

Regarding restorative justice at the prison level, interesting experiments have been developed in France. In 2010, so-called victims-inmates-meetings (*Rencontres Détenus-Victimes, RDV*) were created in the central prison of Poissy and in several other prisons since then. These RDVs are still running. Furthermore, circles of support and accountability have been in the making since 2014 for adults (Versailles). In 2015, so co-called victims-sentenced person-meetings (in the community) (*Rencontres Condamnés-victimes, RCV*) will be initiated in some regions of the country (Pontoise, Pau, Montpellier, La Réunion, especially). More specifically, under Art. 10-1 CPP, experiments of restorative mediation (*médiation restaurative*), between the perpetrator and his/her victim will be introduced in the pre-sentential and the post-sentential stages (Pau).

## 2. Organisational framework for delivering restorative justice measures

Mediation is most often used in the context of diversion. Police and public prosecutors as well as the court are the main gatekeepers, while the Probation and Mediation Service, the victim and the offender may also request mediation. The prosecuting authorities may use the public service of “judicial protection” (“*protection judiciaire de la jeunesse*”, similar to the probation service) or private persons or organizations that organize the execution of such measures.

In juvenile justice, the measure is called “measure of assistance (help) and reparation” (“*mesure d’aide et de réparation*”), which is used extensively at the prosecutorial level by prosecutors specialized in juvenile

justice and family matters. Successful reconciliation of the parties regularly leads to diversion from prosecution, and may also include victim-offender mediation.

### 3. The use of restorative justice in practice

Regarding juvenile justice practice, the statistics available for 2013 reveal that 25,800 reparation orders were imposed: 54% by the juvenile prosecutor, 33% by the juvenile judge at the pre-sentencing stage ( *juge des enfants*) and 13% by the juvenile court (*Juge des enfants en audience de jugement*)<sup>111</sup> It is regrettable that the judicial statistics are not particularly helpful, as they do not differentiate according to the type of sanctions and measures with regards to mediation and reparation. More detailed information can only be found in special studies. Concerning juveniles, a recent study titled “Judicial trajectories of minors and desistance” contains rich information about restorative measures for juvenile offenders. The data come from the “panel of minors followed up by the justice system”. They reveal that measures of reparation, supervision (*liberté surveillée*) and community service (unfortunately all three recorded together) on average accounted for 9.5% of all sanctions and measures imposed on juvenile offenders.<sup>112</sup>

The general conclusion to be drawn from these limited numbers is that measures that could be seen as restorative, or that are at least somehow oriented towards restorative justice thinking, are applied only rarely, in particular at the level of court sentencing.<sup>113</sup> Furthermore it has to be emphasised that the “measure of support and reparation”, which is imposed on juvenile offenders in more than 50% of the cases dealt with by the juvenile prosecutor, only exceptionally involves the participation of victim in the procedure of diversionary measures.

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

In France only very few research studies (general or evaluative) have been conducted on restorative justice measures. The majority of them deal with mediation in penal matters or the reparation order for juveniles (measure of support and reparation, “*mesure d’aide et de reparation*”). As mentioned above, restorative justice elements are rarely used, although experiences seem to be encouraging when victims are involved in the procedure. Victims are satisfied and offenders regularly fulfil the mediation or reparation obligations agreed on. Some critical issues can be mentioned: mediators receive insufficient and inadequate training as far as they do not belong to the associations of victim support (INAVEM) or the probation services (*Citoyens et Justice*). Another point of critique refers to the rare involvement of

111 See *Cario* 2015, p. 282 ff.; Justice, délinquance des enfants et des adolescents. Un état des connaissances, Pub. Ministère de la Justice, 2015, 014 p., [justice.gouv.fr](http://justice.gouv.fr); See *Mainaud*, Une justice pénale des mineurs adaptée à une délinquance particulière, In *Infostat Justice*, 2015-233, [justice.gouv.fr](http://justice.gouv.fr).

112 See *Cario* 2015, p. 283 f.

113 See *Cario* 2010, p. 163 ff.

victims in juvenile mediation procedures as mentioned above. A general law reform project on juvenile justice is currently underway in France, which is in line with the educational approach of the *Ordonnance* of 1945. The authors of the draft bill have a strong desire to implement different forms of restorative justice and in particular family group conferences (*Conférences restauratives*).<sup>114</sup>

In terms of recidivism rates, no respective dedicated studies have yet been published, but the National Council for Victim Support (*Conseil National de l'Aide aux Victimes, CNAV*) has set up a working group with the aim of assessing the possibilities to integrate restorative justice measures into the actual penal law and also to promote evaluation research on “what works” in order to identify “best practices” for nationwide implementation.

Looking at the general development of restorative justice in French juvenile justice, since their implementation, restorative measures have been increasingly used in the criminal justice system. However, to date the role that they play in practice remains a marginal one. There have recently been encouraging experiences in some prisons with so-called victim-offender meetings. The present government, and in particular the Minister of Justice from the Socialist Party, seems to be willing to support a further expansion of restorative justice in penal matters, as can be seen by the recent law amendments of 15 August 2014 mentioned above.

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114 See Cario 2014.

# 13. Germany<sup>115</sup>

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*Frieder Dünkel, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The roots of restorative justice in Germany go back to the mid-1980s, when the first pilot mediation projects were established, primarily in juvenile justice. What does juvenile justice mean in Germany? The German approach is justice and welfare oriented, in that it integrates special educational measures and sanctions into a justice-oriented juvenile criminal procedure.<sup>116</sup> At the beginning, when enacting the Juvenile Justice Act (JJA) in 1923, the competence of juvenile courts in Germany only covered juveniles aged 14-17. Since 1953, 18-20 year-old young adults have also been included, who are sentenced according to their personal development by applying either sanctions of the JJA<sup>117</sup> or the sanctions of the general Penal Code (PC).

The idea of restoration and finding more constructive and educational responses to juvenile delinquency was already gaining importance in the 1970s, when projects started establishing community service facilities, social training courses and special care by social workers (similar to probation). A milestone for the further establishment of restorative justice measures was the enactment of a major law reform of juvenile justice in December 1990, just a few weeks after the reunification of East- and West-Germany. The legislator stated that mediation was the “most promising” intervention. Therefore, the new law provided for mediation and reparation at all stages of juvenile criminal proceedings. The use of diversion was legally extended considerably after it had already increased from 44% to 56% during the 1980s (today the proportion of all cases of 14-20 year-old offenders is 70%).<sup>118</sup> One major reason for diverting a case from further prosecution is if the offender has undergone mediation or efforts to make reparation to the victim (s45(2) JJA). There are also court-based restorative measures like mediation, reparation, and in a wider sense community service. The practice of community service in Germany, however, is

115 The snapshot is primarily based on a report by *Frieder Dünkel* and *Andrea Păroșanu*, University of Greifswald/Germany, see *Dünkel/Păroșanu* 2015. The snapshot was compiled by *Frieder Dünkel*.

116 See *Dünkel* 2011, p. 548 ff.

117 Which at present is the case in 67% on average of sentencing decisions concerning young adults, and in over 90% of cases involving the most serious (felony) crimes, see *Dünkel* 2011, p. 587 ff. The application of sanctions of the JJA in to be understood as a mitigation compared to the general Penal Code sanctions.

118 See *Heinz* 2014.

not really “restorative”, as it is mainly used as a punishment (“disciplinary measure”), and the idea of “doing good” to the society (as it is more common e. g. in Scotland) is widely neglected.<sup>119</sup>

Mediation and restorative measures can also be used while serving prison sentences. There are quite a lot of experiments with forms of victim awareness programmes. In Germany, some Prison Laws 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. Restorative justice has been implemented by providing the aim of compensating the victim and restoring the damage to him or her, which is addressed in the basic principles for the execution of prison sentences on the one hand and as a priority means of conflict resolution (instead of disciplinary measures) in cases of intra-prison conflicts between prisoners and/or prisoners and staff members. This is particularly strengthened in the youth prison legislation, but as a general objective in adult prisons as well.<sup>120</sup>

In Germany, first pilot projects with conferencing have also started, and a project on how to establish peace-making circles is well under way.<sup>121</sup>

In adult criminal law, mediation and reparation have been implemented in legislation as well. Since 1975, judges and prosecutors have been able to consider active repentance and the restoration of damages through material compensation or a mediation process as grounds for dismissing the case (s153a Code of Criminal, CPA, dismissal under the condition of paying reparation or participating at mediation). Also, at the court level, since 1994 successful reparation or mediation can result in a mitigated sentence or in a conviction without punishment (*Absehen von Strafe*) in cases that would otherwise have attracted a prison sentence of up to one year. Since the reform of the general criminal procedure law in 1999 (which also affected juvenile justice), judges and prosecutors have to consider mediation and reparation at every stage of the criminal proceedings and, in appropriate cases, work towards mediation (s155a CCP), thus following demands of international human rights standards. Furthermore, due to another law reform, the criminal judge *has to* consider civil claims for compensation of material and immaterial losses and has to link the civil law procedure to the penal trial (§§ 403 ff. CCP).

119 For a discussion on the restorative potential of community service orders, *Düinkel/Grzywa-Holten/Horsfield* 2015, p. 1051 ff.

120 See, e. g. the prison legislation in Baden-Württemberg, Brandenburg, Thuringia and Saarland, see *Düinkel/Păroşanu* 2015, p. 303 f. In addition, efforts to make reparation while in prison should be favourably considered when making early-release decisions in Germany (see §§ 88 Juvenile Justice Act, § 57 Criminal Code), see *Düinkel/Păroşanu*, *ibid.*

121 See *Düinkel/Păroşanu* 2015, p. 299.

## 2. Organisational framework for delivering restorative justice measures

With regard to organisational issues, mediation is practised by state-run or private mediation schemes. In the field of juvenile justice, priority is given to non-profit private mediation schemes, but often also the local Youth Departments (*Jugendgerichtshilfe*, “youth court associates”) provide mediation services. The same structure can be found for adults over 21, although the “landscape” is not developed to the same extent as in the juvenile justice system. Often, adult cases are dealt with by general mediation schemes (dealing with juveniles *and* adults), and in addition the probation services are involved. This can be seen as problematic, since the work of the probation service and the youth court associates is traditionally offender-oriented. Therefore, more independent agencies (like the specialised mediation schemes) are preferable as their orientation is more neutral and balanced. Two federal states (Brandenburg and Saxony-Anhalt) have implemented a new (state-run) social service especially for mediation.

One peculiarity of German mediation schemes is that many dispose of a compensation fund. If an offender performs community service, he can be “remunerated” for his work via this special fund so that he is able to make financial reparation to the victim (a similar regulation also exists in Belgium).

## 3. The use of restorative justice in practice

Turning now to practice, quite a lot of research has been conducted that focusses on the implementation of mediation since schemes since the early 1990s. A nationwide study on all local youth justice agencies in 1993/94 revealed that mediation schemes were in place in 74% of the 606 Youth Departments. One of the more important research questions was whether the “new” federal states (those from the former GDR) had developed a similar infrastructure for mediation and other educational measures of the JJA in the four years since reunification. The astonishing result was that 88% of the Youth Departments in the East-German federal states offered mediation – so the infrastructure was in parts even better than in the “old” federal states.<sup>122</sup> The “boom” in establishing new mediation schemes continued well into the 2000s. It was then interrupted by the financial crisis that municipalities in some regions of Germany experienced that also required costs to be saved in the field of juvenile welfare.

A recent survey on the implementation of mediation showed that the majority of facilities offering victim-offender mediation were fully or partly specialised (64%). Case selection was predominantly in the hands of public prosecutors, followed by judges, the juvenile court aid and the police.<sup>123</sup>

Unfortunately, no detailed statistics are available on the role of mediation in the sentencing of juveniles and adults. Generally, in juvenile justice sentencing decisions the general trend is one of refraining from

122 See Dünkel/Geng/Kirstein 1998.

123 Kerner/Weitekamp 2013, pp. 31 ff. The entire survey includes information provided by 238 facilities delivering victim-offender mediation.

using custodial sentences, which account for roughly 1-2% of all formally and informally sanctioned 14-20-years-old offenders. At the same time, the proportion of community sanctions has been increasing steadily. To date, roughly 70% of juvenile cases are diverted (at the pre-sentence stage). Community sanctions – special reformatory measures, and community service as a disciplinary measure – have come to play a major role in juvenile court sentencing. 41% of all convicted young offenders in 2012 received a community service order (which, however, hardly can be seen as “restorative”, see above).

At the beginning of the 2000s, it was estimated that each year, between 20,000 and 30,000 cases were mediated in the context of criminal proceedings. About two thirds of the annual caseloads involved young offenders. A nationwide survey on the practice of victim-offender mediation revealed that in 2010, at least 438 facilities offered victim-offender mediation in Germany. The years after 2000 experienced a period of stabilisation, but one could also observe a certain decline due to budgetary constraints in the local communities which affected the implementation of mediation.<sup>124</sup> At present, most projects for mediation cover a maximum of 5-10% (often far less) of all (juvenile) criminal cases of their region. Substantiated estimates indicate that between 16% and 25% of the indictable offences in the field of juvenile justice are intrinsically suitable for mediation or restorative procedures, thus leaving “a vast reservoir” of opportunities.<sup>125</sup>

As it stands today, there is the general danger that mediation will continue to play more or less the role of an additional educative/rehabilitative sanction within the traditional juvenile or adult criminal justice system, and – if left as is – will not be a step towards a fully-fledged restorative justice strategy.

124 See *Dünkel/Păroşanu* 2015, p. 298.

125 See *Dünkel/Păroşanu* 2015, p. 316; *Kilchling* 2012, p. 103 with further references.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

To date, there have been no systematic and nationwide evaluations in Germany of the effects of restorative justice on recidivism. However, a few studies have revealed that the re-integrative effects of mediation are not less than those of other measures. Some reports even indicate a reduced rate of recidivism. The studies reveal small effects of less or less severe re-offending, but there are some methodological problems (selection bias) which make a clear assessment difficult.<sup>126</sup>

In terms of internal project efficiency (that is, the predictability and acceptance of mediation), the German results have generally been positive. First studies have shown that 80% to 90% of offenders and victims approached by mediators agreed to participate in mediation. Settlements were reached in 67% to 81% of all cases, an average of 75%. The same share of offenders fulfilled the commitments made. As the current Federal Victim-Offender Mediation Statistics reveal, from 2006 to 2009, a settlement was reached in 89% of cases on average.<sup>127</sup>

Looking at the general development of mediation in Germany, it can be said that is provided nationwide for young offenders up to the age of 21, and that it has yielded some promising results. However, further research is necessary into *how* it has been implemented and what effects it has on the participating parties and not least on recidivism.<sup>128</sup>

Restorative justice measures have also been developed for adults and in other settings, like in prisons, and more recently there have been experiments with conferencing. Germany is probably one of the best developed countries as far as legal regulations for restorative justice are concerned. The Juvenile Justice Act, the general Criminal Law and the general Code of Criminal Procedure provide differentiated regulations for mediation and reparation at all stages of the criminal procedure. Even Prison Law is well developed and places strong emphasis on restorative issues. The problem in Germany therefore is how the “law in practice” fits to the “law in the books”, a never ending story for implementation and evaluation research.

126 See in detail *Dünkel/Păroşanu* 2015, p. 313 f.

127 See *Dünkel/Păroşanu* 2015, p. 314.

128 See for a few promising, but not sufficient studies *Dünkel/Păroşanu* 2015, p. 313 ff.

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# 14. Greece<sup>129</sup>

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*Sofia Giovanoglou, Andrea Păroşanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

Restorative justice interventions, in particular victim-offender mediation, have gained increased attention over the past decade. Besides mediation in penal matters, mediation has been implemented in various fields such as civil and commercial matters and in some schools.<sup>130</sup>

Legislative reforms introducing restorative measures occurred in a top-down manner, as there were no localised pilot projects on which the legislative framework could be based. The purpose of the reforms was in fact to reduce high court caseloads and to promote the position of victims in criminal proceedings.<sup>131</sup> The introduction of restorative measures is also to be understood in the context of aligning national legislation with relevant EU Directives.<sup>132</sup>

Restorative measures for juveniles were influenced by international documents, both “hard law” and “soft law” instruments of the UN and the Council of Europe. In 2003, the Law 3189 on the “reform of penal legislation for juveniles and other provisions” introduced educational and therapeutic measures for juveniles, including victim-offender mediation, into the Criminal Code. There is no specific juvenile justice act in Greece – provisions for juveniles are contained in the general criminal law.

Regarding juvenile offenders (8 to 17 years), according to Criminal Procedure Code (Art. 45 A) dispositions, the prosecutor can waive prosecution if he/she considers that prosecution would not be necessary to deter the offender from re-offending and the juvenile committed a petty offence<sup>133</sup> or a misdemeanour.<sup>134</sup> In such a case, the prosecutor may order one or more diversionary educational

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129 The snapshot was compiled by *Andrea Păroşanu* and is primarily based on a report by *Sofia Giovanoglou*, see *Giovanoglou* 2015.

130 See also *Artinopoulou* 2013, p. 102. This source also provides detailed information on the legislative basis, procedures and practice of victim-offender mediation in Greece.

131 *Psarouda-Benakis* 1982; *Spinellis* 1989; *Stamatis* 1989, all cited in *Giovanoglou* 2015, p. 337.

132 *Papadopoulou/Papadopoulos* 2008, cited in *Giovanoglou* 2015, p. 337.

133 Any act punishable through imprisonment or a fine. For an overview of juvenile justice in Greece, see *Pitsela* 2011.

134 A misdemeanour is any act punishable with imprisonment for 10 days to 5 years, or by pecuniary penalty.

measures, including victim-offender mediation (*“victim-offender mediation for the expression of forgiveness and the extra-judicial arrangement of the consequences of the offence”*), to apologize to the victim, to provide compensation or reparation to the victim, or to perform community service (Art. 122 Criminal Code). Compensation implies the payment of reparation to the victim by any means. Further educational measures are listed in Art. 122 of the Criminal Code. Victim-offender-mediation and compensation may also be imposed as so-called “restrictive conditions” by the prosecutor in order to avoid pre-trial detention if the young offender is aged 15 or older.

At court level, the juvenile judge can order the same educational measures that are applicable at the pre-court level. The legislator differentiates between the age groups “minors” and “juveniles”. Minors, aged between 8 and 15 years, are not considered criminally liable and can only be subjected to educational measures in case the court deems it absolutely necessary.<sup>135</sup> Juveniles, aged 15 to 18 years, are held criminally liable and educational measures may be imposed if ordering liberty depriving measures is not necessary.

If the juvenile judge sentences a juvenile to detention in a Young Offenders’ Institution, according to the Criminal Code, sentence should be mitigated if the young offender has shown genuine (sincere) remorse and has attempted to alleviate or mitigate the negative consequences of the offence.

The procedure for penal mediation in cases of domestic violence misdemeanours, stipulated by Law 3500/2006 on domestic violence, is applicable only to adult offenders. Where juveniles have committed misdemeanours of domestic violence, the prosecutor may divert the case and apply educational measures, including victim-offender mediation, as described above.

## 2. Organisational framework for delivering restorative justice measures

Regarding the procedure of victim-offender mediation at the pre-trial stage, the juvenile prosecutor issues a diversion order on the condition of mediation, and sets the time period within which the conditions of that order must be fulfilled. If the young offender fulfils the conditions, the prosecutor reports the reasons for diversion to the prosecutors at the Court of Appeal and the proceedings are terminated.

At court level, victim-offender mediation is ordered by the court through the intervention of the Youth

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<sup>135</sup> Law 3860/2010 reformed Law 3189/2003 and increased the age limit of criminal liability of juveniles from 13 to 15 years. The law also stipulates that liberty depriving sanctions can only be ordered when it is proven that educational and therapeutic measures will not be sufficient.

Court Aid.<sup>136</sup> Hereby, the aim of the restorative intervention is that the juvenile apologizes to the victim and repairs the damage caused by the offence. If one of the parties refuses to reconcile, mediation may be substituted by another educational measure upon proposal of the Youth Court Aid. Mediation is delivered by Youth Court Aid staff. However, aid personnel have generally received only little training on mediation. During the mediation sessions, besides the parties, the parents of the juvenile are present. Supporters of the parties are also allowed to participate.

In 2010, the Minor Protection Services were reformed and the “Central Scientific Council for a Response to Victimization and Criminality of Juveniles” (“KESATHEA”) was established by the Ministry of Justice, Transparency and Human Rights. This council is responsible for coordinating (educational) measures for the prevention and treatment of juvenile victimization and delinquency. It cooperates with the Minor Protection Services, including the Youth Court Aid, which provide assistance for juveniles who have been subjected to educational measures, as well as other agencies and organizations.

### 3. The use of restorative justice in practice

Regarding victim-offender mediation in practice, no officially published statistical data are available. Only a few recent research studies provide some (albeit limited) insight into the use of mediation (see below).

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

Research studies aiming at assessing the implementation of restorative justice interventions, including mediation, were conducted at several courts and Youth Court Aid services some years after the introduction of these measures in 2003. Overall, the studies showed a very poor rate of implementation. According to data provided by the Youth Court Aid service of Athens<sup>137</sup>, during the judicial year 2003-2004, out of 1,288 educational measures imposed on juvenile offenders by juvenile courts of Athens, only six cases were referred to mediation, and compensation was ordered in just one case. Diversion from prosecution occurred in only 15 cases. In the judicial year 2005/2006, mediation and compensation were not imposed at all.

A research study was conducted in 2006 in the juvenile courts of Athens and Thessaloniki, and sought to measure court staff’s experiences with and perceptions of mediation. The results served to confirm the

136 The Youth Court Aid is a Regional Department of the Greek Ministry of Justice, Transparency and Human Rights. The service is responsible for preparing, during the stage of the juvenile’s interrogation, a social inquiry report as well as exercising and monitoring the execution and progress of educational measures. It is equivalent to a juvenile Probation Office. See *Pitsela* 2011a, p. 505 ff., 521 ff., and *Pitsela* 1998, p. 1085 ff., 1097. See also *Pitsela* 2011 w. f. ref.

137 *Papadopoulou/Papadopoulos* 2008, cited in *Giovanoglou* 2015, p. 359.

limited use of mediation in practice.<sup>138</sup> Respondents to the survey stated *inter alia* that there was a lack of an adequate infrastructure for implementing mediation, and that judges, prosecutors and Youth Court Aid employees needed to be trained or educated in mediation. A further study showed that victim-offender mediation occurs only very rarely in cases of domestic violence in practice.<sup>139</sup>

Further information on the implementation of educational measures in general was gathered through a study conducted for the needs of the newly founded “Central Scientific Council for a Response to Victimization and Criminality of Juveniles” (“KESATHEA”). According to this unpublished data that cover 26 different Youth Court Aid Services in Greece, in the years 2009 and 2010, mediation (as an “educational measure”) was implemented in only very few cases (73 in total). Most of them (54 out of 73) were in Thessaloniki and in the town of Serres (10 out of 73 cases). In all the other Youth Court Aid services, mediation was implemented only once or twice within these two years.

What are the main obstacles and challenges for achieving a wider use of restorative justice measures? There is a lack of adequate structures and specialised and trained staff. Furthermore, restorative interventions are incorporated into the criminal justice system in a highly unsystematic fashion and there is a distinct lack of funding. Moreover, the legislative implementation of restorative measures in Greece was not preceded by pilot projects upon which the legislative basis could have been based. Victim-offender mediation, involving both juveniles and adults, has not yet been implemented to its full potential.

What is needed in Greece, if the use in practice of restorative justice is to be more successfully promoted, is the establishment of a central mechanism that provides guidelines, ensures best practices in the use of restorative justice measures, and monitors and evaluates practices. An informal network is already in place, including academics, lawyers, Youth Court Aid personnel, NGOs working with juveniles, and other experts. Furthermore, the Greek Ombudsman for the Rights of the Child and public officials of the Youth Court Aid are strongly in favour of the implementation of restorative justice measures.

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138 Giovanoglou 2007, cited in Giovanoglou 2015, p. 359.

139 Artinopoulou 2010, p. 183-185.

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# 15. Hungary<sup>140</sup>

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*András Csúri*

## 1. Forms of restorative justice interventions and their legal basis

In Hungary, victim-offender mediation is the most prominent form of restorative justice in criminal matters. The emergence of victim-offender mediation and restorative justice was emphasized in the National Crime Prevention Strategy in 2003 and aimed at providing alternatives to imprisonment and improving the rights of victims in criminal proceedings. At the same time, the promotion of restorative justice was regarded as a viable and appropriate means for curbing high custody rates and overburdened courts. In order to align national legislation with the Council Framework Decision of 2001 on the standing of victims in criminal proceedings, mediation-related provisions were introduced to the Code of Criminal Procedure in 2006, and the notion of “active repentance” was incorporated into the Criminal Code. Agreements resulting from mediation and performed duly are regarded as successful “active repentance”, which results either in closure of the case or in a mitigation of sentence.

Furthermore, in recent years, group conferencing schemes, restorative initiatives in prisons and peace-making circles have been introduced locally at an experimental level in Hungary. These initiatives also target(ed) young offenders.

Further interventions of a potentially restorative nature can be seen in the sanctions of “restorative work” and “community service” in the Criminal Code. However, for the former, the offender does not need to give his/her consent to the measure, while the latter is formally categorized by law as a form of punishment. Thus, the key restorative principles of ‘voluntariness’ and alteration do not apply for either of these two measures, and they do not involve a restorative process.

The legal framework for victim-offender mediation is provided by the Criminal Code, the Code of Criminal Procedure and the Act on Mediation in Penal Matters (hereinafter: the Mediation Act). The Mediation Act, which came into force in 2007, contains specific regulations on mediation and the profession of the mediator. The Code of Criminal Procedure provides general regulations on mediation,

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140 This snapshot provides a summary of a report by *András Csúri*, see *Csúri 2015* (accurate up to July 2014), for the compilation of which the author extends his thanks to *Andrea Păroșanu*. Special thanks are due to *Philip Horsfield* for the linguistic proof-reading.

which is linked to the legal institution of “active repentance” in the Criminal Code. “Active repentance” is also meant as a substantive requirement for mediation. The Code of Criminal Procedure refers to restitution and future lawful behaviour as the objectives of mediation in connection with “active repentance” (221/A § (1)). Similarly, the Mediation Act emphasizes that the aim of mediation is to settle the conflict via a written agreement, compensating the victim and facilitating future lawful behaviour on behalf of the offender (2. § (1)).

An amendment to the Criminal Code in 2012 extended the scope of mediation to also include cases in which the victim has already received compensation prior to the case being referred to mediation. Furthermore, since said amendment, mediation has also been possible in cases in which a victim has not been identified. There are, in fact, no legal restrictions in terms of eligible categories of victims – both natural and non-natural persons can be the victim in mediation proceedings. Legal entities participate in mediation via their representatives.

The further preconditions for mediation are that the offender has admitted guilt before being indicted and that the parties have given their consent to participate. Furthermore, the prosecutor must be of the opinion that mediation would be both legally possible and favourable. In forming said opinion, he/she shall consider whether a case can be closed or the sentence can be mitigated, and also whether the offender would be prepared and able to compensate the victim.

The Criminal Code states that mediation is possible for certain categories of offences, such as crimes against the person, traffic offences and property crimes. For juvenile offenders, the law extends the scope of eligible offences to include more serious crimes (all offences punishable with up to five years of imprisonment).

Repeat offenders have committed the same or similar offences habitually within a certain period of time and may be excluded from participating in mediation. Furthermore, mediation is not applied in cases in which the offender belongs to a criminal organization or if the crime has resulted in death.

Mediation is also excluded in cases in which the offence has been committed within the period for which the indictment has been postponed (i. e. while conditionally discharged), while on probation or upon conviction and prior to the enforcement of a custodial sentence. Finally, a case is ineligible for mediation if the offence was committed within two years of having successfully participated in mediation for a previous offence.

Victim-offender mediation can take place in the pre-trial phase and before the court of first instance in the trial phase. However, emphasis is placed on using mediation at the pre-trial stage, as the explanatory notes to the Mediation Act reveal.<sup>141</sup> At the pre-trial level, referral to VOM occurs at the discretion of the prosecutor. Mediation may be applied either on the prosecutor’s own initiative (*ex officio*) or upon request of the parties or their legal defence.

At the trial level, the parties or their defence counsel can request from the court that it authorize

141 *Lajtár* 2007, p. 5 ff.

mediation. The judge cannot refer a case to mediation on his/her own initiative. Where the court authorizes mediation, it postpones further proceedings in the case for up to six months, in which time mediation is to take place. The legal guardians of young persons have to attend the mediation process. The parties have the right to legal assistance and support by two further persons (f. ex. family members). Mediators may request that experts (teachers, psychologists for example) participate in the mediation sessions as well when doing so would be fruitful for the process.

At the prison level, restorative initiatives have been introduced on an experimental basis. The project "Prison for the city", for instance, involves the performance of restorative work by prisoners for the community.<sup>142</sup> Within the MEREPS project, restorative approaches were piloted in order to address conflicts between inmates, the restoration of family relations and the making of reparation to victims.<sup>143</sup>

The new Code on the Execution of Sentences, which came into effect on 1 January 2015, introduced the legal basis for victim-offender mediation in prison settings. However, what must be regarded critically is that mediation shall be conducted by prison officials, which could strongly jeopardize the principle of impartiality, at least from the prisoners' perspective.

Where mediation fails, the case is referred back to the prosecutor or the court who then decide on how to proceed. Successful mediation has an impact on the criminal proceedings. What constitutes "success" varies, however. According to the Probation Service, it is sufficient if mediation results in an agreement based on consensus, whereas according to the Code of Criminal Procedure, the offender must have actually already begun with fulfilling the agreement. The legal consequences of successful mediation are different for juvenile and adult offenders. Regarding juveniles, mediation resulting in an agreement always alleviates the offender of criminal responsibility and thus closure of the case. For adults, the gravity of the offence has to be taken into account in deciding whether successful mediation results in impunity or in a mitigation of sentence. For all misdemeanours and felonies punishable with up to three years of imprisonment, successful mediation results in impunity and thus the case being dropped by the prosecutor or court. The prosecutor can prolong the period for "postponement of the indictment" by another one or two years if the mediation agreement cannot be fulfilled in due time. This possibility only exists at the pre-trial stage. Regarding felonies for which the law provides a penalty of up to five years of imprisonment, mediation results in sentence mitigation for adult offenders.

142 2986/2012 Report of the Commissioner for Fundamental Rights.

143 The MEREPS project (Mediation and Restorative Justice in Prison Settings) ran between 2009 and 2012, see Barabás 2012, p. 23 ff.

## 2. Organisational framework for delivering restorative justice measures

In terms of *victim-offender mediation*, mediation is conducted by probation officers who are appointed by the probation service and undergo special training. Furthermore, since the year 2008, specially trained lawyers have also been eligible to conduct mediation so long as they have been formally appointed to do so by the probation service. Due to a lack of funding since 2012, they can no longer be remunerated for this work.

The training mediators receive includes initial training courses on mediation, with at least two 30 hour courses comprising both theory and practice. In addition, mediators have to attend a 90 hour ADR-training course. Mediators receive regular supervision by experienced mentors. In the year 2012, a total of 83 specially trained mediators were registered, of whom 53 were actually practicing mediators. Furthermore, judges and police officers receive training courses which include mediation-related aspects.

Regarding the *mediation agreement*, the Mediation Act only requires that the agreement shall be mutual, lawful, reasonable and ethical, and shall stipulate the deadline by which time it must be fulfilled. Regarding the period of time within which the mediation process must have been conducted, the law provides that it shall be completed within three months of the beginning of the first mediation session. Court proceedings can be postponed for a maximum of six months.

In principle, the offender has to bear the costs for mediation, unless the parties agree otherwise. Travel expenses and further own expenses are paid by each party for themselves. If the court costs have been waived before the referral to mediation has been made, the offender does not have to cover the costs of mediation.

Group conferencing in prisons further involves family members and friends, who the prisoner invites upon consent of the prison administration. This restorative scheme aims at preparing the prisoners for family and community life after release. A probation officer may be in charge of supervising the fulfilment of the agreement.<sup>144</sup>

144 2986/2012 Report of the Commissioner for Fundamental Rights. III.1.

### 3. The use of restorative justice in practice

In Hungary, the Justice Service of the Ministry of Public Administration and Justice provides statistical data on the use of victim-offender mediation. Case referrals rose significantly after the introduction of victim-offender mediation in 2007 up until 2012. In 2007, a total of 2,451 cases were referred to mediation, 299 of which (12.2%) involved juvenile offenders. In 2012, that figure had already risen to 6,410 cases, including 617 juvenile cases (9.6%). 93.3% of cases (N=5,983) were referred by prosecutors, 7.1% (N=457) by the courts. 78% of the cases resulted in an agreement. In 2011, a total of 4,794 cases (thereof 550 juvenile cases) were referred – 538 (97.8%) by prosecutors. and 12 (2.2%) by the courts.<sup>145</sup>

From 2007 until the end of 2011, a total of 13,000 cases were referred to mediation. The majority of referrals were made at the pre-trial stage. Interestingly, the proportion of juvenile cases – around 10% of cases in 2012 – is rather low. To a certain degree, this can be explained by the fact that prosecutors and courts appear to prefer opting for another alternative measure that is available during the pre-trial stage – “probation supervision”. Probation supervision essentially implies that the indictment of the offender is postponed, and aims to provide support for the young offender and to reduce the risk of recidivism by subjecting him/her to the supervision of a probation officer. The probation supervision order in case of juvenile offenders can be applied for all categories of offences.

Mediation is available nationwide. However, there are variations in terms of the geographical distribution of caseloads, depending, *inter alia*, on the prosecutors’ and judges’ perspectives on and perceptions of mediation. In practice, mediation is most frequently applied in cases involving property-related offences.

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

Various surveys of mediation have revealed favourable attitudes towards this form of conflict resolution. A survey conducted among citizens and law professionals prior to the introduction of mediation revealed that the majority of the respondents were in favour of alternative measures, and stated that mediation may well serve to promote victim support.<sup>146</sup>

Another survey among 46 prosecutors and judges was conducted between the passing and entry into force of the new regulations for mediation. The study revealed widespread support for the use of mediation, but questioned its deterrent effect. Victims of crime were primarily perceived as witnesses of crime, who assist in revealing the offender’s guilt in the criminal proceedings.<sup>147</sup>

145 The latest figures are available on the webpage of the Justice Service of the Ministry of Public Administration and Justice. [www.http://kih.gov.hu/nyitolap](http://kih.gov.hu/nyitolap).

146 See *Barabás* 2007; see also *Barabás/Windt* 2008.

147 See *Kerezsi* 2006.

In terms of experiences with victim-offender mediation, several studies have revealed reasons why it is used so sparingly and why there are such prominent geographical variations in that use.<sup>148</sup> These factors included: a rather negative attitude towards mediation among prosecutors and judges; the legal restrictions regarding suitable, eligible offences; the prioritization of other alternative measures for young offenders; differing interpretations between the courts and prosecutors. Furthermore, there are procedural regulations that may limit the use of mediation for juveniles, e. g. that young offenders have to be heard by specially trained prosecutors before their cases can be referred to mediation. In cases in which these specially trained prosecutors cannot easily reach the young offender, due to them living far away, cases are automatically brought before court, as this speeds up the procedure in the case.

Since the Criminal Code, the Code of Criminal Procedure and the Mediation Act use of differing terminologies for the mediation process, there are variations in practice and different viewpoints among academics and practitioners regarding several mediation-related issues. However, the amendment of the Criminal Code, which came into effect in 2013, served to clarify certain aspects, e. g. allowing the referral of cases involving multiple offenders or offences to mediation. Furthermore, if compensation has already been rendered prior to the case being referred to mediation, it can be taken into consideration in the final mediation agreement.

Finally, in terms of expanding the scope and widening the use of mediation, the new Act on the Execution of Sentences explicitly provides a legal basis for mediation in prison settings.

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148 See Barabás 2010.

# 16. Ireland<sup>149</sup>

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*Kerry Clamp, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The modern roots of restorative justice in Ireland go back to the mid-1990s, when first mediation initiatives with juveniles started. Restorative justice is available as a disposal for both adults and juveniles who commit crime. However, only restorative programmes within the juvenile justice system have a statutory basis and operate at a national level in Ireland.

The Children Act 2001 established an overall statutory framework for dealing with young offenders as well as with children in trouble with the law. Juvenile Justice in Ireland covers 12 to 17 year-old juveniles. 10 year-old children are criminally responsible in exceptional cases of murder, manslaughter, rape and aggravated sexual assault.<sup>150</sup> The Act formalised two restorative justice interventions that were being piloted.

The first was a scheme run by An Garda Síochána (the national police) in their Garda Juvenile Diversion Programme. The scheme is designed to divert young offenders away from criminal activity and out of the criminal justice system by means of a caution, which can be either formal (with supervision) or informal (without supervision). In formal cautions, a family group conference may be arranged at which the victim, where appropriate, is also invited to attend. Victims are able to participate in informal cautions through a mediation process.<sup>151</sup>

Second, the Act creates a statutory basis for the Children's Court to divert cases to family conferences organised by the Probation and Welfare Service. The process is arranged with a view to addressing the offender's behaviour and its impact. Victims must be invited to attend, unless their attendance would

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149 This snapshot is a summarized version of a report by *Kerry Clamp*, University of Western Sydney/Australia, see *Clamp 2015*, and was compiled by *Frieder Dünkel*.

150 See *Walsh 2011*, p. 724.

151 Where the victim attends, offenders have the opportunity to apologise directly to the victim and, where appropriate, make financial or symbolic reparation. Both cautions are facilitated by police officers known as *Juvenile Liaison Officers*, who are trained in mediation skills and restorative practices.

not be in the best interests of the conference. Despite the enabling basis of the Children Act 2001, it does not make explicit reference to restorative justice, *per se*.<sup>152</sup>

Ireland has a longer tradition in implementing community service and reparation orders into the general criminal justice system, but these alternative sanctions are not seen as restorative and therefore not covered in the Irish report by *Clamp. Walsh* (with reference to *Kilkelly* 2006) states that most of the disposals of the Childrens Act 2001 were a “repackaging” of the sentencing options for the court available since the original Childrens Act of 1908.<sup>153</sup> Community service orders were introduced in 1984 for at least 16-years-old young offenders.<sup>154</sup>

Regarding restorative justice at the prison level, i. e. the execution of prison sentences, there are no statutory regulations for bringing victims and offenders together (although some few cases have been so dealt with on an experimental basis). Nor does the law foresee that the making of compensation or other restorative efforts be considered in decisions on early release.

## 2. Organisational framework for delivering restorative justice measures

With regard to organisational issues, one has to differentiate first the Garda Juvenile Diversion Programme, which is a police-based programme and funded by the Irish Youth Justice Service. The Juvenile Liaison Officer (an experienced and trained member of the police) either gives an informal caution or facilitates a formal restorative caution or conferencing, where parents, the offender and members of agencies having contact with the juvenile offender participate. Also the victim and his friends, parents or other relevant persons are invited. At the conference an action plan for the offender is developed, which may include mediation, apologies or reparation to the victim, but also curfews and other restrictions for the offender.<sup>155</sup>

At the court level, court-referred family conferences are provided by the Children Act of 2001. They are funded by the Probation and Welfare Services. The structure of the conferences is about the same as those at the police level.

Another organisation systematically providing mediation is the Tallagh Restorative Justice Service, an NGO working in the region around Dublin. It is funded by the Probation and Welfare Service and includes a cooperation of different stakeholders. Again this scheme operates at the court-level at the

152 In terms of the adult criminal justice process, two schemes operate in an informal manner in two pilot projects that allow mediation or other restorative interventions for adults who appear before the courts. As there is no special legislation, these projects work on the basis of the discretionary power of the judge to divert cases, see *Clamp* 2015, p. 393.

153 See *Walsh* 2011, p. 732.

154 See *Walsh* 2011, p. 734.

155 See in detail *Clamp* 2015, p. 402 f.

discretion of the juvenile judge, who refers cases to the project. Where a positive outcome is achieved with the victim, the judge drops the case.<sup>156</sup>

### 3. The use of restorative justice in practice

In terms of practice, the available statistics reveal that a relatively high number of juveniles are referred to the police based Juvenile Diversion Programme (2010: nearly 18,000 offenders). However, only 72% were actually admitted. The use of restorative practices within the programme increased from 307 referrals in 2006 to 792 in 2010, which also included more serious cases of assault, robbery and burglary.

Court-based family conferencing is used rather infrequently. In the five years from 2004 to 2009, in total 145 conferences took place (173 had been referred to the scheme). The yearly was rather stable in that time period (about 30 cases per year).<sup>157</sup>

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Ireland, only little research has been conducted on restorative justice measures. The data that is available indicate high rates of participant satisfaction, high rates of victim participation and changes in the offenders’ demeanour. The few unsuccessful cases were so-called victimless crimes. Unfortunately, no comparative recidivism studies have been published to date.

Looking at the development of restorative justice in general, since their implementation, restorative justice measures have been increasingly used in the criminal justice system and in juvenile justice in particular. However, in Ireland restorative justice remains on the margins of the criminal justice system, and despite the existing will to expand the idea by providing respective statutory regulations also for adults, the economic crisis and austerity make it unlikely that major improvements in this direction can be achieved in the near future. What is becoming evident is a lack of research in the field on the long-term effects of the Irish restorative justice projects. A first step to increase the use of restorative measures undoubtedly is to reduce the knowledge-gap of legal practitioners and other key players and stakeholders. The government seems to have realised this important task, at least.<sup>158</sup>

156 Another interesting project, however dealing with adult offenders, focusses on community reparation, i. e. the offender meets with volunteer representatives of the community who try to ensure that offenders take responsibility for their offences and make reparation to the victims, see *Clamp* 2015, p. 406.

157 See in detail *Clamp* 2015, p. 407 f.

158 See *Clamp* 2015, p. 411 f.

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- Walsh, D. (2011): Ireland. In: Dünkel, F., J. Grzywa, P. Horsfield, I. Pruin (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments. 2<sup>nd</sup> ed., Mönchengladbach: Forum Verlag Godesberg, p. 721-764.

# 17. Italy<sup>159</sup>

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*Lorenzo Picotti, Roberto Flor, Elena Mattevi,  
Ivan Salvadori, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The roots of restorative justice in Italy date back to the late 1990s, when first mediation initiatives with juveniles started. It was only in the year 2000 that explicit legislation to use mediation was introduced (coming into force in 2002). Before that time some restorative measures could be (and were) used only rarely and with difficulties, as Italian criminal procedure was and remains governed by the principle of legality. This principle was weakened in Juvenile Justice by the reform of criminal procedure in 1988, opening the floor for diversionary measures including victim-offender mediation and reparation for 14- to 17-year-old juveniles. The law reform of 2000 created the Justice of the Peace, who was given the legal competence to come to a resolution of conflicts by different measures including restorative ones. However, the scope is still limited as only minor crimes are involved.

The Juvenile Justice System does not regulate mediation and reparation explicitly, but both measures were developed within the scope of pre-court diversion (Art. 9 Juvenile Criminal Procedure Code, JCPC) and the court-based decision on the “irrelevance of the act” according to Art. 27 JCPC. A court based diversionary decision is possible if the offence is not a serious one, the “nature of behaviour” is “occasional” and educational reasons justify that decision.

The referral to a mediation or reparation scheme can already be made at the police and prosecutorial level of the procedure. Apart from the above mentioned Art. 27, the judge can – according to Art. 28 JCPC – also suspend the proceedings on probation and postpone the sentencing decision, i. e. it is less a probation sanction than a conditional dismissal of the case.<sup>160</sup> In theory, all crimes can be involved, but in practice more serious crimes such as robbery are the absolute exception in the field of mediation.

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159 The snapshot was prepared by *Frieder Dünkel* and is mainly based on a report by *Lorenzo Picotti, Roberto Flor/University of Verona, Elena Mattevi* and *Ivan Salvadori/University of Trento/Italy*, see *Picotti/Flor/Mattevi/Salvadori 2015*; general information on the Italian juvenile justice system is given by *Padovani/Brutto/Ciappi 2011*.

160 See *Picotti/Flor/Mattevi/Salvadori 2015*, p. 428 f.

A special possibility for restorative measures exists on the prison level. Here the judge for the execution of prison sentences may remit the offender to the Social Services (social workers) at the community level in particular if the offender has “taken steps so far as possible to benefit the victim of his crime” (Art. 47 Par. 7 of the Prison Law of 1975).

Other forms of restorative justice (conferencing, peace circles) do not exist in Italy.

## 2. Organisational framework for delivering restorative justice measures

Mediation is often used at the court level. The Social Services attached to the courts arrange the referral to the mediation scheme. In general, though, the police and public prosecutors as well as the court have the main gatekeeping function. Mediation is organised under the administrative structure of the municipalities by the local Social Services, in juvenile cases by the specialised Social Services for Juveniles and by NGO’s. Although emphasis is laid on professionalising the work of mediators (i. e. training courses do exist), and specific guidelines have been developed by the Ministry of Justice, it is not clear if mediators are regularly well-trained, as it is sometimes in the responsibility of the mediation schemes and Social Services to provide special training to their staff.<sup>161</sup>

## 3. The use of restorative justice in practice

As to practice with juveniles, no valid nation-wide statistics are available. Some research studies conducted in specific districts or cities demonstrate no clear picture. According to earlier sentencing statistics given by *Padovani/Brutto/Ciappi*, from 1992-2006, the number of preliminary hearings resulting in a dismissal of the case due to the irrelevance of the case (acc. to Art. 27 JCPC) decreased from about 27,000 to about 19,000. In the same time span, the number cases conditionally dismissed “on probation” (“pre-trial probation”, Art. 28) increased from less than 800 to about 2,300.<sup>162</sup> However, it is not indicated in how many cases mediation or reparation were involved.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Italy there exist only a few research studies on the regional or local level on the implementation and use of restorative justice measures, which give only spotlights on an apparently only limited use

161 See *Picotti/Flor/Mattevi/Salvadori* 2015, p. 436.

162 See *Padovani/Brutto/Ciappi* 2011, p. 783.

of mediation in juvenile justice. No data are available on the use of mediation and reparation in adult criminal law (i. e. in the scope of the Justice of the Peace). There is no evaluative research on the outcomes of mediation and reparation with regards to recidivism and the question of continuity of desistance from criminal offending in Italy in general and concerning mediation in particular.

Looking at the general development – according to the observation of practitioners and academics – since their implementation, restorative justice measures have been increasingly used in the juvenile justice system, but regional data shows also a decline in the last few years.<sup>163</sup> Reasons for the very limited use might be seen in the culture of strictly adhering to the legality principle in the adult criminal procedure and a still reluctant practice in juvenile criminal law due to organisational problems and a lack of (financial) resources and also interest of the judicial gatekeepers.<sup>164</sup> Signs of change can be observed in reform bills and considerations in the last years, which, however, under the uncertain political stability of the Italian governments of the last decade, had no chance yet to be realized. Italian crime policy in recent years was more concerned to extend community service as an alternative to imprisonment and house arrest,<sup>165</sup> which may be not really a restorative approach, but at least could bear potential for it.<sup>166</sup>

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- Picotti, L., Flor, R., Mattevi, E., Salvadori, I. (2015): Italy. In: Dünkel, F., Grzywa-Holten, J., Horsfield, P. (Eds.): *Restorative Justice and Mediation in Penal Matters – A stocktaking of legal issues, implementation strategies and outcomes in 36 European countries*. Mönchengladbach: Forum Verlag Godesberg, p. 417-448.
- Padovani, A., Brutto, S., Ciappi, S. (2011): Italy. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): *Juvenile Justice Systems in Europe – Current Situation and Reform Developments*. 2<sup>nd</sup> ed., Mönchengladbach: Forum Verlag Godesberg, p. 765-801.

163 *Picotti/Flor/Mattevi/Salvadori* 2015, p. 439 report a total of 882 cases of mediation in the region of Cagliari in 2008 and of 273 in 2010. These data are certainly not representative for Italy as a whole, but they indicate that 35% to more than 50% of the juvenile cases are pre-court diversion decisions, about 25% to 30% are court based mediation referrals, and that mediation during the execution of sentences plays only a very marginal role with only 3 cases during 2008-2010 in that region.

164 See *Picotti/Flor/Mattevi/Salvadori* 2015, p. 443.

165 See *Picotti/Flor/Mattevi/Salvadori* 2015, p. 442 ff.

166 See the discussion on community service as a restorative measure under *Section 2.2.5* in the summary chapter by *Dünkel/Grzywa-Holten/Horsfield/Păroşanu* in this volume.



# 18. Latvia<sup>167</sup>

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*Ilona Kronberga, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Latvia, various restorative justice schemes have been implemented in the past or are currently under development.<sup>168</sup> The following should be highlighted in this regard: victim-offender mediation, restorative conferences, restorative projects such as victim support circles as well as circles of accountability and support, and, to a certain extent, community service.

In elaborating the legal framework of restorative justice schemes such as mediation, international standards were of major importance, such as Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters<sup>169</sup> and Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)<sup>170</sup>.

Since 2005, victim-offender mediation (“settlement with intermediary”) has been available in Latvia, organised by the State Probation Service. The legal framework for victim-offender mediation is provided by the Criminal Procedure Law (Section 381) and the State Probation Service Law. Furthermore, the Mediation Law regulates mediation in civil and commercial matters.

Victim-offender mediation can be conducted at the pre-trial stage, during all stages of criminal proceedings, after trial, after the coming-into-effect of the injunction of a public prosecutor regarding a punishment, or after the coming-into-effect of a decision to conditionally terminate criminal proceedings.

Thus, mediation can also be carried out at the prison-level with the support of a mediator from the State Probation Service. In this context, mediation might be a factor to be considered in decisions concerning early conditional release from prison. Furthermore, mediation can be used as a diversionary measure

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167 This snapshot is based on a report by *Ilona Kronberga*, see *Kronberga* 2015; and was compiled by *Andrea Păroșanu*.

168 For a more detailed account of juvenile justice reform in Latvia in general, but also of the legislative basis and practice, see *Judins* 2011.

169 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). Available at: <https://wcd.coe.int/ViewDoc.jsp?id=420059>.

170 Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0001:0004:en:PDF>.

for young offenders or as an alternative to punishment. According to the Law on Compulsory Measures of a Correctional Nature, where mediation has been successful, the court may apply a compulsory measure of a correctional nature and terminate criminal proceedings.

Where mediation is successful, the criminal proceedings may be waived or the sentence can be mitigated. What the precise legal consequences of a successful mediation process are depends on the offence that has been committed. If the offence is a misdemeanour for which a liberty depriving measure of up to three months is possible, or a less serious crime for which the law provides imprisonment for up to three years if committed intentionally, and the offender has reconciled with the victim, the proceedings can be waived. In cases of other offences, the sentence can be mitigated.

Turning now to other manifestations of restorative justice, restorative conferences emerged on an experimental level in 2010, targeting young offenders in particular. Conferences are based on similar legal provisions as victim-offender mediation, as they, too, are implemented as a form of “settlement with an intermediary”. The legal consequences of successful restorative conferencing procedures are the same as those for mediation described above.

Recently, restorative initiatives such as circles of accountability and support as well as victim support circles have been implemented on a pilot basis in Latvia. They currently lack a legal framework and are essentially experimental localised projects. Circles of accountability and support are held with the aim of fostering the social reintegration of sex offenders after their release from prison. Victim support circles were developed in order to respond to the needs of victims and their families.

Regarding compensation, the State-provided victim support system includes compensation for victims of crime in specific cases as well as legal assistance for certain groups of victims. The legal framework is provided by the Criminal Procedure Law, the Law on State Compensation to Victims as well as the State Ensured Legal Aid Law. However, State funded compensation represents only one element within the victim support system, which could in fact be further extended in order to provide support to victims more efficiently.

Moving on, offenders can be ordered to perform community service (only young offenders) or compulsory work (adult and young offenders). Compulsory work, regulated by the Criminal Law, is formally classified as a criminal punishment. Adults and juveniles aged 14 and older can be ordered to perform between 40 and 280 hours of work. Community service, provided by the Law on Compulsory Measures of a Correctional Nature, is a possible intervention for young offenders aged between 11 and 17 years. When ordered to perform community service, young offenders work for between 10 and 40 hours. Community Service does not result in a criminal record. Both interventions are to be carried out for public services in the local community. In case of young offenders, the work has to be useful for and beneficial to their further development. Working directly for the victim is not an option for either of these measures. However, both can in fact constitute part of agreements stemming from a mediation process.

## 2. Organisational framework for delivering restorative justice measures

The State Probation Service is responsible for organising victim-offender mediation, restorative conferencing as well as community service. Mediation is conducted by specially trained mediators (intermediaries) at the State Probation Service. At present, 93 mediators work for the State Probation Service, including 20 volunteers.

Regarding the work and certification of (volunteer) probation officers as mediators, the Rules of the Cabinet of Ministers No. 825 on the “procedure of how the State Probation Service organizes and leads settlement with intermediary” (2007) and the Rules of the Cabinet of Ministers No. 782 on the “procedure of certification of volunteer probation officers who are intermediary in settlements” (2007) are of significance.

Cases can be referred to the State Probation Service for mediation by the police, prosecutors, offenders and courts. Where the offender in a case is a juvenile, the police, the prosecutor or the court have the duty to inform the State Probation Service about the case, which in turn proposes mediation to the young offender. The young offender’s parents and other supporters also participate in the mediation process.

Concerning restorative conferences, they can be initiated by the police, prosecutors, offenders or victims and are conducted by State Probation Service staff. Beside the parties of the conflict, family and friends as well as relevant professionals are invited to participate in order to provide support to both victim and offender.

Since 2013, circles of accountability and support have been carried out by the State Probation Service within the framework of the *EU Specific Programme Daphne III 2011-2012 Circles for Europe (CIRCLES4EU)*. Circles of support and accountability, which are community-based, aim at the social re-integration of high-risk sex offenders. The circles are composed of an internal circle and an external circle. The offender, as well as volunteers who support and monitor the offender, form the internal circle. The external circle includes professionals who assist and supervise the volunteers and circle-coordinators.

Victim support circles have been implemented in Latvia on a pilot basis since 2011, organised by three NGOs in the country. They address the needs of women victims as well as parents of children and young persons who have been victimized and are in need of support.

### 3. The use of restorative justice in practice

Regarding the use of victim-offender mediation, which has been practised by the State Probation Service since 2005, case numbers were on the rise from 2005 to 2008. In 2009 and 2010, the figures went into decline due to the financial crisis and its consequences, but from 2011 until 2013 the number of mediation cases was on the rise again. In 2012, there were a total of 706 cases, including 108 juvenile cases. By 2013, the number had risen to 1,090 cases, of which 273 cases involved juvenile offenders.<sup>171</sup> The total number of mediation cases accounted for 1.6% of all criminal cases formally initiated in 2012, and 2.4% in 2013.<sup>172</sup>

Most of the offences committed are property related offences; only few of the offences in question are linked to physical injury or more serious crime. In 2013, 70% of the offences committed by juveniles (similar to adult offenders) were misdemeanours or less serious offences. As a consequence, in those cases the criminal proceedings were usually terminated when mediation was successful (rather than “merely” mitigating sentence).

Agreements reached in the mediation process usually contain specific conditions. In 2013, slightly more than half of all agreements in mediation cases (56%) required the making of financial compensation. 14% envisaged that the offender make an apology to the victim. Other conditions included seeking assistance from a psychologist or addiction specialists, etc. (22%).<sup>173</sup>

Community service plays a rather substantial role in criminal justice decision making. 28% of all offenders are sentenced or subjected to community service.<sup>174</sup> Community service is most commonly ordered for property related offences such as theft, robbery and fraud (32%) and driving under the influence of intoxicating substances (23%).

The number of restorative conferences involving young offenders has recently been on the increase, from 12 conferences in 2012 to 22 carried out in 2013.<sup>175</sup> Regarding circles of support and accountability for sex-offenders released from prison, until April 2014 two circles had been initiated in Riga and Valmiera.<sup>176</sup> The core members (offenders) were 22 and 21 years of age. The circles were set to run for 12 months, and a third circle was in planning at the time of writing.

171 Annual Report of State Probation Service of Latvia. Available at: <http://www.probacija.lv/page.php?id=57>, Annual Report of the State Probation Service of Latvia, Department of Mediation (2013) – unpublished material.

172 Annual Report from the State Police. Available at: <http://www.vp.gov.lv/?id=189&said=189>, Judicial Information System. Available at: [http://tis.ta.gov.lv/tisreal?FORM=TIS\\_STaT\\_O](http://tis.ta.gov.lv/tisreal?FORM=TIS_STaT_O).

173 Annual report of the State Probation Service of Latvia, Department of Mediation (2013) – unpublished material.

174 Data from the Judicial Information System 2005 -2012.

175 Annual Report of the State Probation Service of Latvia, Department of Mediation (2013) – unpublished material.

176 Implementation of Circles in Latvia. Available at: [http://www.circles4.eu/uploaded\\_files/Pres\\_2S&A\\_%20seminar\\_Presentation\\_Darzniece.pdf](http://www.circles4.eu/uploaded_files/Pres_2S&A_%20seminar_Presentation_Darzniece.pdf).

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

Each year, the State Probation Service carries out a survey of victims and offenders on their experiences with victim-offender mediation. The survey for the year 2013,<sup>177</sup> which included 484 victims and offenders, revealed positive attitudes towards the mediation process. The majority of respondents (78%) found it useful to meet the other party. 92% stated that the mediator explained the consequences of victim-offender mediation as well as the rights of the parties in an understandable way. Regarding the aspects of mediation that the parties deemed most important, respondents declared that first and foremost, it was important that the mediator is well-trained and acts professionally. Further responses included that mediation would resolve the conflict more quickly, and that the environment in which mediation was conducted was safe and comfortable. Respondents found the following aspects to be positive: peaceful conversations, receiving the explanations from the other party, the professionalism and responsiveness of the mediator, finding a quick solution, a feeling of safety, etc. Aspects that mediation participants regarded as negative included that the process involves too much paperwork, the amount of time spent in mediation meetings and for getting to the actual meeting, etc. Finally, the majority of respondents (77%) stated they would recommend mediation to other persons.

In general, interventions such as victim-offender mediation as well as community service are well implemented in law and practice. State compensation to victims is another aspect that is legally secured, but could be extended. Furthermore, the legislator has assumed a favorable stance towards restorative conferences and supports their implementation. Other interventions with a restorative character, such as circles of support and accountability and victim support circles, are based on the work of NGOs and also funded by them. Overall, though, better training of professionals in the field, awareness raising among society in general, and amending laws in order to further promote restorative justice interventions are all needed.

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- Kronberga, I. (2015): Latvia. In: Dünkel, F., Grzywa-Holten, J., Horsfield, P. (Eds.): *Restorative Justice and Mediation in Penal Matters – A stocktaking of legal issues, implementation strategies and outcomes in 36 European countries*. Mönchengladbach: Forum Verlag Godesberg, p. 449-476.

177 Annual Report of the State Probation Service of Latvia, Department of Mediation (2013) – unpublished material.



# 19. Lithuania<sup>178</sup>

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*Skirmantas Bikelis, Gintautas Sakalauskas,  
Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Lithuania, no fully restorative justice interventions have been implemented as of yet. Several of the Government policy programmes that have been elaborated since 2003 have referred to the objective of introducing restorative justice measures in the country, but mention of the notion of restorative justice has to date remained only theoretical.

In the field of juvenile justice and crime prevention and control, different Government plans have underlined the scope of implementing measures, including restorative justice interventions, but no steps have been taken to realize these goals in law or practice. The objectives were not followed up on due to a lack of support among key stakeholders in policy and law enforcement. Furthermore, there is a lack of (well-funded) NGOs that could promote the idea of restorative justice among society, policy makers and justice stakeholders. The work of just a small handful of NGOs is linked to the criminal justice system, mainly in the form of providing assistance to prisoners and released prisoners.

However, some criminal law provisions in Lithuania reflect restorative thinking to a certain degree, for instance victim-offender reconciliation, compensation of damages to victims, and community service. Several regulations in the Criminal Code make reference to damage compensation, for example in the context of release from criminal liability on bail, release of juveniles from criminal liability, release from criminal liability due to reconciliation with the victim or as a mitigating circumstance when compensation is made voluntarily. “Restriction of liberty”, which implies that persons are obliged to fulfil to certain obligations, can be combined with mandatory damage compensation. Furthermore, the court may order an offender to make pay a contribution to the fund for crime victims.

Moreover, the Law on Probation, which came into effect in 2012, explicitly underlines restorative justice as a key principle in the implementation of probation services. The law points out the significance of linking restorative justice to the process of rehabilitation while on probation, with the aim of achieving

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178 The snapshot is based on a report by *Skirmantas Bikelis* and *Gintautas Sakalauskas*, see *Bikelis/Sakalauskas 2015*, and was compiled by *Andrea Păroșanu*. Throughout see also *Sakalauskas 2011* on Lithuanian juvenile justice in terms of the reform history, the legislative basis, procedure and practice.

reconciliation between offender and victim and the delivery of damage compensation to the victim. However, there is yet a need to implement these provisions in practice.

Victim-offender reconciliation in Lithuania serves a similar purpose to victim-offender mediation, in that it aims at reconciling the parties of a conflict and coming to a mutual agreement. However, there are substantial differences between these two approaches: victim-offender reconciliation does not include a neutral third party that facilitates the conflict resolution process. Further, the offender, upon achieving reconciliation, can only be released from criminal liability if he/she does not reoffend within one year. The beneficial effects of successfully participating in victim-offender reconciliation are thus conditional.

Reconciliation is possible in case the offender has committed a misdemeanour, a petty crime or a less serious crime. The legal consequence is that the offender is released from criminal liability. It is necessary that the offender has confessed to the offence, voluntarily compensated for or alleviated the damage caused, or has agreed to do so and reconciles with the victim.

Furthermore, there must be a prediction that the offender will not commit a new offence. Repeat offenders as well as persons who have already been released from criminal liability due to reconciliation within the last four years are excluded from this provision and are thus not eligible for reconciliation. Where an offender commits a misdemeanour or a negligent crime within one year, release from criminal liability *can* be revoked. The court's decision *shall* be revoked if an intentional crime is committed within that time period.

Victim-offender reconciliation is possible during the pre-trial investigation, at the preliminary hearing and during trial. At the level of pre-trial investigation, the pre-trial judge confirms the prosecutor's decision and orders release from criminal liability. Reconciliation is also possible in cases of private prosecution (complainant's crimes) and, when successful, formally results in the withdrawal of the charge by the complainant.

Juveniles can also be released from criminal liability if they have offered an apology to the victim and compensated or eliminated, fully or partly, the damage caused by the offence, or are willing to do so. Compensation or alleviation of damage can also be ordered against juveniles as a "reformatory sanction". Where a juvenile has voluntarily compensated the victim for the suffered damages or alleviated the harmful consequences of his/her offence, sentence can be mitigated by the court.

Community service can only be ordered if the offender agrees to the measure. It does not involve that the offender performs work for the direct victim. Rather, it usually entails the cleaning of public green spaces, for instance. Community service generally does involve a restorative process, i. e. community service as it is currently codified cannot form part of a reconciliation agreement.

## 2. Organisational framework for delivering restorative justice measures

Regarding victim-offender reconciliation, little is known about the process. Victims, offenders, police officers or other investigators, prosecutors or judges can initiate reconciliation or request that it be initiated. There is no neutral third party – a mediator – who facilitates communication and fosters reflection on the offence and its consequences. Past attempts to introduce mediator-related aspects into the new Criminal Code have not been successful. However, within a new project aiming at fostering mediation in Lithuania, see under *Section 4*, a training programme for mediators is being developed.

In terms of reconciliation in private prosecution cases, the judge invites the parties to state their perspectives regarding the offence and to assess whether they would like to reconcile. Where reconciliation is achieved, the victim withdraws the complaint and the case is closed.

## 3. The use of restorative justice in practice

Statistical data in the field of criminal justice (e. g. on pre-trial proceedings, material damage caused by offences) are provided by the Department of Information Technology and Communications, which is subjected to the Ministry of the Interior.<sup>179</sup> Regarding penalties imposed by the courts, the National Court's Administration offers relevant data.<sup>180</sup>

Regarding all adult and juvenile offenders, for the year 2013, out of 46,332 investigations completed by prosecutors, 6,977 (15.1%) cases were terminated on the basis of victim-offender reconciliation.

Community service does not play a very important role in practice. In 2012, community service accounted for 7.8% of all penalties imposed by the courts. However, the share more than doubled compared to 2011, where community service represented only 3.4% of all sentences.

Regarding the “compensation or alleviation of damages”, “unpaid work” and “paying a contribution to the victim's fund”, in 2012 they represented only 5.7% of all imposed penalties.

In 2013, according to estimations by the pre-trial investigation institutions, 13.5% of the material damage caused by property-related offences was repaid/compensated voluntarily.

179 Department of Information Technology and Communications within the Ministry of the Interior. <https://www.ird.lt>.

180 Data of National Courts' Administration, <http://www.teismai.lt>.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

Research on international recommendations on restorative justice, experiences with the implementation of restorative justice in other countries, and the conditions necessary for introducing a restorative justice system in Lithuania, was conducted by the Law Institute of Lithuania in 2006.

In 2008, the Law Institute elaborated a draft concept of restorative justice and a draft Government plan 2009-2011 for the implementation of restorative justice measures, taking into account prior Government programmes relating to restorative justice. The plan envisaged: an experimental mediation project for young offenders in one district in Lithuania; that this project be extended to adult offenders and to other regions of the country, and; the enactment of a Law on Mediation in Criminal Matters and relevant amendments to the Criminal Code and Code of Criminal Procedure. Since delivery of the draft concept and the draft plan to the Ministry of Interior, no further steps had been taken at the time of writing.

Only the project on mediation in juvenile justice was included in a measure plan of the Government’s juvenile justice programme of 2009. Based on the programme, a project to familiarize police with restorative justice was implemented and police received training in order to use restorative justice methods when working with juveniles. Recently, the Ministry of Justice once again suggested the elaboration a new concept by working groups in order to promote the idea of restorative justice within the criminal justice system in 2014. However, the concept seems to be very restrictive and vague in terms of the practical issues of introducing mediation to the context of penal matters.

At the end of 2014, a promising project aiming at the further development of victim-offender mediation in Lithuania was launched by the Probation Service under the Prisons Department. The Norwegian Grants project “Implementation of Mediation in Probation Services”, which is designated for two years, aims at establishing a long-term system of mediation services in Lithuanian prisons. The key objectives of the project are to develop a methodology for implementing mediation in such a setting, preparing a mediators’ training programme and training 80 mediators in all main regions of Lithuania. Until the end of 2016, within this programme mediation services shall be provided for 1,500 persons.

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# 20. Luxembourg<sup>181</sup>

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*Ulla Peters, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Luxembourg, the possibility of victim-offender mediation for adults at pre-trial level is regulated by Art. 24(5) Code of Criminal Procedure since 1999. Regarding juveniles, there is no explicit statutory basis for victim-offender mediation. Mediation with young offenders is, however, possible under the Law on Youth Protection of 1992.<sup>182</sup>

As there is no specific juvenile justice act, the Law on Youth Protection includes provisions for juveniles up to 18 years who have committed an offence or who have antisocial behaviour, as well as for children and juveniles in need of care. The law does not provide for penalties or sanctions, just for safeguarding, educational and protection measures, and thus places priority on the principle of education instead of punishment.

Young offenders aged 16 years and older who have committed a crime (assaults and homicide) can receive a penalty provided by adult criminal law, or be placed in secure residential care (which is also possible for juveniles below 16 years) until reaching the age of 21 or 25.<sup>183</sup> The Youth Tribunals are the competent courts for dealing with young offenders as well as children and juveniles in need of protection. There are no specific criminal proceedings for juveniles falling within the scope of the Youth Protection Law.

In 1997, victim-offender mediation was first carried out at an experimental level in a pilot project with juveniles, in which the Centre for Mediation (*Centre de Médiation*) was established. Promising results led

181 This snapshot was compiled by *Andrea Păroșanu* and is widely based on a report by *Ulla Peters* prepared for the project “Alternatives to Custody for Young Offenders – Developing Intensive and Remand Fostering Programmes”, coordinated by the IJJO in the EU-member states (2015). This snapshot also includes information from responses to a questionnaire answered by *Ulla Peters*. Repeated reference is also made to *Schroeder 2004* and *Schroeder 2005*.

182 See *Schroeder 2004*, p. 83.

183 See *Peters 2015*, p. 1. For a comprehensive overview on juvenile justice and the legislative basis see *Goniva 2010*, cited in *Peters 2015*, p. 1.

to the introduction of victim-offender mediation involving adults in the Code of Criminal Procedure in 1999.<sup>184</sup>

Victim-offender mediation (*mediation réparatrice*) may be proposed by the Magistrates of the Youth Protection Department of the Prosecutor's Office. It plays a role in particular for first-time offenders.<sup>185</sup> However, in practice mediation with juveniles is rarely used. Regarding adults, victim-offender mediation may be applied in theory for any type of offence, and depends on the discretion of the prosecutors. After successful mediation, the case may be dismissed by the prosecutor.<sup>186</sup>

## 2. Organisational framework for delivering restorative justice measures

In Luxembourg, mediation with juveniles is delivered by the Centre for Mediation. No legal provisions regarding procedure and organizational structures of mediation with juveniles are in effect. Mediation is free of charge for the participants and the mediators are paid their fees by the Ministry of Justice.<sup>187</sup> In case of adults, regulations concerning the mediation procedure and the accreditation of mediators have been in effect since 1999. Mediators are appointed by the Ministry of Justice and need to be individuals who fulfil the conditions of competence, training, independence and impartiality.<sup>188</sup>

## 3. The use of restorative justice in practice

Mediation has been carried out for juveniles since the establishment of the Centre for Mediation at the end of the 1990s, however to a very limited quantitative extent. There seems to be a tendency that mediation cases have been decreasing in the last three years.<sup>189</sup> Statistical data provided by the Centre for Mediation do not differentiate between cases of juvenile justice and cases of divorce. However, data regarding the referral of cases by the Youth Tribunal are provided by the Center for Mediation. In 2012, a share of only 4.7% of all the cases dealt with in mediation at the Center for Mediation was referred by the Youth Tribunal.<sup>190</sup>

184 See *Schroeder* 2004, p. 85.

185 See *Peters* 2015, p. 6.

186 See *Schroeder* 2004, p. 83.

187 See *Peters* 2015, p. 12.

188 See *Schroeder* 2004, p. 83 f.

189 Information provided by *Ulla Peters* by responding to a questionnaire, referring to information given by the Center for Mediation.

190 See *Peters* 2015, p. 6.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Luxembourg, the subject of restorative justice is not highly debated by the wider public, among professionals or academics. The longlasting youth welfare system is widely accepted and therefore discussions to promote restorative justice interventions are scarce.<sup>191</sup>

Although the practice of mediation is rather limited, outcomes of mediation indicate positive results. It was found that a few years after implementing victim-offender mediation with juveniles, the rate of successful outcomes was about 70%.<sup>192</sup>

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191 Information provided by *Ulla Peters* by responding to a questionnaire.

192 See *Schroeder* 2005.



# 21. Malta<sup>193</sup>

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*Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Malta, restorative justice recently gained additional importance when the Restorative Justice Act (Cap. 516 of the Laws of Malta) came into effect in 2012. This act introduced victim-offender mediation (Art. 29-43) as well as new provisions on parole and victim support. The Restorative Justice Act was based on a White Paper on Restorative Justice, published in 2009 by the then Ministry of Justice and Home Affairs.

The Restorative Justice Act applies to all offenders tried in criminal courts of Malta, including the Juvenile Court. Restorative justice interventions are part of the criminal justice system and can be applied at any stage of the criminal proceedings. Either the judge, the prosecutor, the defence lawyer or the probation officer can request at any time during the proceedings that the court refer a case to the Victim Offender Mediation Committee in order to assess the eligibility and suitability of the case for referral to victim-offender mediation.

If an offender is on probation or serving a suspended sentence of imprisonment, the probation officer or the supervising officer can request the court to refer the case to the Victim Offender Mediation Committee for determining eligibility and suitability for mediation. The Probation Act provides for alternatives to imprisonment, such as the Probation Order or Community Service Order. Furthermore, even at the post-sentencing stage, when the offender is serving a prison sentence, referrals to mediation by the Remission Board, the Offender Assessment Board and/or the Parole Board are possible.

Successful victim-offender mediation does not result in the possibility to divert the case and terminate criminal proceedings. Instead, it is considered as a mitigating factor in sentencing or grounds for imposing alternatives to detention on the offender. In principle, all kinds of offences can be referred to mediation, as the law does not explicitly make any exclusions or restrictions in terms of offence eligibility.

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<sup>193</sup> The snapshot was compiled by *Andrea Păroșanu* and is based on information kindly provided by *Joyce Damato*, as well as on *Damato 2013*. However, the conclusions drawn in relation to the relevant legislation and system reflect the views of *Andrea Păroșanu* alone.

## 2. Organisational framework for delivering restorative justice measures

The Restorative Justice Act provides for the establishment of a Victim Offender Mediation Committee, which is responsible for assessing the eligibility and suitability of victims, offenders and cases for mediation. In determining the eligibility and suitability of a case for mediation, the nature of the offence is taken into consideration. The Committee elaborates criteria for the appointment of mediators, keeps a register of mediators and is responsible for supervising the work of mediators.

Only the court has competence to refer a case to mediation, but prosecutors, lawyers, probation or other responsible officers can submit a proposal to the court for mediation to be initiated. According to the law, mediation proceedings shall involve the direct parties to the offence, in person, and without any legal representation. The proceedings are the same for juvenile and adults – there are no specific provisions with respect to young offenders. The law is clear in that both the victim's and the offender's participation must be voluntary. Agreements reached through successful mediation may include elements like damage compensation, apologies and/or performing community service.

The Parole and Probation Department is responsible for coordinating victim-offender mediation, which is delivered by victim support services. Mediators need to be academically qualified in mediation and should be part-time professionals. Participating in victim-offender mediation is free of charge for the parties.

However, the legal framework can be characterized as partially restrictive, as it does not allow for successful mediation to have any direct diversionary effects on the criminal procedure. Furthermore, the legal provisions contradict themselves to a certain degree. According to article 453 of the Criminal Code, offenders need to have formally admitted their guilt in accordance with Criminal Code regulations. This implies that suspects who have been indicted by the prosecution service because there was sufficient evidence to press charges according to the respective legal provisions could be excluded. However, the same Code states that referrals can be made at every stage of criminal proceedings, which would include offenders who are indicted.

## 3. The use of restorative justice in practice

As the Restorative Justice Act only recently came into effect in 2012, as of yet there have been no practical experiences with juveniles participating in victim-offender mediation. No data are yet available, and no evaluations or the like have been conducted that could give some insight into the quantitative use of restorative justice measures in practice. Also regarding victim-offender mediation with adults, no trends can be identified at this time, as the law has not been in force for very long.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

Restorative justice measures like victim-offender mediation have not been evaluated in Malta so far, as they have only been available for a short time. There are indeed challenges with regard to the further development of victim-offender mediation in terms of the legislative framework and its implementation in practice. The Ministry of Justice has started a project to reform the juvenile justice system in Malta. Special emphasis within this reform process shall also be placed on restorative justice. It is envisaged that restorative justice for young offenders can be a topic for discussion and an area of further development in order to promote an expansion of restorative practices, including mediation.

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# 22. The Netherlands<sup>194</sup>

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*Diane van Drie, Sanneke van Groningen,  
Ido Weijers, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In the Netherlands, various forms of restorative interventions for young offenders can be found. Most importantly, victim-offender mediation and restorative conferencing have to be mentioned, as well as community reparation orders including restorative elements. Besides, a variety of local restorative initiatives emerged ‘bottom-up’ and are available throughout the country, at different places including in schools, in neighbourhoods, in youth detention centres and in prisons. The majority of restorative measures in the Netherlands are applied independently of the criminal justice system, standing next to it. The emergence of restorative interventions has been influenced by the victim support movement as well as the tradition of critical research and reflection on restorative ideas and practices, inspired also by the notion of Abolitionism in the 1970s (*Bianchi and Hulsman*).

In the early 1980s, the initiative HALT (meaning ‘The Alternative’), targeting juvenile offenders aged 12 to 18 years, was established at the police level.<sup>195</sup> The emergence of this project was particularly influenced by the development of diversionary approaches for young offenders. The project soon expanded nationwide, receiving wide support from the municipalities. The project was legally implemented in 1995. As a diversionary measure, police can refer juveniles who have committed minor property-related offences (e. g. vandalism, shoplifting) on a voluntary basis to HALT. Interventions within the project include delivering reparation, apologising to the victim or performing community service, and serve as grounds for non-prosecution.

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194 The snapshot is mainly based on a report by *Diane van Drie, Sanneke van Groningen and Ido Weijers*, see *van Drie/ van Groningen/Weijers* 2015 and was compiled by *Andrea Păroșanu*.

195 See *van Kalmthout/Bahtiyar* 2011, p. 919 f. The aforementioned report also provides a detailed account of juvenile justice in the Netherlands in terms of reform history, legislative basis and practice. See also *Sagel-Grande* 2013, p. 176 ff. for a comprehensive overview over the current legal situation concerning restorative justice as well as practice in the Netherlands.

Since the mid-1990s, restorative conferences were initiated on a pilot basis with the objective to be applied at nationwide level. These conferences, called 'Real Justice'-conferences (also known as Own Strength – 'Eigen Kracht' conferences) can be carried out with both young and adult offenders and focus on less serious offences. The conference outcome (a plan for the future) usually has no consequence on the further criminal proceedings. The meetings involve victim and offender as well as their social networks. Recently, a legal amendment was made that envisaged that the parents or legal guardians have to develop a plan to provide for support and care of the juveniles. If such a plan was not developed, the relevant organisation (Eigen Kracht) can ask the legal representatives to do so. It is hence to be expected that this legal amendment will lead to the wider use of conferences.

At the prison level, restorative justice interventions including conferences have been put into place in localised pilot projects in juvenile detention centres since the early 2000s. Since the nationwide availability of victim-offender mediation, *see below*, (young) offenders have the rights to ask for participation in this restorative justice measure. Further restorative prison projects have offered restorative services, including encounters with victims, to convicted persons.

Since 2007, victim-offender mediation has been available nationwide and provided by the organisation 'Slachtoffer in Beeld' (SiB). The focus is on young offenders, but adult perpetrators have also been allowed to participate since 2009. Prior to the nationwide implementation, victim-offender mediation had already been offered by various projects since 1990. Mediation is legally provided by Art. 51h Code of Criminal Procedure, which was introduced in 2012 and states that the police has to inform victim and suspect as early as possible about the possibility of mediation. If mediation results in an agreement between victim and suspect, the judge has to take this into consideration when imposing a measure and/or penalty. The Department of Public prosecution has to encourage mediation between victim and sentenced offender.

In 2010, the Youth Court of Amsterdam started a pilot project called 'Mediation next to the penal law', influenced by the 2001 Council Framework Decision on the standing of victims on criminal proceedings.<sup>196</sup> Within the project, mediation was part of criminal proceedings, while the central aim was to reach agreements primarily on how damages can be compensated. Juveniles constitute the main target group of this pilot project, although adult offenders are also allowed to participate. The public prosecutor or judge have to take successful mediation into account in their decision-making, however it is at their discretion whether to dismiss the case. The experimental phase of the Amsterdam pilot project has been extended, and since 2013 further law courts have initiated such pilot projects.

<sup>196</sup> See *Sagel-Grande* 2013a.

## 2. Organisational framework for delivering restorative justice measures

Regarding victim-offender mediation, the organisation *Victim in Sight*, 'Slachtoffer in Beeld' (SiB), provides nationwide mediation services based on unitary standards. Probation officers, staff of the national organisation for victim support (*Slachtofferhulp Nederland*), staff of the Board for Youth Protection, lawyers, police, prosecutors and judges are informed about this service and may suggest mediation to their clients. Usually, mediation is carried out in one encounter between victim and offender.

Mediators work as full-time professionals and are well experienced. They receive training from the organisation SiB, which includes eight modules in one day. In addition, newly trained mediators are accompanied or mentored for six months by experienced mediators and can exchange their experiences in further meetings and/or attend further training. Currently, about 40 mediators are working in the whole country. SiB receives funding from the Ministry of Justice and Safety.

Real Justice (*Eigen Kracht*) conferences are organised by independent coordinators, who undergo a six day training programme. Besides the parties of the conflict, family members, friends, neighbours, social workers and other professionals can participate. Shuttle mediation, where the coordinator delivers messages between victim and offender, is possible. After explaining the situation to the coordinator, he/she leaves the conference and the circle of participants independently develops a plan for the future, which later on is presented to the coordinator. Participants shall be encouraged with this method to find own solutions to the problem. The costs for conferences are mainly funded by provincial or municipal resources.

## 3. The use of restorative justice in practice

In general, only few reliable statistical data on the use of restorative justice interventions are available, as data are not centrally collected and there are numerous service providers. There exist, however, estimations on the implementation of restorative measures. According to data presented by *van Hoek* and *Slump*<sup>197</sup>, the number of restorative practices increased from 2001 to 2010. Regarding mediation and conferences outside the domain of criminal law, in the period from 2006-2010, in the field of youth care about 2,100 *Eigen Kracht* conferences were conducted, about 100 in schools and about 250 in neighbourhood settings. (Peer) mediations at school were conducted in 5,000 cases, neighbourhood mediation for juveniles in 60 cases and neighbourhood mediation in general in about 10,000 cases.

In terms of restorative justice interventions with a connection to criminal proceedings, since the nationwide establishment of victim-offender mediation, case numbers rose up until 2010. A total number of 3,500 victim-offender mediations were conducted by 'Slachtoffer in Beeld' (SiB) from 2007-

197 *van Hoek/Slump* 2011, cited in *van Drie/van Groningen/Weijers* 2015, p. 570 f.

2010. In 2007, 400 mediation cases were carried out, in 2008 the cases number more than doubled (900), further rising to 1,150 in 2010.

Regarding Real Justice (Eigen Kracht) conferences, *van Hoek and Slump* estimate that in the period from 2006-2010, 50-60 conferences were conducted annually on average. According to own data of Eigen Kracht, since 2001, about 700 restorative conferences have been carried out nationwide.<sup>198</sup>

The number of HALT-settlements has been decreasing in recent years, as juveniles seem to have committed fewer offences.<sup>199</sup> Estimations by *van Hoek and Slump* show that the absolute number of HALT-settlements decreased from 24,025 in 2007 to 17,315 in 2010.<sup>200</sup>

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

The vast majority of restorative justice projects in The Netherlands have been evaluated.

A recent study analysing the experiences of victims and offenders with victim-offender mediation revealed positive effects on the parties.<sup>201</sup> 88% of victims and 81% of offenders stated that mediation was valuable for them and they felt satisfied with their participation in it. A greater share of offenders than of victims found that the mediation meeting helped them to cope with the offence. The vast majority of victims (86%) and offender (85%) found the mediation procedure very positive. Furthermore, victims reported that mediation supported them to experience less fear and anger towards the offender after the mediation meeting. Offenders tended to be more open and empathetic towards the consequences for the victim.

Regarding the Amsterdam pilot project, an analysis showed that the project is effective. In 66% of the cases (17 out of 26), mediation resulted in an agreement between victim and offender. In most cases, the offenders apologized to the victim. Prosecutors and judges have taken into account the results of mediation and stated that mediation influenced their decision-making. About 70% of the cases were terminated before trial.<sup>202</sup>

In 2006, a study focusing on the impact of HALT-settlements with juveniles found that the project had no effect on recidivism. Six months after the settlements the research did not find a significant difference

198 Website *Eigen Kracht Centrale* 2011, [www.eigen-kracht.nl](http://www.eigen-kracht.nl).

199 See <http://www.halt.nl>.

200 *van Hoek/Slump* 2011, cited in *van Drie/van Groningen/Weijers* 2015, p. 571 f.

201 See *Zebel* 2012, cited in *van Drie/van Groningen/Weijers* 2015, p. 572 f.

202 See *Verberk* 2011, cited in *Sagel-Grande* 2013a, p. 284 ff.

in self-reported offences between the juveniles involved in HALT-interventions and a control group.<sup>203</sup> These research results differed from first research on the prevention of recidivism that had revealed rather positive results.<sup>204</sup>

Overall, the number of restorative justice interventions such as victim-offender mediation and restorative conferences is steadily increasing, and it can be expected that the use of these practices, in particular mediation, will be expanded in the future, based on favourable organizational structures and well prepared staff.

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203 See *Ferwerda/van Leiden/Arts/Hauber* 2006, cited *van Drie/van Groningen/Weijers* 2015, p. 574, as well as in *Sagel-Grande* 2013, p. 178.

204 See *Kruissink/Verwers* 1993, cited in *Sagel-Grande* 2013, p. 178.



# 23. Northern Ireland<sup>205</sup>

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*David O'Mahony, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The modern roots of restorative justice in Northern Ireland go back to the early-2000s, when the first conferencing initiatives with juveniles started. Juvenile justice legislation in Northern Ireland covers 10 to 17 year-old juveniles,<sup>206</sup> with roots dating back to a more welfare-oriented law of 1908. It was only in 1995 that interventions for children in need of care were fully legally separated from sanctions for juvenile offenders. In 2002, the Justice (Northern Ireland) Act mainstreamed restorative justice by introducing a statutory restorative conferencing scheme for juveniles. *O'Mahony* emphasizes that Northern Ireland is the only part of the UK where statutory legislation on restorative justice and in particular conferencing has been passed.<sup>207</sup>

In 2003, the Youth Conference Rules (Northern Ireland) followed, which established the procedural rules to be followed when convening and facilitating a restorative youth conference. The Youth Conferencing Service was introduced in December 2003 in the form of a pilot scheme for 10 to 16 year-old offenders, and was expanded to a province wide service in 2005 that also covers 17-year-old offenders.

The conferencing system is embedded into juvenile justice as a pre-sentence diversionary scheme as well as a court based intervention. In Northern Ireland, the police also have wide discretion for making diversionary decisions. Petty offences by first-time offenders are mostly responded to with an “informed warning” issued at the police station (parents or guardians being present). More serious crimes can be dealt with by a restorative caution, which may include meeting the victim or other persons affected by the crime and reparative efforts by the offender. The parties can also agree that the offender

205 This snapshot is primarily based on a report by *David O'Mahony*, University of Essex/England, see *O'Mahony* 2015 w. f. ref., and was compiled by *Frieder Dünkel*. For general information on the juvenile justice system in Northern Ireland, see *O'Mahony* 2011 w. f. ref.

206 See *O'Mahony* 2011, p. 961.

207 See *O'Mahony* 2011, p. 960 f.; *O'Mahony* 2015, p. 585.

participates in work-efforts in order to make amends to the victim or the community. Where the youth diversion scheme at the police level is deemed inappropriate (or if the offender does not agree to the caution), instead of sending the case directly to court, the prosecutor can refer an offender to the youth conferencing service for a 'diversionary youth conference'. If deemed inappropriate or if the offender does not wish to participate in such course of action, the prosecutor can send the case to court. The court then routinely refers the case to the conferencing scheme. This mainstreaming of restorative youth conferencing is unique in Europe, as it makes exceptions from the statutory obligation to refer a case to a youth conference only for crimes punishable with life imprisonment if committed by an adult and for terrorist acts.

Besides youth conferences, the courts also have other measures at their disposal that could be regarded as restorative to a certain degree, such as Reparation Orders or Community Responsibility Orders (both also introduced in 2002). The latter has a particular focus on the community and victim awareness, though both orders have been criticised and are very rarely applied in practice (see below under *Section 3*).<sup>208</sup>

The movement towards restorative justice in Northern Ireland must be seen against the backdrop of the peace process in Northern Ireland. There was a feeling that a new approach to criminal justice was needed as trust in the traditional criminal justice system had been lost during the conflict. So after the IRA ceasefire in 1994 and the Belfast Agreement of 1998 the door was open for a radical review of the criminal justice system. The restorative youth conferencing model and the police-based restorative interventions in Northern Ireland were strongly influenced by international standards and human rights norms. For example, the Council of Europe Recommendation (99)19 Concerning Mediation in Penal Matters was referred to by the criminal justice review group in Northern Ireland as grounds for integrating restorative measures into the criminal justice system.

Restorative Justice measures are also available for those serving prison sentences, though they are not regulated by statutory law and are addressed by a range of programmes promoting victim awareness. The programmes are organised by charities and voluntary organisations in cooperation with the prison service.

While restorative measures have been widely introduced in juvenile justice, adult criminal law has remained virtually unchanged. The only restorative intervention for adults is the conditional caution that was introduced in 2011. In contrast to traditional police cautions, this measure can be combined with elements of reparation and compensation orders. The conditional caution is provided for less serious crimes, if refraining from prosecution through a criminal court can be justified.<sup>209</sup>

208 See *O'Mahony* 2015, p. 592, 599 ff.

209 See *O'Mahony* 2015, p. 586 f.

## 2. Organisational framework for delivering restorative justice measures

The first and most important “gatekeeper” is the police, as they handle and directly determine the outcome of the large majority of cases. The courts receive only a small minority of the total youth justice caseload from the prosecution service, who themselves likewise can divert cases from court via diversionary youth conferences (see below). Once a case has reached the courts, there is almost no discretion, as all cases are mandatorily referred to the conferencing system (court-ordered conferences) except for rare, very serious cases, or where the offender refuses to become involved in the restorative process.

Restorative cautioning by the police is organised by specially trained and experienced police officers, who engage with young offenders in a restorative meeting that can also involve the victim either directly or indirectly.

The conferencing system is facilitated by the Youth Conferencing Service (YCS), which is funded by the government and is part of the wider criminal justice system.<sup>210</sup> There are two channels through which the YCS receives its cases. On the one hand, referrals can be made by the prosecutor (so-called “diversionary youth conferences”), which are intended to divert the juvenile from formal prosecution. It should be noted that a conference plan can still recommend formal prosecution. On the other hand, the courts are obliged to refer young offenders to the conferencing service bar for a small number of particularly serious offences and terrorist offences. Outcomes achieved through court-ordered conferences (conference plans) 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. The agreement is laid down in a file, but in case of a diversionary conference it is not seen as a conviction.

When accepted by the court, a court-ordered conference plan becomes a “youth conference order”. This order appears 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 that conference plans are proportionate to the offence and the circumstances of the offender and victim.<sup>211</sup>

## 3. The use of restorative justice in practice

Statistics on the use of restorative measures show that a relatively high number of juveniles are referred to the police-based Juvenile Diversion Programme (around referrals 9,000 per year). Of all offence-related referrals made in 2011/12, around 13% were dealt with by means of a restorative caution. The police have been actively promoting the diversion young people away from formal criminal processing

210 See *O’Mahony* 2015, p. 594 f.

211 See *O’Mahony* 2015, p. 598; the conferencing procedure is described in detail on pp. 594-598; see also *Doak/O’Mahony* 2011, p. 1736 ff.

for a number of years (about 80% are diverted) and they have encouraging reconviction data to support their policy: only about 20% of juveniles cautioned in Northern Ireland go on to re-offend within a one to three year follow-up period, whereas about 75% of those convicted in the juvenile courts were reconvicted over a similar period.<sup>212</sup>

Rounding off the level of pre-court diversion, from 2008 to 2011, an average of around 850 cases was resolved via diversionary youth conferences.

At the court sentencing level, Community Responsibility Orders (2012: n = 24) and Reparation Orders (2012: n = 0) are of virtually no significance. By contrast, and as intended by the legislation, court-ordered youth conferences accounted for by far the largest share of cases coming to the courts in 2012 (n=402). Only 50 juveniles were sentenced to custody in a juvenile justice centre in 2012. Custody thus can truly be regarded as a “last resort”, which indicates that at conferencing has been successful in achieving a reduction in the use of custody.<sup>213</sup> In 2013, 1,219 10-17 year-old-offenders were convicted. Of them 566 received a youth conference order (46.4%).<sup>214</sup>

The data indicate that the youth justice system responses to youth offending are strongly characterized by restorative justice measures, conferencing in particular, whereas adults of at least 18 years of age are still widely dealt with by means of traditional sanctions such as fines (“monetary penalty”; 2013: 54.5%), probation (4.5%), community service orders (4.2%) and suspended custodial sentences (15.3% of all sentences against adults and juveniles together).<sup>215</sup>

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Northern-Ireland quite a lot research has been conducted on restorative justice measures and conferencing in particular. However, this is not the case for police diversion schemes on restorative cautioning (for police diversion in general see above under *Section 3*). In that respect, a recent study has demonstrated that the diversion scheme often dealt with very minor offences, regularly by first-time offenders, who under the previous system would have received a simple warning (i. e. a certain degree of net-widening could be observed). Victim participation (very often shoplifting) was rarely achieved in these cases.

Much more research has been done on youth conferencing, and the overall picture that the results paint of the implementation of conferencing and the outcomes achieved is rather positive. Victim participation was achieved in over two thirds of conferences (69%). They were actively engaged in

212 See O’Mahony 2015, p. 599 with further references.

213 Counted according to O’Mahony 2015, p. 602, Table 1.

214 Counted according to *Government, Department of Justice, Analytical Service Group 2014*, p. 13, 15, Tables 3a, 5c.

215 See *Government, Department of Justice, Analytical Service Group 2014*, Table 5a.

the process and were generally very satisfied with the apology of the offender (91% of offenders made an apology to the victim). Both parties were usually satisfied with the process of conferencing and the agreements resulting from the process, and victims expressed that this form of participation was a valuable experience (in contrast to traditional court hearings).<sup>216</sup> Positive effects could also be demonstrated in terms of long-term effects and on re-offending, although the evidence is not always easy to judge, as methodological reservations remain if merely comparing different re-offending rates for different groups of disposals. Nevertheless, the results from a comparison of offenders who received diversionary restorative conferences (29% reoffending) or court-ordered restorative youth conferences (45% reoffending) with recipients of other community sanctions (54% re-offending) and custodial sentences (68% reoffending) can be interpreted as “encouraging”.<sup>217</sup>

Looking at the general development, since its implementation in the years from 2003 onwards, youth conferencing has been increasingly used in juvenile justice with very promising outcomes. With good reason, Northern Ireland can be classed as one of the “good practice” models for implementing restorative justice and changing the traditional juvenile justice system towards a restorative model. A challenge for Northern Ireland (as well as for most European countries) will be how to transform the general penal law and procedure for adults and give priority to restorative elements there, too.

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216 See O’Mahony 2015, p. 605 f.; see also Doak/O’Mahony 2011, p. 1739.

217 See O’Mahony 2015, p. 608.



# 24. Poland<sup>218</sup>

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*Wojciech Zalewski, Andrea Păroşanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Poland, victim-offender mediation is the most prominent form of restorative justice. Other interventions, such as restorative conferences, are still only carried out at an experimental level. Furthermore, compensatory measures with certain restorative elements, such as the duty to redress the damage or to apologize to the victim, are included in the Criminal Code, and aim to strengthen the needs of victims.

Victim-offender mediation was introduced in 1995 as a pilot programme in the field of juvenile justice.<sup>219</sup> The Committee for Introducing Victim-Offender Mediation in Poland, later known as the Polish Centre for Mediation, led the programme in cooperation with further NGOs. Being supported by the Ministry of Justice, mediation initiatives were carried out in several Family Court districts. During the three years trial period of the programme with young offenders, 110 mediations took place.

The encouraging outcomes of this project led to the amendment of the 1982 Act on Juvenile Delinquency Proceedings in the year 2000, introducing victim-offender mediation for juveniles.<sup>220</sup> Already in 1997, the new Criminal Code and the Code of Criminal Procedure introduced mediation-related provisions for adult offenders that came into effect in 1998. Amendments to the Criminal Code and Code of Criminal Procedure in 2013, which enter into force on 1 July 2015, introduced the possibility to discontinue criminal proceedings concerning indictable offences if the offender has made reparation or compensated the damage caused. Although mediation is not explicitly mentioned in the new provisions, it is nonetheless the common opinion that mediation is the best means for reaching a compensation agreement between the victim and the offender. The emergence of restorative justice in Poland was linked to the search for alternatives to formal criminal justice interventions, the promotion of victims' rights as well as the influence of international standards in this field.

218 The snapshot is based on a report by *Wojciech Zalewski*, see *Zalewski 2015*, and was compiled by *Andrea Păroşanu*.

219 For a comprehensive account in English of juvenile justice reform in Poland, but also of legislative bases, procedures and practices, see *Staińdo-Kawecka 2011*. See also *Staińdo-Kawecka/Deszyńska 2013* for restorative justice in theory and practice, including with juvenile offenders, in Poland.

220 See *Waluk 1999*; *Czarnecka-Działuk 1999* cited in *Zalewski 2015*, p. 639.

According to the Act on Juvenile Delinquency Proceedings (AJDP), which is applicable to young persons under the age of 17, the Family Court is the responsible institution for carrying out juvenile proceedings at every stage, including the pre-trial stage. The court may refer a case at every level of the proceedings to a relevant institution or a “trustworthy person” in order to carry out mediation. Cases are referred upon the initiative of the court or upon request by the young offender and the victim. There are no legal restrictions in terms of eligible cases or offences. What is required is that the essential circumstances and facts of the case should be clear and that all participants agree to them. The law makes no explicit reference to the consequences of successful mediation. Thus, the effects of mediation on the procedure lay in the hands of the Family.

At the court level, the Family Court may impose compensatory measures on the young offender, for instance obligations to repair the damage or to perform certain services for the benefit of the victim or the community. These measures may also be achieved i. e. agreed on through mediation.

## 2. Organisational framework for delivering restorative justice measures

Victim-offender mediation, as a service, can be delivered by an institution or a “trustworthy person”. Usually the institutions are NGOs, among them most prominently the Polish Mediation Centre that has mediation centres in different places. The PMC also organizes trainings for mediators and has elaborated standards on good practice. Mediators in these centres principally work as volunteers.

Further organisations are for instance the PCMPP, a Gdansk based centre, and The Lower Silesian Mediation Centre (DOM).<sup>221</sup> Furthermore, the Family Consultation and Diagnostic Centres in the country may carry out mediation in family conflicts as well as victim-offender mediation for juveniles, which was done especially in the first years after the emergence of victim-offender mediation. The majority of mediators, however, do not work in mediation institutions, but instead deliver mediation services on an independent basis (as a “trustworthy person” as stated in the law).

Specifications on the competences of mediators are laid down in a Minister of Justice Order from 2003 concerning mediation in criminal cases, and another concerning mediation in juvenile cases from 2001. Regarding juvenile offenders, mediators need to be graduates in psychology, pedagogy, sociology, resocialization or law and be experienced in the education and resocialization of young persons. They need to have undergone mediator training, contrary to mediators in adult cases, who are not required to have taken a formal training course. All mediators must be over 26 years of age. Mediators shall not be linked to the justice system, a restriction that seeks to prevent that mediation and the formal justice system are interlinked or “mixed” so as to foster the impartiality of the mediator. Mediators need to be accredited by the Courts of Appeal

221 See *Zalewski* 2015, p. 652; *Czarnecka-Dzialuk* 2010, p. 219, 223.

During the mediation process, juvenile offenders and victims can be accompanied by their parents or legal guardians. In case a direct meeting between victim and offender is neither possible nor desirable, mediation may be conducted indirectly. Mediation proceedings are highly formalized and also regulated to a strong degree. Accordingly, the law does not allow a wider circle of participants, such as community representatives, to participate in the meetings.

### 3. The use of restorative justice in practice

Statistical data on the use of mediation in Poland are published by the Ministry of Justice. Regarding mediation in adult criminal cases in civilian courts, case numbers increased from 1998 up to 2006, where there were 5,052 mediation cases. The subsequent decline in case numbers can be traced back, *inter alia*, to reductions in levels of overall registered criminal offending. In the year 2013, there were 3,696 cases, of which 3,159 were carried out by “trustworthy persons” and 537 by institutions. 63% of cases resulted in a mediated agreement.

Case numbers concerning young offenders in Family Courts show that from 2004 until 2013 there were between 218 and 298 successful mediation cases per year. In 2013, 278 mediation proceedings were conducted with juvenile offenders, of which 218 were successful. However, in relation to all criminal cases, only 0.3% to 0.4% of all sanctioned young offenders participated in mediation. The overwhelming majority of mediation cases involve adult offenders, juvenile cases account for less than one tenth of all cases.

There are great geographical variations in the use of victim-offender mediation across the country. Some places, for instance Białystok, show a higher mediation case numbers than other places, where mediation is rarely applied.

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

The first experimental project on victim-offender mediation involving young offenders was evaluated from 1997 to 1999 with the aim of assessing mediation and developing guidelines to improve and enhance its use.<sup>222</sup> Furthermore, the research aimed at contributing to the analysis of alternative measures for young offenders to be incorporated in the juvenile law, which was being developed at the time.

Regarding offence categories, 66.5% of the young offenders had committed property offences, while 31% were offences against the person. 90% of victims reported that they were satisfied with their

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222 See *Czarnecka-Działuk/Wójcik* 2001, cited in *Czarnecka-Działuk* 2010, p. 227 ff. The latter source also provides information on the legislative basis, organizational aspects, practice and research relating to victim-offender mediation in Poland.

participation in mediation and with the outcome of mediation. Receiving an apology from the offender and perceiving the offender as being truly regretful were essential to almost one third of the victims. 95% of young offenders were satisfied with participating in mediation as well as with the agreement that resulted from it.

92.5% of the 145 young offenders who participated in mediation came to a mutual agreement through the mediation process. 57.8% of the agreements included financial compensation, one third required an apology and 10% provided for the offender to render service or work to the victim.

In the large majority (87.9%) of cases in which agreements were reached, the Family Court decided to discontinue the case. In 5.3%, the responsible authority decided not to initiate proceedings at all and 6.8% of juveniles were subjected to educational measures by the Family Court. Concerning the re-offending rate, 14.4% of young offenders were convicted within the follow-up period of one to 2.5 years after mediation.

Evaluative research on victim-offender mediation involving adults has also revealed positive results on the mediation process.<sup>223</sup> In 65.7% of the 347 cases that were referred to mediation in 1999, the proceedings ended in an agreement. Courts decided to either conditionally discontinue the proceedings (36.3%), to terminate the proceedings (23.8%), to order a suspended liberty depriving sentence (23.5%) or a fine (5.5%).

Research on the perceptions of mediators has been conducted in 2001 and 2002.<sup>224</sup> 77% of the surveyed mediators reported a perceived lack of understanding of the significance of mediation among judges and prosecutors. Nearly half of the mediators stated that they lacked adequate premises for delivering the mediation process, and more than half of the mediators reported financial insecurity. 65% of mediators stated a lack of support from the State with respect to mediation. The majority of respondents (91%) reported that the victim received moral satisfaction and 83% of mediators stated that mediation helped to reduce fear in victims. 80% confirmed that the victims felt to have recovered self-confidence.

Further research on the attitudes of mediators, public prosecutors and judges in the area subordinated to the Gdańsk Court of Appeal (in the case of judges also from Mińsk and Białystok) was carried out in 2008 and 2009.<sup>225</sup>

Concerning the surveyed mediators, almost all found that mediation influenced the parties in a positive way. 76% stated that they felt there was a lack of knowledge of mediation within society in general. Further challenges were seen in the complexity of cases, the small number of referrals by the courts and limited knowledge about the role of mediation among judges and prosecutors, as was also revealed in the studies from 2001 and 2005 mentioned earlier.

223 See *Kruk/Wójcik* 2004, cited in *Zalewski* 2015, p. 667.

224 See *Zalewski* 2003, cited in *Zalewski* 2015, p. 665.

225 See *Zalewski* 2009, cited in *Zalewski* 2015, p. 666 f.

The sample also included 122 prosecutors. 72% of them reported that they “very rarely” referred cases to mediation; a further 20% did so only “rarely”. 43% of prosecutors stated that they did not consider that mediation fulfils its purpose, whereas 31% of the respondents found mediation fulfilled its purpose. The study further revealed a lack of knowledge among prosecutors regarding the qualifications of mediators. Only 18% found that mediators were sufficiently qualified. The vast majority (95%) of surveyed prosecutors felt that mediation was not suitable for all offences. Only 27% of prosecutors agreed that resocialization can be achieved through mediation.

Judges appeared to have a more favourable opinion of mediation than prosecutors, as they tended to refer more cases to mediation than prosecutors. 56% out of 62 respondents stated that mediation is generally a good method for conflict resolution. 79% of judges stated that mediation contributes to civic society and 40% felt that it indeed fulfils its role. 40% of surveyed judges reportedly felt that mediators were highly or sufficiently qualified. Regarding eligible offences, 74% of judges felt that mediation was not adequate for all categories of offending. About half of the surveyed judges stated that mediation could contribute positively to the offender’s resocialization.

Recommendations for the further promotion of restorative justice in Poland in future will need to focus on raising awareness in society as well as among legal professionals, so as to properly inform these stakeholders of the significance of victim-offender mediation as well as of its availability *per se*. The potential for juveniles could be used to a far greater extent, as case numbers are significantly lower for young offenders than for their adult counterparts. After all, the experiences made with the experimental programme on victim-offender mediation for juveniles were very positive. Furthermore, the scope of restorative justice could be widened further through legal amendments that allow restorative conferences to take place and that promote a wider use of victim-offender mediation.

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# 25. Portugal<sup>226</sup>

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*Anabela Miranda Rodrigues,  
Claudia Cruz Santos, Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Portugal, the Educational Guardianship Law has provided a separate system for young offenders since 1999.<sup>227</sup> The law highlights the guiding principles of education and social reintegration when applying educational measures, and is based on the minimum intervention as well as the restorative models of juvenile justice. It provides for the possibility of mediation as a promising response to juvenile delinquency, as was pointed out in the explanatory memorandum of the law. The law considers the application of victim-offender mediation to be useful whenever it contributes to the goals of the proceedings. However, the law does not regulate the preconditions for mediation to be applied or the mediation procedure in great detail.

The Educational Guardianship Law integrated suggestions of Council of Europe Recommendation Rec (87) 20E of 1987 concerning social responses to juvenile delinquency with respect to restorative interventions. Furthermore, 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 encouraging the use of mediation at all stages of dealing with juveniles was taken into consideration.<sup>228</sup>

Restorative measures linked to mediation can either be applied as diversionary measures as means for suspending the criminal proceedings, or in the preliminary hearing before the judge in order to determine the educational measure that should be applied. Mediation is thus used as a means to reach consensus on the adequate educational measure.

Within the context of diversion, through a public or private mediation service, the young offender can elaborate a plan of conduct that will be presented to the prosecutor. The aim of this plan is to emphasize the juvenile's commitment to refrain from re-offending, thus facilitating the option of suspension of the

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226 The snapshot was compiled by *Andrea Păroșanu* and is based on a report by *Anabela Miranda Rodrigues* and *Claudia Cruz Santos*, see *Miranda Rodrigues/Cruz Santos* 2015.

227 See also *Duarte-Fonseca/Miranda Rodrigues* 2011, p. 1027 ff. For an in depth look at juvenile justice in Portugal regarding reform history, theory and practice, see *Duarte-Fonseca/Miranda Rodrigues* 2011.

228 See *Fonseca* 2010, p. 11 and 13.

proceedings. This possibility applies to offences which are punishable by imprisonment up to five years. If the juvenile complies with the plan of conduct, the proceeding will be terminated. The plan of conduct may include the option to apologize to the victim or to provide total or partial, financial or symbolic reparation of the damage, carrying out an activity in favour of the victim, making economic provisions, or performing community service.

At court level, educational measures that reflect restorative thinking to a certain degree (such as damage compensation, organizing economic provisions for the victim, community service) can be applied by the judge. However, they are applied coercively i. e. do not require approval from the offender. According to the Educational Guardianship Law, during the preliminary hearing, mediation can be conducted in the context of the preliminary hearing with the aim of achieving a consensus in terms of which non-institutional educational measures to apply. The victim also can be heard when forming a decision on which measure the offender should be subjected to.

At post-sentencing level, the law provides for so-called “shared enforcement of non-institutional educational measures”. These measures may include possibilities to redress damages, economic provisions or community service. In order to redress the damage, the Educational Guardianship Law stipulates that the young offender may apologize to the victim, may economically compensate the victim, or may perform, to the benefit of the victim, activities that stand in connection to the damage caused. The provisions to economically compensate the victim or to perform activities to the benefit of the victim can only be included if the aggrieved party agrees.

## 2. Organisational framework for delivering restorative justice measures

Victim-offender mediation in Portugal is organised by two entities that are both linked to the Ministry of Justice. Regarding mediation for young offenders and restorative measures at the post-sentencing stage, the Directorate-General of Social Reinsertion (DGSR) is responsible for implementing mediation. As specified by the Educational Guardianship Law, in order to achieve the goals of the proceedings, the judicial authority may cooperate with public or private mediation entities. Regarding mediation as an element of procedural diversion at the investigation stage for adult offenders, the Alternative Dispute Resolution Office (GRAL) is the responsible entity.

In juvenile justice, the procedure of mediation is not well regulated. Mediation might be initiated by the judicial authority, the juvenile, his/her parents, legal representative(s) or defence lawyer. When mediation is used as a diversionary measure in order to suspend proceedings, the prosecutor needs to give his/her consent. During preliminary hearings, the judge has the discretion to resort to mediation as a means of choosing the guardianship measure to be applied.

The Social Reinsertion Services are responsible for developing the Mediation and Redress Programme (PMR), which provides the conditions for mediation to be carried out. The programme supports the young offender in redressing the damages caused by the offence, and employs restorative measures to

promote the young offender's sense of responsibility and commitment to education and avoiding re-offending.

During the investigation stage, the Mediation and Redress Programme focuses on victim-offender mediation in order to support the juvenile in developing a plan of conduct, in the fulfilment of that plan or in the successful conclusion of a mediation agreement. At the trial stage, the programme points out that support shall be rendered for reaching a consensus on which non-institutional educational guardianship measure should be applied. Furthermore, victim-offender mediation shall be encouraged in order to apply a guardianship measure that aims at repairing the damage caused to the victim.

Victim-offender mediation for adults takes place within the Penal Mediation System and was introduced by Law no. 21/2007. Specialized penal mediators are selected by the Alternative Dispute Resolution Office (GRAL). Mediators need to be over 25 years of age, hold a bachelor's degree or suitable professional experience and be trained in victim-offender mediation. A requirement for mediation is that the parties have to participate in person. The fees for the penal mediator's services are covered by the Alternative Dispute Resolution Office (GRAL) of the Ministry of Justice.

### 3. The use of restorative justice in practice

Statistical data on the use of educational interventions provided by the Educational Guardianship Law, including mediation, are available from the website of the Directorate-General of Social Reinsertion of the Ministry of Justice. In 2007, there were 25 cases of interventions involving mediation, in 2008 the number rose to 44, and in 2009 there were 48 cases. Regarding the use of mediation in the context of the suspension of criminal proceedings, in 2007 proceedings were conditionally suspended and involved mediation in 103 cases (2008: 92 cases with mediation, 10 without; 2009: 93 with mediation, 11 without).

### 4. Evaluation of restorative justice measures ("good practices") and challenges

In Portugal, to date no research studies have been conducted that sought to measure participants' experiences with mediation, practitioners' perceptions of mediation or recidivism following participation in mediation. Studies about juvenile delinquency have shown that the enforcement of the Educational Guardianship Law in 1999 had a positive impact. However, the research also reveals that the use of restorative measures nonetheless remains highly limited, both with juvenile and adult offenders.

A study coordinated by *Sousa Santos* confirms the rare application of mediation within the context of the Educational Guardianship Law.<sup>229</sup> Among other factors, the limited use of mediation in practice

229 *Sousa Santo* 2010, p. 215 ff., 320.

is caused by the generally prevailing tendency to reject mediation outside the judicial system and the resulting excessive judiciarization of mediation (in that judicial authorities play an excessively pivotal role in the effective promotion of the measure). The study furthermore highlights the potential of mediation in the field of crime prevention. Commitment to such social mediation implies a subsequent empowerment of key stakeholders at the local level.

The limited implementation of mediation in practice can also be seen in connection with the “localization” of mediation within the framework of judicial intervention (i. e. where it latches on to the criminal justice system), as Portuguese legal doctrine criticizes that this may be a factor impeding genuine diversion. Recourse to mediation depends to a large extent on judicial discretion. The legal framework is also restrictive in that it only allows the use of mediation in cases of offences punishable with up to five years of imprisonment.

The future of restorative practices in Portugal should involve a shift in understanding of the purpose of restorative practices. They should be regarded not only as alternative dispute mechanisms orientated towards celerity and economy of resources, but also as modes of achieving reconciliation in criminal conflicts that favour the socialization of the offender, redress the damages suffered by the victim and pacify the community.

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# 26. Romania<sup>230</sup>

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*Andrea Păroșanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

In Romania, the most significant form of restorative justice is victim-offender mediation. In the early 2000's, within the process of reforming juvenile justice, emphasis was placed on the promotion of alternatives to punishment. In the context of the promotion of the juvenile justice system and restorative justice, the first experimental project on restorative justice for young offenders was implemented in two Romanian cities from 2002 until 2004. The main objective of the project was to provide victim-offender mediation to juveniles and young adults aged 14 to 20 years. Further localised projects in the field of restorative justice and victim-offender mediation subsequently emerged.

The emergence of restorative justice-based projects, in particular mediation, was supported by NGOs, academics and international experts. The promotion of alternative dispute resolution methods such as mediation gained importance in the context of EU accession and harmonization with international standards.<sup>231</sup> Furthermore, juvenile justice reforms aimed at decreasing high incarceration rates and the expansion of community-based measures, as well as reducing the high caseloads that courts were facing at the time.

First elements of restorative justice were introduced into the legislative framework in the field of combating domestic violence in 2003 and the protection of rights of victims in 2004. In 2006, the Law on Mediation came into effect, which contains general provisions on mediation, and is applicable in various fields, such as mediation in civil, commercial, family and penal matters.<sup>232</sup> The law applies both to juveniles and adults.

Victim-offender mediation can be carried out all stages of criminal proceedings. The law explicitly stipulates that mediation may be conducted before and after the criminal procedure has been initiated. In principle, mediation is also possible at the stage of serving sentences. The Law on Mediation provides

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230 The snapshot is a summary of *Păroșanu* 2015 (on restorative justice in particular) and *Păroșanu* 2011 (juvenile justice).

231 See further *Balahur* 2007, p. 65; 2012, p. 316.

232 Law on Mediation and the Mediator Profession No. 192/2006, published in the Official Gazette No. 441 of 22 May 2006, further amended and modified.

that victim-offender mediation can be applied in criminal cases concerning both the penal as well as the civil aspects of the offence.

According to the Law on Mediation, mediation linked to criminal proceedings (thus concerning penal aspects) can be conducted only in cases of complainant's offences, for example forms of minor violence, bodily harm, breaking and entering, property damage, theft, harassment etc.<sup>233</sup> Regarding all offences, civil claims can always be asserted by way of mediation. Special procedural rights of juveniles have to be safeguarded, thus legal assistance and the presence of parents or guardians are mandatory in cases involving young offenders. Furthermore, probation officers, social workers, family members or community members may participate.

The new Code of Criminal Procedure, which came into effect in 2014, further underlined mediation-related aspects. The law indicates that criminal proceedings at the pre-court and the court level have to be suspended if the parties reach a reconciliation agreement through mediation. 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.<sup>234</sup>

Furthermore, the new Code of Criminal Procedure expanded the use of mediation and 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 alleviate the consequences of the offence or to repair the harm are also taken into consideration. The prosecutor can determine a period of up to nine months within which the obligations shall be fulfilled.

## 2. Organisational framework for delivering restorative justice measures

Regarding the organisation of mediation as well as the activity of mediators, the central institution in charge is the Mediation Council. Established in 2007, the council is an autonomous body of public interest. The Mediation Council is responsible for promoting mediation activities, ensuring the quality of mediation services, elaborating training standards and authorizing mediators. Furthermore, the council adopted the Code of Ethics for Mediators, referring to the role and responsibilities of mediators. To become a mediator, a person needs to have a university degree and at least three years of work experience. Mediators have to be specially trained and authorized by the Mediation Council in order

233 Furthermore, the Law on Mediation stipulates that mediation, as part of criminal proceedings, is applicable if the parties reconcile and criminal liability is thus removed, but this concerns only a very small number of offences. The term "reconciliation" was introduced in communist Romania in the late 1960s and is not to be regarded as synonymous with mediation. Reconciliation does not necessarily involve a restorative process between victim and offender, and there is no need for an impartial third party to facilitate the dialogue.

234 See *Danileț* 2014, cited in *Păroșanu* 2015, p. 706.

to perform their work. Mediators are principally professionals and not volunteers. They come from different professional background, and include lawyers, teachers, social workers, psychologists, engineers, notaries, physicians, teachers, economists, judges, police, etc.

Mediation is delivered either by individual mediators, private organizations or NGOs. Most mediation providers offer 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 arrange privately for mediation and must bear the costs themselves. This can be seen as a major problem in the implementation of victim-offender mediation, especially with regard to juveniles.

In terms of the duration of mediation that is linked to criminal proceedings, if mediation is conducted after the preliminary proceedings or trial proceedings have begun, these proceedings may be suspended until termination of the mediation procedure, however for no longer than three months after the suspension has been ordered.

### 3. The use of restorative justice in practice

Reliable statistical data on the number of victim-offender mediation cases are not yet available. 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.<sup>235</sup> To date, no statistics have been published by the Mediation Council. As has been mentioned above, only few facilities and few mediators are specialized in victim-offender mediation, thus the number of mediation cases in penal matters can be estimated to be rather low.

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Romania, only few evaluation studies concerning victim-offender mediation have been conducted. The experimental projects on restorative justice were evaluated in 2003 and in 2004 by researchers of the Institute of Sociology at the Romanian Academy.<sup>236</sup> The aim of the research was to assess the overall performance of the established restorative justice centers as well as to identify challenges and potentials for the further enhancement, implementation and optimisation of restorative justice interventions.

The first research study conducted in 2003 showed relatively high levels of participants’ satisfaction with the mediation procedure. Most participants reported that they appreciated their active involvement

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

236 See Rădulescu/Banciu 2004; Rădulescu/Banciu/Dâmboeanu/Balica 2004, cited in Păroşanu 2015, p. 717 ff.

in mediation, as well as the fact that they were treated with respect and were listened to during the mediation process. More than 90% of the beneficiaries were satisfied with the mediation agreements and found that they met their needs. About 75% of the participants, including victims, offenders, parents and supporters, found that mediation contributed to resolving 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. The second evaluation study showed similar results and confirmed the above mentioned high levels of satisfaction among the beneficiaries of the programs.

A further study, conducted in 2010, focused on the perceptions of public prosecutors and judges on victim-offender mediation.<sup>237</sup> The research aimed at analyzing the level of information on victim-offender mediation and the acceptance of mediation by judicial bodies. This is particularly relevant if one bears in mind the fact that, since 2010, judges and prosecutors have been legally obliged to inform the parties about mediation.<sup>238</sup>

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. 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 that they felt well informed about the procedure of mediation. The results indicated a need to further and more appropriately inform judges and public prosecutors of issues such as the procedure of mediation, facilities delivering mediation services and experiences with mediation.

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 restrictive legal framework 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.

State-funding should be provided in order to ensure that the parties must not bear the costs for victim-offender mediation themselves. Furthermore, regarding the wider use of victim-offender mediation, the specialization and further training of mediators has to be provided for in order to ensure the quality of mediation.

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237 *Păroșanu/Balica* 2013, p. 62 ff. 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 since in practice judges usually deal with both criminal and civil cases (due to a lack of specialized panels), it was not possible to obtain specific data on the number of criminal law judges.

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

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# 27. Scotland<sup>239</sup>

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*Michele Burman, Jenny Johnstone, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The Scottish juvenile justice system has some peculiarities, which require that it be analysed separately from the systems in England & Wales and in Northern Ireland, the two other juvenile justice jurisdictions within the EU-member state of the United Kingdom.

Scottish juvenile justice has kept its tradition of the so-called welfare approach by emphasising the protection of children and juveniles and providing educational measures instead of punishment. The most important form of delivering such support are the so-called Children's Hearings, that were established in 1968 (replacing the former youth courts) and later by the Children's (Scotland) Act of 1995. They deal with children in need of care and protection as well as with children who offend. The age to be qualified for criminal investigation is 12, but Children's Hearings can take place for children between 8 and 15 years of age. Most cases of juvenile crimes are dealt by the Children's Hearing System, but in certain serious cases they may also go to criminal courts. The prosecution will 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. In these very serious cases the offender will be adjudicated at the High Court of Justiciary (Supreme Court), which is responsible for dealing with murder cases and similar very serious crimes, and can also impose life sentences (even against juveniles).<sup>240</sup>

Juveniles aged 16 and above are treated as adults and are normally subjected to normal criminal justice proceedings.<sup>241</sup> In 2003 a special Youth Court was established for 16 and 17 year-old persistent juvenile offenders (three separate incidents of alleged offending in the previous six months) or who are "at risk"

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239 This snapshot is based on a report by *Jenny Johnstone* and *Michele Burman*, University of Glasgow/Scotland, see *Johnstone/Burman* 2015, and was compiled by *Frieder Dünkel*. Said report is accurate up until January 2014.

240 See *Burman/Frazer/Johnstone/McNeill* 2011, p. 1173 f.

241 Apart from the High Court, which deals with the most serious cases as described above, besides the Youth Court (established for persistent offenders, see below) two other court levels play a role in cases of 16 and 17 year-old juvenile offenders. The District Court deals with minor offences under a summary procedure (maximum penalty is 60 days of imprisonment). The so-called Sheriff Court deals with more serious crimes and can impose up to 3 months of imprisonment in a summary procedure and sentences exceeding 3 months in a solemn trial (jury trial) in cases of serious crimes.

of more serious offending (criticised as a “catch-all”). Apart from this, 2003 also saw the introduction of specific fast-track-hearings for young persistent offenders *under* 16 years of age. The purpose of this move was to provide a means for dealing with this group more efficiently by providing a much swifter justice system response than could be achieved via Children’s Hearings. An evaluation of these proceedings revealed that the length of proceedings could be reduced, but that no impact on reoffending could be observed. Therefore, the Scottish Government subsequently abolished this procedure.<sup>242</sup>

The first place for restorative justice measures and mediation is the Children’s Hearing, but restorative justice-related disposals such as Compensation Orders, Supervised Attendance Orders or Community Reparation Orders are provided as well and used also by the District and Sherriff Courts and at the level of pre-court diversion. On 1 February 2011, the “Community Payback Order” came into force in Scotland and replaced provisions for Community Service Orders, Probation Orders and Supervised Attendance Orders. The Community Payback Order consists of a number of requirements from which the court can create an individualised sentence makeup tailored specifically to each offender based on the nature of the offence as well as the underlying issues that may have facilitated it, and which may need to be addressed in order to prevent future re-offending. For example: the Order might include a requirement to carry out hours of unpaid work in the community with benefits for the community, intensive supervision, alcohol or drug treatment or behavioural programmes. Clearing pathways of snow and ice, building eco-plant areas for school children, repainting community centres or churches, cleaning up beaches, growing vegetables and distributing the produce to care homes and local charities, are just a few of the unpaid work activities being carried out by offenders in communities across Scotland.<sup>243</sup>

There is intense debate in Scotland as to what is “restorative”. In particular, distinction is made between mediation on the one hand and restorative justice measures on the other. While both have certain degree of overlap due to their consideration of repairing the harm caused to the victim, mediation places emphasis on the process of negotiating, while others apply a more outcome-oriented definition of restorative efforts of the offender through compensation or reparation.<sup>244</sup> Whereas the former community service orders were provided for “higher tariff offences”, supervised attendance orders were a sanction for fine defaulters. The community reparation order described above addressed young persons involved in minor crimes or anti-social behaviour according to the Anti-Social-Behaviour-Order-legislation (ASBO’s). All these sanctions can have restorative elements by “doing good” to the victim or the community while at the same time making the offender aware and responsible for his/her wrongdoing.<sup>245</sup> The new Community Payback Order may be seen as symbolic for the Government’s crime policy of addressing victims’ needs on the one hand, and offender accountability and responsibility to restore the damage caused on the other.

242 See *Burman/Johnstone/Frazer/McNeill* 2011, p. 1177 f.

243 See the Scottish Government’s explanations on <http://www.gov.scot/Topics/archive/law-order/offender-management/CPO>.

244 See *Johnstone/Burman* 2015, p. 757 ff. with further references.

245 See *Johnstone/Burman* 2015, p. 760.

Other forms of restorative Justice in Scotland are Restorative Justice Conferences, which – beyond the classic situation of victim-offender-mediation – include supporters of the victim and offender, i. e. family members, friends, social workers, school staff etc. Facilitators do not attend at the meetings. Restorative Family Group Conferences exist as well. In these meetings the facilitators (mediators) attend the meeting.

Various other restorative initiatives have been developed in Scotland at different stages of the criminal justice system: pre-sentencing, as part of a sentence and post-sentencing. These include *Shuttle Dialogues* (a form of indirect mediation, where victim and offender do not personally meet), *Victim Awareness-programmes*, *Support for Persons Harmed-programmes* (both in different settings, also in prisons), *Restorative Conversations* or *TASC (Talking after Severe Crime*, both mostly in prisons, see below).<sup>246</sup>

Finally, restorative approaches can also be observed in Scottish *prisons*. Restorative Justice is used by prison staff as an alternative, non-punitive means of dealing with the harm caused by misconduct, bullying or a breach of prison rules and violence in two prisons in Scotland (one of them the prison for female offenders). Experiences show that Restorative Justice in this sense is most likely to be effective if implemented as a “whole prison”-approach, rather than as an “add on”-scheme.

Another form of implementing restorative elements are the so-called “restorative tasks” established in several prisons (organised by the prison staff together with charity and community organisations, to date without funding by the prison administration). This approach involves that imprisoned convicts provide goods or services that help to meet the needs of disadvantaged people in the local community and in the developing world. The projects enable those in prison to learn about the needs of others and their ability to help them and to feel that they have “given something back” to the community, which can improve their self-esteem and sense of accountability. Furthermore they can learn new skills which can increase their own employment prospects.

Some programmes specifically aim to increase sensibility and empathy for (potential) victims as a rehabilitative measure. In this context there are two other forms of “post-sentence” restorative justice approaches, practised either in prisons or even after release. One provided in serious cases of violence (including murder etc.) is called TASC (Talking after Serious Crimes). The aim is to facilitate and promote dialogue with the victim or his/her relatives who may be suffering from the crime and its consequences. It is well-known that not only the victims and their relatives are traumatised, but often also the offender, which can make such talks a positive experience for both sides. Two facilitators of the restorative justice agency “SaCRO” (see below) prepare and accompany this dialogue in appropriate cases in a fashion that is sensitive to the circumstances.

So-called “Crime Impact Awareness Groups” are another approach that can be found in Scotland. This approach entails that perpetrators of less serious crimes, that have nonetheless had a significant impact on the victim, meet not their own victim, but victims who have had a similar experience. These meetings give those who have been harmed the opportunity to express their feelings about the offence and the persons who harmed them in a powerful and appropriate context. Their “voice” has the potential to

246 See *Johnstone/Burman* 2015, p. 777 ff.

challenge attitudes and thought-patterns that may give rise to repeat-offending. This kind of rehabilitative approach is not primarily intended to influence decisions on early release, notwithstanding that the assumption of responsibility for the offence and increased victim-awareness can certainly improve the reintegrative process and thus indirectly influence prognostic assessments.<sup>247</sup>

The *history* of restorative justice in Scotland goes back to the early-1980s, when some pilot projects were set up in the field of juvenile justice. But it took until the early 2000s until the Scottish Government showed interest in further developing restorative measures. The Youth Crime Action Plan published in 2002 wanted to expand the provision of community-based youth justice. In January 2004, 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 restorative projects to allow offenders to face up to their offending. The Scottish Government in 2006 delivered a clear statement on its commitment to provide all young people harmed by youth crime the opportunity to participate in a restorative type process. Local Authorities were provided funding to develop services and strategies for youth justice and provide Restorative Justice Services.<sup>248</sup> In 2008 the Scottish Government reaffirmed its commitment to making restorative approaches available to young people in its report on *Preventing Offending by Young People*. In the same year the government produced guidance to implement standards for the delivery of restorative justice services. Further guidance was set out in a document entitled *Best Practice Guidance for Restorative Justice Practitioners and their Case Supervisors and Line Managers (Scotland)*, 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.”<sup>249</sup> A next step was the Victims and Witnesses (Scotland) Act 2014, which addressed the demands of the 2012 EU Directive, which clearly highlighted restorative justice and pointed to considerations that member states should have regarding victims and witnesses. Thus, one could say that international human rights standards have also played a role in the development of restorative justice in Scotland.

## 2. Organisational framework for delivering restorative justice measures

With regard to organisational issues one has to be aware that the main providers of restorative justice services are the Local Authorities themselves and organisations such as SaCRO (Safeguarding Communities Reducing Offending), the latter being the largest provider of these services. A few other organisations are involved on the local level.

The first gatekeeper in the criminal justice system is the police, who in 2004 were provided by statute

247 See in detail *Johnstone/Burman* 2015, p. 771 ff., 776 f.

248 See *Johnstone/Burman* 2015, p. 761, 764.

249 See the details and references given by *Johnstone/Burman* 2015, p. 763 and *The Scottish Government* 2008.

with the power to issue so-called “restorative warnings”. The police are entitled to use this approach in dealing “quickly” with relatively minor offences committed by first time offenders. The second judicial authority is the Procurator Fiscal, who has discretion in relation to the decision to proceed and diversionary options. The Criminal Proceedings (Reform) (Scotland) Act 2007 provides prosecutors with direct measures to issue fiscal fines, compensation offers or a combination of both. Prior to this the only way a court could deal with restitution or compensation had been to defer sentence to enable repayment to be made or other restitution to be effected.<sup>250</sup> Although Children’s Hearings are not as formalised as ordinary criminal procedures, certain standards and legal safeguards have been developed, e. g. that the juvenile be represented by a defence council “where the issues are legally complex”, a development that was forced by the European Court of Human Rights.<sup>251</sup>

### 3. The use of restorative justice in practice

Despite a lack of legal regulations, restorative justice widely comes into play as a measure for diverting offenders from prosecution and in parallel with the Children’s Hearings legislation. *Gavrielides* cites the Scottish Office guidance as follows: “*There has been a significant growth of RJ services across Scotland as a consequence of Scottish Executive’s strategies and policies to prevent, address and reduce youth offending. The fundamental difference between the children’s hearings system and other youth justice systems is that by virtue of being referred to the Principal Reporter a child charged with an offence is diverted from prosecution in a criminal process and instead enters a non-retributive civil procedure which aims to meet the child’s educational and developmental needs.*”<sup>252</sup>

In 2006 and 2008, the Scottish Restorative Justice Consultancy Service monitored the development and extent of restorative justice practice by undertaking two censuses. In 2008, services were in place in 31 out of 32 Scottish local authorities. Those services are provided by a number of different organisations including 17 by SaCRO, 12 by local authorities and three by other organisations.<sup>253</sup>

Regarding actual practice, the available data demonstrate that a relatively high number of juveniles are referred to the Children’s Hearings, and from there potentially to a restorative justice or mediation programme, whereas court based restorative measures remain rarely used. However, the statistical data are limited. Detailed statistical data on the importance of restorative measures in juvenile justice (pre-trial and on the court level) are not available. Therefore it cannot be judged whether 2,150 police or Children’s Panel Reporter’s warning letters is a lot or not, and to what extent these are restorative warnings. Clear statistical data are also lacking at the level of the Children’s Hearings and court dispositions. However, a general look at court sentencing practice reveals a decline in the use of custodial sentences since the

250 See *Johnstone/Burman* 2015, p. 767.

251 See *Burman/Johnstone/Frazer/McNeill* 2011, p. 1176 f. with reference to ECtHR case *S v Miller* 2001 SC 977, according to which Children’s Hearings now are seen in the ambit of Art. 6 ECHR.

252 *Gavrielides* 2013, p. 9.

253 See *Johnstone/Burman* 2015, p. 764.

beginning of the 2000s and a parallel increase in community sanctions, amongst them also restorative measures (unfortunately, individual shares are not differentiated).<sup>254</sup> Community service seems to play a considerable role (insofar as one can class this measure as restorative). In the first 12 months following its introduction in 2011, the Community Payback Order was used in 11,162 cases. 8,198 (=73.5%) included unpaid work or other activity requirements, while only 383 compensation requirements were issued.<sup>255</sup> In the second year the numbers increased to 15,857 cases, 12,630 of them including unpaid work (= 79.6%) and only 599 compensation orders.<sup>256</sup>

Also, according to the reports available through SaCRO, it seems that restorative justice measures in a narrow sense play only a marginal role in a quantitative sense, although Restorative Justice Services have been implemented nationwide in juvenile justice. Some studies on individual programmes and regional data indicate that Restorative Justice is well developed in juvenile justice, but that for adult offenders it remains the exception. The initiatives inside prisons are certainly a positive note, a field in which *Scotland* (together with few other countries such as e. g. *Belgium*) seems to be ahead in Europe.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Scotland several research studies have been conducted by involved agencies and the Government, but also by criminologists from Glasgow or Edinburgh Universities. Data indicate that victim involvement in restorative justice measures is rather limited and that – in light of international research – victim participation should be addressed as “the most potent influence on young people’s desistance from offending is the ‘victim factor’; thus, consideration needs to be given to increasing victim involvement with interventions.”<sup>257</sup> Data also suggest that most young offenders referred to restorative justice services comply with participating in restorative measures. The fact that 97% of persons harmed agreed to be involved in the restorative, reparative actions agreed on. Overall, satisfaction among all participants with the restorative procedures and outcomes they had experienced was high.

In terms of re-offending, studies have highlighted the difficulties involved in measuring and comparing re-offending rates. Up to now, no clear evidence of reduced re-offending has been presented.<sup>258</sup>

Looking at the general development of restorative justice, since their implementation restorative justice measures have been increasingly used in the juvenile justice system, whereas for adults it is still on

254 See *Burman/Frazer/Johnstone/McNeill* 2011, p. 1179 ff.

255 See the statistical data presented by the Scottish Government under <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/CPOs>.

256 See Scottish Government, *Criminal Justice Social Work Statistics 2012-13 in Scotland*, 30 may 2014, Table 8 and 10 under <http://www.gov.scot/Resource/0045/00451608.pdf>.

257 *Dutton/Whyte* 2006; *Johnstone/Burman* 2015, p. 786.

258 See *Johnstone/Burman* 2015, p. 787 f.

the margins of the criminal justice system. More research on the implementation and outcomes of restorative justice measures is needed and also a clarification of the contents and meanings (in terms of penal philosophy) of mixed sentences such as the Community Payback Order. Nevertheless, the strong emphasis given by the Scottish Government to further develop Restorative Justice not only in juvenile justice, but also for adults, and in different settings including prisons should be appreciated.

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# 28. Slovakia<sup>259</sup>

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*Miroslava Vráblová, Andrea Párošanu*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

Since the 1990s, emphasis has been placed on the development of alternative measures to punishment, decreasing the use of prison sentences and on the high court workloads in Slovakia.<sup>260</sup> In this context, mediation and probation were introduced in the early 2000's in order to set up an alternative model for handling criminal cases efficiently and based on a restorative approach.<sup>261</sup>

In 2002, a pilot project coordinated by the Department of Criminal Law at the Ministry of Justice on mediation and probation in several county courts was started, running for one year. The aim was to assess the potential of implementing mediation and probation at the national level. An Action Group for the Probation and Mediation Service in charge of the project was created, comprising legal professionals and non-profit organizations.

After successful implementation of the pilot project, the Probation and Mediation Act came into effect in 2004 and mediation and probation services were established in every county court in Slovakia. Probation officers and mediators have since been responsible for monitoring the enforcement of court imposed measures and for promoting the social re-integration of convicted persons.

The probation and mediation procedures were introduced in 2004. Other restorative measures (such as "Agreement of Guilt and Sentence", "Community service", "Conditionally refraining from imposing a sentence") were introduced just in 2006 after legal amendments to the Criminal Code and the Code of Criminal Procedure. Legal reforms were influenced by European trends and international standards emphasizing restorative justice interventions.

Mediation ("conciliation in the criminal procedure") is possible at both the pre-court and the court

259 The snapshot was compiled by *Andrea Párošanu* and is based on *Vráblová* 2015.

260 See also *Mražek* 2010 for an overview on the development, legislative basis, procedures and organizational structure of victim-offender mediation in Slovakia.

261 For a comprehensive account of juvenile justice reform in Slovakia, as well as of legislation, procedures and practice, see *Válková/Hulmáková/Vráblová* 2011.

level as a diversionary measure for offences punishable with imprisonment for up to five years. The same provisions apply to juvenile and adult offenders. Successful mediation results in a reconciliation agreement upon consent of victim and offender. The reconciliation agreement has to be approved at the pre-court or court level, and contains a plan for rendering material or immaterial damage compensation or for restoring the damage by other means. Furthermore, another prerequisite for the reconciliation agreement is that the offender has to pay an amount of money for community purposes. However, the prosecutor and/or the judge hereby take into account the social and economic status of the offender. After successful completion of the agreement, the case will be formally dismissed.

Besides mediation, a further legal instrument with potentially restorative content is damage compensation as a part of the decision of the prosecutor or the judge to conditionally dismiss a case. Conditional dismissal is possible for offences punishable by a maximum prison sentence of five years. The offender needs to have compensated the damage or agreed to do so, or used other means to repair the damage and concluded an agreement of damage compensation with the victim. This agreement of damage compensation is principally achieved through mediation. After successful completion, the case will be dismissed and criminal proceedings will be terminated.

Another possibility for compensating damages is linked to the so-called "Agreement of Guilt and Sentence" (plea bargaining). It is an agreement between the prosecutor and the accused. Such agreement is possible in cases of less serious offences, medium severity offences as well as particularly serious crimes (for all types of criminal offences) and seeks to effect the compensation and reparation of damages and other harms. The Agreement of Guilt and Sentence comes into effect after approval by the court and only with the consent of all parties. The injured person is included in order to give his/her consent or disapproval to the accord, i. e. the injured person is not involved in the reaching of an agreement on guilt and sentence – this is a matter for the attorney general and the offender (and his/her legal representation), and is thus not to be regarded as the restorative element. Rather, the victim is involved in the second element of the measure (compensation, reparation).

A further partly restorative measure is community service, provided by the Criminal Code for juvenile and adult offenders since 2006. Community service can be imposed by the court with the consent of the convict in case of offences which are punishable by imprisonment for up to five years. The amount of community work that young offenders can be required to perform ranges between 30 and 150 hours.

At the court level, "conditionally refraining from imposing a sentence" is possible for juvenile offenders in cases of less serious offences. The requirements are that the juvenile has expressed regret for committing the offence and has exhibited serious efforts to restore or compensate the damage. The offender must to give his/her consent to conditional refrain from imposing a sentence. During the probationary period of one year, the court imposes educational measures, duties or restrictions on the young offender.

## 2. Organisational framework for delivering restorative justice measures

The legal framework concerning the work and duties of mediators and probation officers is provided by the Probation and Mediation Act. Victim-offender mediation is conducted by specifically trained mediators. They need to be at least 18 years old and be adequately educated. According to the Probation and Mediation Act, mediators and probation officers must hold an advanced university degree in the fields of law, theology, pedagogy, or any other Master's degree in humanities. However, in practice, this is not always the case and not every mediator and probation officer has this kind of university education.

Mediators and probation officers are employees in the public service of the county courts. In 2005, there were 116 mediators and probation officers in Slovakia. In 2009, numbers decreased to 78 and in 2011 only 62 mediators and probation officers are performing their work in the whole country.

Regarding community service, mediators and probation officers are in charge of supervising the measure. Usually community work entails the cleaning of public areas and parks as well as working in hospitals, libraries, retirement homes, charitable facilities, etc. In carrying out their duties, mediators and probation officers cooperate with governmental and non-governmental organizations.

## 3. The use of restorative justice in practice

Statistical data on the use of victim-offender mediation and probation activities have been collected since 2006. In the period from 2006 to 2009, most mediation cases (N = 3,785) were assigned to mediators in the year 2007 (both juvenile and adult offenders). In the years that followed, absolute case numbers decreasing to 2,601 by the year 2009. In 2009, 2,724 mediations were conducted (including a certain degree of caseload carry-over from the preceding year), out of which 1,087 resulted in a reconciliation agreement.

Concerning reconciliation in case of young offenders, in 2010, 170 reconciliation cases were approved by the prosecutor and 8 by the court. Regarding adult offenders, in 2010, 991 cases were approved by the prosecutors and 158 by the courts. In 2011, prosecutors accepted 139 juvenile cases of reconciliation and 1,116 adult cases, whereas courts approved 16 juvenile reconciliation cases and 102 adult cases. Case numbers are significantly higher for adult than for juvenile offenders.

In terms of probation cases in general, in 2009 a total of 7,279 cases were assigned to probation and mediation services, which represents about 94 cases per probation officer. In 2006, just about 62 probation cases were referred to a probation officer. Thus, since caseloads have been decreasing parallel to an increase in workloads, one must conclude that the decline in the number of active mediators and probation officers has been even greater.

Regarding conditional discharge, in 2011, 4,172 cases of adult offenders and 523 cases of juvenile

offenders were conditionally dismissed by the prosecutor, and 224 adult cases as well as 35 juvenile cases were dropped by the courts.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

For ten years now, probation and mediation services in Slovakia can be considered as having been successfully implemented. The organizational infrastructure for providing mediation was established nationwide, thus mediation services are available in every county court. The legal framework, including the Criminal Code, the Code of Criminal Procedure and the Probation and Mediation Act, provides a favourable basis for carrying out restorative measures.

However, in practice mediation case numbers – especially regarding young offenders – are still low, as only few cases are assigned to mediation. Reasons can also be seen in the lack of coordination between national prosecution services and probation and mediation services. Furthermore, the decline in the number of mediators and probation officers across the country in recent years is worrying and related to a lack of funding for the judicial system. Regularly supervising and evaluating the work of mediators and probation officers, especially in the field of juvenile justice, has been emphasized as being of significant importance; the same applies to ensuring that staff have respective professional qualifications.

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# 29. Slovenia<sup>262</sup>

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*Katja Filipčič, Andrea Păroşanu*

## 1. Forms of restorative justice interventions and their legal basis

In Slovenia, the first legal manifestations of restorative justice were implemented into criminal law in 1995. Since 1999, victim-offender mediation, the most prominent form of restorative justice both in Slovenia and throughout Europe, has been available. The emergence of victim-offender mediation was influenced by various factors, for instance the promotion of mediation in different fields of conflict, or the need to overcome high court caseloads that included a large share of minor offences. Furthermore, reforms in the criminal justice system in the 1990s aimed at introducing new ways of dealing with crime, inspired by positive experiences in other countries. International standards, such as the Council of Europe's recommendation on mediation in penal matters (No. R (1999) 20), was another important driving factor.

The legal framework for restorative measures is provided by the Criminal Code and the Code of Criminal Procedure. To date no separate legislation for juveniles (14 to 17 years) has been enacted, although the new Criminal Code (2008) stipulated a separate youth act.

Victim-offender mediation can be used at the pre-court level, where it is primarily applied in practice, as well as at the court level. Mediation may be used as a diversionary measure by prosecutors. At the court level, mediation is also a sanction that can be imposed on juvenile offenders only.

At the pre-court level, the prosecutor may refer a case to mediation if the juvenile has committed an offence punishable by imprisonment for up to five years. The law is more favourable towards juvenile offenders, as adult offenders can be referred to mediation if the offence is punishable by a fine, by imprisonment for up to three years, or by imprisonment for up to five years only in case of certain offences. Having previous convictions does not make the offender ineligible for mediation. Since 2004, guidelines of the General State Prosecutor instruct prosecutors on the suitability of mediation. Successful mediation at the pre-court level results in the dismissal of prosecution, i. e. the case is dropped.

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<sup>262</sup> This snapshot is based on a report by *Katja Filipčič* on restorative justice and mediation in penal matters, see *Filipčič* 2015, and was compiled by *Andrea Păroşanu*. Furthermore, for a comprehensive account of juvenile justice in Slovenia in terms of reform history, legislative basis, procedures and practice, see *Filipčič* 2011, to which reference can be made throughout.

At the court-level, young offenders can be subjected to educational measures, or exceptionally be sentenced to a juvenile penalty if they are 16 or 17 years old. As an educational measure, the juvenile judge may order the young person to fulfil certain obligations (“instructions and prohibitions”). These duties provided by the Criminal Code include the duty to reach a settlement with the victim and/or to apologize to the victim, both of which are achieved through mediation. The court takes the will of the young offender to cooperate with and fulfil these duties into consideration. However, the offender’s consent is not a formal prerequisite for imposing the measure.

Besides victim-offender mediation, restorative elements can be found in measures such as “reparation of damages” and “community service”. Damages can be repaired in a variety of ways, for instance by apologizing to the victim (symbolic), paying a certain amount to the victim (monetary), working for the victim, or making a donation to public institutions, humanitarian organizations or to the victim compensation fund.

Prosecutors can condition the dismissal of further prosecution on the offender making reparation. Both victim and offender must give their consent to making/receiving reparation via such conditional dismissals. Conditional dismissal is possible when a juvenile has committed an offence that is punishable by a prison sentence of up to five years. Before choosing this option, the prosecutor has to assess whether victim-offender mediation can be carried out, as mediation is prioritized by the legislator. The General State Prosecutor Guidelines from 2004 provide information on which offences conditional dismissal is suitable for.

When the prosecutor opts for conditional dismissal, he/she summons the offender, the victim and their legal defence to a hearing at the Public Prosecutor’s Office. The parents of juvenile offenders need to be present. The victim is invited to communicate his/her expectations and may propose a task that the offender could fulfil. Finally, the prosecutor imposes the condition(s) on the offender, and is not obliged to accept the suggestions of the victim. The prosecutor sets a period of time (no longer than six months) within which the condition(s) must be fulfilled.

Concerning juvenile offenders, reparation can also be imposed at the court level by the juvenile judge as an educational measure. Reparation refers to apologising to the victim, financial compensation, work or other means of restoring the damage.

Community service can be applied as a diversionary measure, or as a sanction ordered by the court for juvenile offenders. For adult offenders, community service can be used as an alternative to serving a prison sentence of up to two years. For juveniles, the court can order community service as an educational measure. The offender always has to give his/her consent to perform community service. The Centre for Social Work is responsible for overseeing the enforcement of community service and selecting adequate organizations for which the work can be carried out. Community service imposed by the prosecutor (pre-court) can entail performing up to 60 hours of work within three months. When ordered by the juvenile judge as an educational measure (court level), community service shall not exceed 120 hours to be performed within a period of six months.

## 2. Organisational framework for delivering restorative justice measures

Regarding victim-offender mediation, the prosecutor decides whether to refer a case to mediation. Victim and offender cannot initiate or suggest mediation to the prosecutor. The parties can only state their view on mediation after their case has been referred, or deemed eligible for referral to the mediator.

The parents of juvenile offenders must be present during mediation sessions. The defence lawyer may participate, but this happens only rarely in practice. Furthermore, a representative of the Centre of Social Work or another “trustworthy person” may participate. The Instruction on Mediation, issued by the Ministry of Justice, provides information on how the mediation process should be carried out. It states that the tasks convened in the agreement should be fulfilled within three months. The whole mediation process should be finalized within five months.

Mediation at the pre-court level is delivered by individual mediators who work as volunteers alongside their regular professions. Mediators are appointed by the Minister of Justice and need to comply with conditions laid down in the State Prosecutor Act of 2011. To become a mediator, a person must be at least 30 years of age. She/he must hold a university degree and be specifically trained in mediation. Training programmes are organized by the State Prosecutor’s Office, the Ministry of Justice or other adequate institutions.

In 1999, when mediation was introduced in Slovenia, 194 persons received training in mediation. The number of trained mediators has dropped in recent years, and in 2011, 136 mediators were officially listed. 40% of the mediators have a legal background, but other professional backgrounds include economists, teachers, social workers and physicians.<sup>263</sup> The prosecutor has to consider the specialisation of the mediator when referring a case. Up until 2011, the annual workload of each mediator was about ten cases on average. The Office of the General State Prosecutor set up a Supervisory Board in 2000 in order to monitor the work performed by mediators.

At the court level, the Centre for Social Work is in charge with the enforcement of educational measures, including victim-offender mediation. Staff of this centre conduct the settlement between victim and offender, or are responsible for seeing to that an apology can be delivered or that reparation can be made. A face to face encounter between young offender and victim is not strictly necessary for the realization of the reparative tasks.

Concerning the costs for mediation, mediators are paid a fee for each case by the State Prosecution Office. Thus, the parties do not have to bear the formal costs for mediation. They only cover their own expenses arising from travel for instance, but this can be addressed in the mediation agreement. Besides the complexity of the case and the number of participants, the outcome of mediation is also a factor that is considered when remunerating the mediator: the mediator receives a higher fee when mediation is successful.

263 Ministry of Justice, [www.mp.gov.si](http://www.mp.gov.si).

### 3. The use of restorative justice in practice

Victim-offender mediation has been practiced in Slovenia since the year 2000. Statistical data are made available by the Office of the State Prosecutor General. Since 2004, and again since 2010/2011, case referrals to mediation by prosecutors have been dropping significantly. In 2004, 1,939 cases including adult offenders and 344 cases involving juvenile offenders were referred to mediation, while in 2011 only 1,532 adult cases and 88 juvenile cases were referred. By 2013, the number of referrals had dropped further to 576 for adult offenders and 17 for juvenile offenders.<sup>264</sup>

This dramatic decline is partly a consequence of the introduction of new simplified procedures for minor offences and of new alternative measures. However, the more recent decline has been strongly related to a lack of funding for the payment of mediators.

In terms of the success of mediation, between 2004 and 2013, the rate of successfully resolved mediation cases that involved juvenile offenders was around 68% on average, somewhat higher than for adults. In 2012, the success rate for juveniles was only 52%, and peaked at 94% in 2013.<sup>265</sup> The high success rate for 2013 is clearly to be attributed to the very low case numbers in that year and a respectively effective approach to selecting appropriate cases when mediation was opted for.

An evaluation study conducted in 2005 and 2006 by the Institute of Criminology at the Law Faculty in Ljubljana concerning 356 mediation cases (adults and juveniles) revealed that, in almost 80% of unsuccessful cases, one or more parties had not responded to the mediator's invitation or had not given their consent to participate in mediation.<sup>266</sup>

Regarding the outcome of mediation in juvenile cases, in 2011, in about half of all cases an agreement was reached to apologize (51.7%), further to compensate the damage (36.7%) or to a lesser extent to provide restitution, perform community service, etc. The average share of juvenile cases referred to mediation in 2005 was 6.5%, and had dropped to 0.6% by 2013.<sup>267</sup>

In terms of conditional dismissal of prosecution (deferred prosecution), numbers have been declining due to the same reasons as found in the decline of victim-offender mediation. In 2006, prosecution was deferred in 3,300 adult cases and in 417 juvenile cases. By 2013, the numbers had declined to 2,148 adult and 169 juvenile cases. In the period from 2005 and 2013, the share of conditionally dismissed cases among all cases involving juvenile offenders ranged between 12.1% in 2006 and 5.8% in 2013.

The success rate for conditionally dismissed prosecution for juvenile offenders oscillated between 55.9% in 2006 and 79.2% in 2009, levels that were generally higher than those achieved by adults. Regarding the tasks to be fulfilled by juveniles (one or more tasks could be imposed), in 72.3% of cases community

264 Office of the State Prosecutor General RS, annual reports (<http://www.dt-rs.si/>).

265 Office of State Prosecutor General RS, annual reports (<http://www.dt-rs.si/>).

266 See *Filipčič et al.* 2008, cited in *Filipčič* 2015, p. 867.

267 Office of the State Prosecutor General RS, annual reports (<http://www.dt-rs.si/>).

service was performed, in 40.8% damage compensation was made and in 7.5% of cases, offenders made payments to public institutions or humanitarian organizations.<sup>268</sup>

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

The Institute of Criminology at the Faculty of Law in Ljubljana conducted the project titled “Victim-offender mediation in Slovenia”, see also *section 3*.<sup>269</sup> It involved an overall theoretical analysis, an analysis of the legal framework of mediation as well as an empirical evaluation. 356 court files on victim-offender mediation were analysed, as were 73 questionnaires from state prosecutors and 64 questionnaires of mediators.

According to this research, there are great geographical variations in the use of victim-offender mediation in Slovenia, as the analysis on the work of prosecutors showed. The share of cases referred to mediation by prosecutors varied significantly throughout the country. In 2005, in the 11 state prosecutor’s office districts in the country, the proportion of juvenile cases referred to mediation ranged from 0% to 19.4%. Concerning adult offenders, the share of referred cases ranged between 0.1% and 11.6% in 2006, illustrating that overall, practice was rather inhomogeneous in 2005.

The evaluation study developed proposals on how to best promote the implementation of mediation in practice and enhance the work of mediators and prosecutors. Among the findings was the need to provide the parties to mediation with (better) information so as to motivate them to participate. Likewise, the study showed that the public in general needs to be made aware of the availability of mediation and the advantages it can bring. A faster handling of the case by the prosecutor could significantly increase the interest of the parties, the victims in particular. The need for (ongoing) training of mediators was also underlined in the study.

Despite the above mentioned challenges, including the dramatic decline in mediation cases in recent years and the lack of funding for mediators, the existing legal framework is generally favourable towards the use of mediation and other interventions that reflect restorative justice thinking to a certain degree. Restorative justice measures could thus be strengthened over time with the support of committed researchers, legal and social professionals.

268 Office of the State Prosecutor General RS, annual reports (<http://www.dt-rs.si/>).

269 See *Filipčič et al.* 2008, cited in *Filipčič* 2015, p. 866 f.

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# 30. Spain<sup>270</sup>

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*Esther Giménez-Salinas, Samantha Salsench,  
Lara Toro, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The roots of restorative justice in Spain go back to the mid-1980s, when mediation and reparation initiatives were discussed at several conferences organised in particular in Catalonia by *Esther Giménez-Salinas* and her team in Barcelona. The idea of mediation was supported on the one hand by abolitionist thinking and amongst others *Nils Christie's* paper on “conflicts as property” (1977), but also by the victim’s rights movement, that had been very influential in reforms of the position of the victim in the criminal procedure. One rather questionable effect that is unique in Europe is that the women’s equality movement “succeeded” in strictly excluding mediation in cases of gender violence by a law reform in 2004.<sup>271</sup>

The first mediation project in Spain started in 1990 in Barcelona in the field of juvenile justice. It was much easier at the time to organise such projects under juvenile justice legislation, as adult criminal procedure in Spain (similar to Italy) is governed by the principle of legality. Thus the possibilities for public prosecutors to divert cases and send them to mediation schemes were very limited.<sup>272</sup> Experiences with restorative justice measures therefore are restricted to the juvenile justice system, i. e. the age group

270 This snapshot is based on a report by *Esther Giménez-Salinas, Samantha Salsench and Lara Toro* of the University Ramon Llull/Barcelona, see *Giménez-Salinas/Salsench/Toro* 2015, and was compiled by *Frieder Dünkel*.

271 See *Giménez-Salinas/Salsench/Toro* 2015, p. 875.

272 This does not mean that restorative efforts by adult offenders are of no importance at all. Since a reform of the General Penal Code in 1995, delivering compensation/reparation to the victim has served as a general mitigating factor (for all crimes, see Art. 21.5 Penal Code), and plays a role when deciding between suspended and immediate prison sentences as well as in the execution of sentences in the context of early release decisions (Art. 80-87 Penal Code), see *Giménez-Salinas I Colomer* 2013 (also for further activities to promote restorative justice for adults by the *Consejo General del Poder Judicial* in Madrid, an organ which amongst others develops proposals for the modernisation of the judiciary). For certain crimes, the victim can stop the criminal proceedings by withdrawing the complaint, a context in which mediation agreements play a major role, see *Giménez-Salinas/Salsench/Toro* 2015, p. 876 f. Furthermore, also in adult criminal justice, a few pilot projects on mediation have been developed, the first one in Valencia in 1993.

of 14 to 17-year-old juveniles.<sup>273</sup>

The juvenile law reform of 1992 introduced the provision that extrajudicial reparation to the victim can serve as grounds for dismissing criminal proceedings. The same reform also placed community work on a statutory footing for juveniles for the first time. 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 undertakes to repair the damages suffered by the victim, the judge may declare the stay of proceedings, following a respective prior proposal submitted by the public prosecutor.”*

The aforementioned law reform also envisaged a form of out-of-court reparation in which, after the conclusion of proceedings, the sentence would be suspended. In this regard, reparation became one of the key elements of the justice system’s approach to responding to juvenile delinquency.

The most important reform in the field of juvenile justice came with the enactment of the Ley Orgánica 5/2000, the “Law that regulates the criminal responsibility of minors”. In the preamble of the law, mediation and reparation are explicitly given priority over all other disposals. Furthermore, they are emphasised in the light of the principles of minimum intervention (diversion), of education (rehabilitative character of mediation etc.) and of using custody as a last resort.<sup>274</sup> This legislation governing juvenile courts aimed to serve as a sort of “test bed” for future application in the adult jurisdiction. Among others (e. g. the introduction of a broad catalogue of educational measures), 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.

In juvenile justice, mediation and reparation are provided at the pre-court level as a form of diversion, and at the court level as a judicial sanction. Diversion by the prosecutor in accordance with Art. 18 of Ley 5/2000 is limited to first time offenders and to certain minor crimes.

At the court level, too, mediation and reparation can serve as grounds for dismissing a case (Art. 19). Furthermore, they can constitute one element of the juvenile judge’s intervention, or serve as a stand-alone measure. The most important sanctions at the court level are probation, which can be combined with restorative measures, and community service orders. In Spain, more than in other countries, the terminology used in the context of community service orders reflects the restorative roots of this sanction: it is also called “social contribution” and thus refers to the notion that the offender is giving something back to society through work. Community service was introduced into and forms part of the general criminal law, but also applies to juveniles. It is worth noting that the kind of work performed, or the recipient of that work, should be directly or indirectly related to the crime committed.<sup>275</sup>

273 See Giménez-Salinas/de la Cuesta/Castany/Blanco 2011, p. 1318.

274 See Giménez-Salinas/Salsench/Toro 2015, p. 883 f.

275 See Giménez-Salinas/de la Cuesta/Castany/Blanco 2011, p. 1325, 1335 f.; In juvenile cases, special care must be taken that community service does not interfere with school, vocational training or work schedules. Furthermore, juveniles must consent to community service.

To date, Spain, like most of the rest of Europe, has not legislated for conferencing. Nevertheless, some mediators are currently working on the development of a pilot programme for juvenile offenders.

For adults, restorative justice measures can be considered during the execution of sentences according to the Penitentiary Laws from 1979 and 2003. Delivering compensation/reparation to the victim is one major condition for conditional early release and for decisions to place offenders in an open prison setting. Interestingly these regulations are restricted to adults – the law makes no equivalent provision for juvenile prisons.<sup>276</sup>

## 2. Organisational framework for delivering restorative justice measures

As a preliminary consideration, it should be noted that the lack of specific legislation on restorative justice in Spain and the territorial organization of the State, with its *Comunidades Autónomas*, has led to the inexistence of a common and specific policy regarding the organization and configuration of structures of managing restorative procedures. Consequently, the *Comunidades* have developed the implementation of restorative justice in their own territory with differing degrees of intensity, although always lacking behind the standards of many European countries.

Even though mediation or reparation procedures have been around in Spain since 1990, restorative justice took its greatest impetus from the EU 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.

In many regions, mediation services are provided primarily by NGOs. In Catalonia, by contrast, the mediation and reparation programme for juvenile justice, which had been in force since 1990, is provided by the General Directorate of Alternative Penal Measures and Juvenile Justice of the Generalitat de Catalunya. 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.

Two types of teams may be distinguished: governmental and 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 different non-profit organisations.

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

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<sup>276</sup> See *Giménez-Salinas/Salsench/Toro* 2015, p. 897 f.; in practice, it is likely that positive efforts to make reparation or apologize to the victim will have similar effects with regard to the execution of juvenile prison sentences.

the victim and the perpetrator and it may be applied at either the pre-court or the court level, before and after sentencing.

Moving along to the Basque Country, a penal mediation service was founded in Barakaldo in 2007, the first penal mediation service in that region, on the initiative of the *Dirección de Ejecución Penal* (“Directorate of Penal Execution”) of the Department of Justice, Employment and Social Security of the Basque Government. The aim of creating the penal mediation service was to facilitate reparation and conciliation. Before the beginning of any mediation procedure, the personal capacity and situation of the parties are assessed and the facts of the case are clarified. The service is not open to any kind of criminal offence. 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 (which is in fact forbidden by law, see above); crimes against family rights and duties; and crimes against sexual liberty.

### 3. The use of restorative justice in practice

Unfortunately, no nationwide official statistics are available that could give an insight into formal juvenile justice practice. Research that has been done in specific regions of Spain, in particular in Catalonia, shows that the use of mediation has increased over the last 25 years, and in the 1990s in particular. In the years 2000-2007 between 17% and 25% of the informal measures issued by juvenile prosecutors in Catalonia were “mediation”. Court statistics from 2000-2005 in Catalonia do not refer explicitly to mediation and reparation. They do, however, serve as conditions of probation, which accounted for 20% of all informal and formal sanctions in 2005. In addition, community service played an important role in juvenile sentencing practice (12%).<sup>277</sup> The breakdown provided by *Giménez-Salinas/Salsench/Toro* reveals that mediation accounted for 18% of all measures issued against juveniles in Catalonia in 2012 (2,135 in absolute numbers). The numbers have been mostly stable since 2002, following a strong increase during the 1990s.

No data are available on the use of mediation and reparation in adult criminal law.

### 4. Evaluation of restorative justice measures (“good practices”) and challenges

To date, no evaluative research has been conducted on the outcomes of mediation and reparation on recidivism. In Spain, there have only been a few research studies at the regional or local level that investigate the implementation and use of restorative justice. Due to their geographical limitation, these studies are only able to paint part of the full picture of how mediation is used in juvenile justice practice.

<sup>277</sup> See *Giménez-Salinas/de la Cuesta/Castany/Blanco* 2011, p. 1330 ff., 1334 f.,

Similar to other countries and the findings from studies from outside of Spain, between 80% and 86% of mediation cases in Catalonia from 2002-2012 ended in a successful mediation agreement (2012: 80%).<sup>278</sup>

Looking at the overall development of restorative justice in Spain, restorative justice measures have been increasingly used in the juvenile justice system since having first being implemented in the early 1990s. Nevertheless, apart from Catalonia, practice seems to be fragmented and underdeveloped in most regions. Reasons for the very limited use of restorative measures in practice might lay in the culture of strictly adhering to the principle of legality in the adult criminal procedure, and still-reluctant practice in juvenile criminal law due to organisational problems and a lack of (financial) resources. Further still, there is a perceived lack of trust among the judicial gatekeepers in the voluntary organisations that are involved in providing mediation.<sup>279</sup> Signs of change can be observed in some reform proposals and considerations of the past few years, which, however, have had no chance to date to be put into practice. The government is starting to feel some pressure, though, as Spain has not yet adapted its legislation to the EU Framework Decision of 2001 and the respective Directive of October 2012.

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278 See *Giménez-Salinas/Salsench/Toro* 2015, p. 907.

279 See *Giménez-Salinas/Salsench/Toro* 2015, p. 909. Catalonia, again, is an interesting exception. There, mediation is organised by the Ministry of Juvenile Justice and maybe thus more widely accepted by the judiciary.



# 31. Sweden<sup>280</sup>

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*Linda Marklund, Frieder Dünkel*

## 1. Forms of restorative justice interventions for juveniles and their legal basis

The modern roots of restorative justice in Sweden go back to the late-1980s, when the mediation movement came from Norway combined with idealistic ideas of abolitionist thinking (e. g. *Nils Christie's* article on “conflicts as property”, 1977). First mediation projects were founded in 1987 at the police level. These developments involved schemes for juveniles in particular, that have been promoted by the National Crime Prevention Council since 1998 (pilot project). In 2002, a Framework Act for Mediation was enacted, which resulted in initiatives for a nationwide establishment of mediation schemes in juvenile justice. It has to be noted that Sweden has no specialised juvenile justice administration and law. Instead, some special rules and sanctions are provided for 15 to 17-year-old juveniles as well as for 18 to 20 year-old young adults in the general Penal Law and in the Code of Criminal Procedure.<sup>281</sup> Therefore, when we speak of juvenile justice in Sweden, the age group of young persons under the age of 21 are to be considered.

In 2008 it became mandatory for the municipalities to offer mediation to young offenders under the age of 21. This mandatoriness is specified in the Social Service Act.<sup>282</sup>

The 2002 Mediation Act has the aim of promoting mediation at all stages of the criminal procedure without any restriction with regards to age groups and offence categories. However, due to the obligations laid down in the Social Service Act, mediation projects are mainly designed to cater for young offenders below the age of 21. As mediation has to be considered at any stage of the criminal procedure, it can result in a dismissal of the case by the prosecutor (pre-court diversion) or by the judge (court diversion), or can form an element of judicial sentencing, i. e. as a condition of probation etc.

In Sweden mediation is the only sanction/measure that is accepted as “restorative”. Community service

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280 This snapshot is primarily based on a report by *Linda Marklund*, Centre for Conflict Resolution, Stockholm/Sweden, see *Marklund* 2015, and was compiled by *Frieder Dünkel*.

281 See in detail *Haverkamp* 2011, p. 1356 f. The aforementioned source provides a detailed account of juvenile justice in Sweden in terms of reform history, the legislative basis and practice.

282 See *Marklund* 2015, p. 918.

orders have a long tradition in Swedish practice and legislation, but they are seen more as punishment than as a (potentially) restorative measure. Therefore, no information can be provided on practices concerning reparation or compensation orders.

Finally, there are – as far as can be seen – no pilot projects on conferencing in penal matters. Experiences have to date been limited to the area of family law. Likewise, the use of mediation while serving prison sentences is not yet systematically practiced in Sweden, although this would be possible in theory.

## 2. Organisational framework for delivering restorative justice measures

With regard to organisational issues, in 60% of the municipalities in Sweden, mediation is provided by the social services. 20% of the municipalities make use of the services that have been established in other municipalities, while 14% have made other arrangements. Some of the mediation services also offer mediation for adults aged older than 21, but a lack of organisational regulations and statutory provisions that regulate the interplay of prosecutors with mediation schemes makes it difficult to follow that line in practice.

## 3. The use of restorative justice in practice

Regarding practice, data about the number of mediators and the municipalities that really offer mediation are plentiful, but there are apparently no statistics that allow us to assess the role that mediation plays in (juvenile) criminal justice compared to other sanctions. Therefore, it cannot be ascertained whether or not mediation plays a significant role in juvenile criminal proceedings or in the sentencing of young offenders. The feelings of judges and prosecutors are that mediation does not play any significant role, but that it is a good complementary measure.

The aim of making municipalities responsible for delivering mediation schemes nationwide seems to have been widely achieved in practice. A report in 2008 by Brå (Swedish National Council for Crime Prevention) showed that mediation in Sweden prior to 2008 was practiced 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. In 2012, another stock-taking revealed that, out of the 224 municipalities covered by the survey, 135 had their own mediation service, while 79 used either the facilities of other communities or purchased private mediators or organisations as providers. However, it is likely that some of the communities that failed to respond to the survey, mostly small towns of less than 10,000 inhabitants, really face problems in providing sustainable mediation services.<sup>283</sup>

283 See *Marklund* 2015, p. 925.

## 4. Evaluation of restorative justice measures (“good practices”) and challenges

In Sweden, one research study compared recidivism among young offenders who had participated in a mediation programme to a control group that had received other disposals. The main conclusion was that youths who had participated in mediation programmes subsequently relapsed into crime to a lesser extent than youths who had not participated in mediation. Re-offending risk was twice as high for the control group.

Two other research studies addressed the process of mediation and the problems faced by different approaches to organising and delivering mediation programmes. Mediation seems to be a meaningful and effective procedure if well-trained and specialised mediators are involved, which was not the case in all municipalities. It is also important to note that mediation is not one of many juvenile justice activities of the Social Services, but that the programme is a highly specialised one. The same thus applies to the staff who deliver it.

Mediation is a complement as well as an alternative to the legal process, however judicial stakeholders sometimes lack faith and trust in mediators or fear losing their influence on the course of criminal matters.

The results of the second study by *Marklund* showed that the Swedish mediation service needs more explicit support and education at all levels, and that there is a need for 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.

Looking at the general development of mediation in Sweden, it can be said that it is available nationwide for young offenders up to the age of 21 with some promising results, but that further research is needed on how it has been implemented and with what effects on the participating parties and not at least on recidivism.<sup>284</sup>

One open question is whether and how restorative measures could be further developed also for adults and in other settings like in prisons. Overall, the report by *Marklund* on Sweden remains skeptical: “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 (in Sweden) 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 centred

284 See *Marklund* 2015, p. 929 ff.

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.”<sup>285</sup>

### Literature:

- Brå (2008): Medling vid brott. En sammanfattning av Brå: s femåriga regeringsuppdrag (“Mediation in Criminal Cases. A summary of the National Council’s five-year mission”). Stockholm: Brå.
- Haverkamp, R. (2011): Sweden. In: Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I. (Eds.): Juvenile Justice Systems in Europe – Current Situation and Reform Developments. 2<sup>nd</sup> ed., Mönchengladbach: Forum Verlag Godesberg, p. 1355-1388.
- Marklund, L. (2015): Sweden. In: Dünkel, F., Grzywa-Holten, J., Horsfield, P. (Eds.): Restorative Justice and Mediation in Penal Matters – A stocktaking of legal issues, implementation strategies and outcomes in 36 European countries. Mönchengladbach: Forum Verlag Godesberg, p. 917-933.

285 See *Marklund* 2015, p. 932.

# Restorative Justice and Juvenile Offenders in Europe – Comparative Overview

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## 1. Introduction

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, and as can be taken from the 30 snapshots provided in this publication and the 36 national reports provided in *Düinkel/Grzywa-Holten/Horsfield (2015)*, 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 strongly increased, and international standards and instruments from the European Union, the Council of Europe and the United Nations have increasingly referred to mediation and RJ over the last 15 years. What research has also shown is that 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 juvenile justice system. Previous studies have indeed painted a very heterogeneous picture of the European RJ landscape,<sup>286</sup> characterized by in some cases strongly divergent approaches to achieving similar outcomes, and the picture painted by the snapshots is no different: 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 purpose of the comparative overview provided in this chapter is to summarize information on key issues 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 (“good practices”).

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. Conceptual background and definitions of restorative justice

The present 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.<sup>287</sup> In fact, they can be traced back to indigenous cultures and traditions all over the world.<sup>288</sup> 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*.<sup>289</sup> The gradual spreading of RJ in the context of responding to 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.<sup>290</sup>

286 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* 2006; *Mastropasqua et al.* 2010.

287 *Strickland* 2004, p. 2.

288 *Hartmann* 1995; *Liebmann* 2008, p. 302; *van Ness/Strong* 1997; *Braithwaite* 2002.

289 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.

290 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.

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”,<sup>291</sup> or “all things to all people”.<sup>292</sup> Van Ness/Strong state that “it can seem that there are as many answers as people asked”.<sup>293</sup> 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”.<sup>294</sup> 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”.<sup>295</sup>

The modern concept of RJ was originally formulated in a theory by Christie (“conflicts as property”),<sup>296</sup> 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.<sup>297</sup> “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.”<sup>298</sup>

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,<sup>299</sup> in the end, the conflict caused by an offence is principally viewed as being between the offender and the State and its laws,<sup>300</sup> 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.”<sup>301</sup>

“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.”<sup>302</sup> 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.”<sup>303</sup> More often than not, victims have a desire to question the offender, to receive an apology

291 Fatah 1998, p. 393.

292 See for instance O’Mahony/Doak 2009, p. 167.

293 Van Ness/Strong 2010, p. 41.

294 Van Ness/Strong 2010, p. 41.

295 Van Ness/Strong 2010, p. 41.

296 Christie 1977.

297 O’Mahony/Doak 2009, p. 165 f.; Doak/O’Mahony 2011, p. 1,717; Strickland 2004, p. 3.

298 Doak/O’Mahony 2011, p. 1,717.

299 For a comprehensive overview of the juvenile justice landscape in Europe today, see Dünkel et al. 2011; Dünkel 2013; 2015; 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.

300 Doak/O’Mahony 2011, p. 1,717; Zehr 1990; Strickland 2004, p. 2.

301 Christie 1977, p. 1; Walgrave 2008, p. 5.

302 See Aertsen et al. 2004.

303 Van Ness/Strong 2010, p. 42.

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*.<sup>304</sup> Such or similar compensation 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 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.<sup>305</sup> 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.<sup>306</sup> 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.<sup>307</sup> 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.

304 See the reports by *Dünkel/Păroşanu* on Germany, *Doak* on England/Wales, *Cario* on France and *Aertsen* on Belgium in *Dünkel/Grzywa-Holten/Horsfield* 2015.

305 *Willemsens* 2008, p. 8.

306 *O'Mahony/Doak* 2009, p. 166.

307 See for instance *Liebmann* 2007.

This overall conceptualization places the process involved at the centre of importance.<sup>308</sup> 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.”<sup>309</sup> 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.<sup>310</sup> 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 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.”<sup>311</sup> Some argue for including any action that “repairs the harm caused by crime”.<sup>312</sup> 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”.<sup>313</sup> 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.”<sup>314</sup> 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.

308 Zehr 1990.

309 Marshall 1999, p. 5.

310 Braithwaite 1989.

311 Liebmann 2008, p. 301.

312 Daly/Hayes 2001, p. 2; see also Willemsens 2008, p. 9.

313 O’Mahony/Doak 2009, p. 166; see also United Nations Office on Drugs and Crime 2006.

314 Van Ness/Strong 2010, p. 43.

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 achieve their outcomes.”<sup>315</sup> 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.”<sup>316</sup> 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.<sup>317</sup> 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,<sup>318</sup> 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 (see the introductory chapter to this publication, as well as specific references to said standards throughout this report).

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”.<sup>319</sup> 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.

315 *Doak/O’Mahony* 2011, p. 1,718.

316 *United Nations Office on Drugs and Crime* 2006, p. 6.

317 See for instance *Campbell et al.* 2006 on experiences in Northern Ireland.

318 See for instance *Latimer/Dowden/Muise* 2005; *Bergseth/Bouffard* 2007; *Sherman/Strang* 2007; *Shapland et al.* 2008; *Shapland/Robinson/Sorsby* 2012.

319 *Daly* 2004, p. 500.

## 1.2 Aims and methodology

As already described in the introductory chapter to this publication, the aim of this report is to compile a snapshot of the current Restorative Justice landscape for juveniles as it stands in Europe today in theory and practice, and to subsequently identify “good practices” in Europe, upon which the further stages of the ECJJ project (the “European Model” and the “toolkit” as described in the introduction to this publication) can build.

In a first step, short national reports (or “snapshots”) were compiled by the Greifswald research team on Restorative Justice in 30 EU juvenile justice jurisdictions. The reports share a common report structure so as to facilitate comparability, and provide information on 1.) forms of Restorative Justice and their legislative basis, 2.) the organisational structures that have been put in place, 3.) the use of Restorative Justice in practice, and 4.) evaluation of Restorative Justice and “good practices”. In a second step, these national accounts were compiled and subjected to analysis so as to draw a general picture of the RJ landscape for juveniles, to identify recurring obstacles and challenges and to subsequently highlight “good practices” for overcoming them.

The basis for this research was provided by the results from a wider research study conducted by the Department of Criminology at the University of Greifswald, Germany, titled “Restorative Justice and Mediation in Penal Matters”.<sup>320</sup> The study 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. The methodologies of the publication at hand and the aforementioned Greifswald-project are virtually congruent: the larger Greifswald study compiled national reports from 36 European EU and non-EU countries on Restorative Justice for both adult and juvenile offenders according to a common report structure, that were subsequently drawn together to provide a comprehensive overview of RJ in Europe and analysed with a view to identifying effective solutions to the obstacles that countries are facing in establishing and sustaining effective Restorative Justice measures.

Thus, the research study at hand is primarily based on the Greifswald project, and therefore shares the same conceptual approach. In light of the diversity and flexibility in defining the concept of RJ, drawing a conceptual outline is by all means necessary.

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.<sup>321</sup> 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.*” 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, res-*

320 See *Dünkel/Grzywa-Holten/Horsfield* 2015. At this point, it needs to be pointed out that, whenever a country is stated in *italics*, reference should be made to the national report from that country published in *Dünkel/Grzywa-Holten/Horsfield* 2015, as well as to (insofar as provided) the snapshot of said country in this volume. The national reports from *Dünkel/Grzywa-Holten/Horsfield* 2015 are listed separately in the bibliography at the end of this report.

321 *United Nations Economic and Social Council* 2002.

*titution 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. 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.

### 1.3 Structure of this chapter

The remainder of this chapter is structured as follows. *Section 2* is devoted to mapping out Restorative Justice in juvenile justice in Europe based on the snapshots provided in this volume as well as on the full national reports from the Greifswald study (*Dünkel/Grzywa-Holten/Horsfield 2015*). The Section covers the motors for Restorative Justice reform in Europe, forms of Restorative Justice available and their legal basis, organisational structures, the use of Restorative Justice measures in practice and a brief summary of general research and evaluation findings on Restorative Justice. In advance, it is safe to say at this point that the picture drawn by this analysis is very much in line with the findings of previous research studies,<sup>322</sup> in that it “*continues to be one of considerable heterogeneity, even if the various programmes are aiming to address common questions.*”<sup>323</sup> *Section 3* then provides an analysis of the results presented in *Section 2* with the aim of identifying “good practices” for the implementation of restorative strategies in the context of responding to youth offending. Following a brief definition of what constitutes good practice in this regard (what defines practice as “good”), the analysis continues with a presentation of what the recurring common obstacles and hindrances have been in the European Union for establishing and sustaining Restorative Justice strategies in juvenile justice that achieve good outcomes and that are not entirely marginalized in terms of their role in juvenile justice practice (*Section 3.1*). Drawing on these central challenges as a starting point, *Section 3.2* is then devoted to identifying experiences in Europe in which these issues could be successfully overcome. Three countries in particular – *Belgium, Finland, Northern Ireland* – serve as key examples, as they have successfully implemented exemplary restorative strategies for young offenders, accompanied by comparatively high rates of use and promising evaluation results, as shall become more than clear as this report progresses.

The chapter closes with a summary in *Section 4* 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 procedure and juvenile justice practice in a fashion that achieves positive outcomes for all involved.

322 For instance *Miers/Willemsens 2004; Miers 2001; Aertsen et al. 2004; Miers/Aertsen 2012a*.

323 *Miers/Aertsen 2012a*, p. 514.

## 2. Overview of Restorative Justice in penal matters involving juvenile offenders in Europe

As already announced, this section of the report is devoted to summarizing the findings from the snapshots in order to create a picture of the European landscape of Restorative Justice in juvenile penal matters. We address each subheading of the snapshot outline presented in the introduction to this publication with a separate subchapter. Thus, *Section 2.2* provides an overview of the forms of Restorative Justice that are available to juveniles in the European Union, and how they are tied into the criminal justice system. *Section 2.3* is devoted to providing an outline of organizational structures, while *Section 2.4* investigates the use and role of Restorative Justice in criminal justice practice. Finally, *Section 2.5* provides a brief account of key results from research and evaluation in Restorative Justice measures and an overview of the state of research in Europe.

While not foreseen in the snapshot structure outlined in the introductory chapter to this publication, it is nonetheless valuable to take a step back to investigate what the key driving forces behind the introduction of Restorative Justice in penal matters have been *per se*. Just as conceptual understandings of what RJ actually implies show a great deal of variation (see *Section 1.1* above), 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, of which juvenile justice reform constitutes merely one, that have been decisive in the evolution of RJ to a “worldwide movement”<sup>324</sup> over the last three decades, and to its entry into the realm of the criminal procedure. The ways in which RJ is implemented in a given country depends on the context in or from which they have arisen, which is why we shall now turn our attention to these contextual factors prior to looking at the RJ landscape in the European Union in more detail.

Finally, it needs to be stressed that the analyses that follow in this *Section 2* also incorporate non-EU countries that were covered in the larger Greifswald study, for instance *Switzerland, Ukraine, Russia, Norway* and numerous Eastern European countries, but for which no snapshot is provided in this publication. Where possible, differentiation is made between EU and non-EU countries. Simply omitting the information we have on these jurisdictions would serve no purpose, as the experiences that are being made there – particularly in those countries that have most recently introduced RJ in the context of adapting their national legislation with a view to potential EU-accession – can prove to be valuable.

324 *Aertsen et al.* 2004, p. 16.

## 2.1. Key driving factors for the introduction of Restorative Justice in European (juvenile) justice systems<sup>325</sup>

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.<sup>326</sup> Europe's earliest bottom-up VOM initiatives in *Austria, 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.<sup>327</sup> The reports 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.

### 2.1.1. 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, Poland, Romania, Scotland, Slovakia* and *Slovenia*,<sup>328</sup> 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, Croatia, France, Germany, Hungary,*

325 *Subsection 2.1* is based on information drawn from the 36 national reports from the Greifswald project, as the snapshots did not focus on this matter due to spatial constraints. Likewise, the presentation also includes non-EU states, as reform developments outside the EU, in *Norway* in particular, in the early years of RJ were very influential for the rest of Europe.

326 For instance *Christie* 1977.

327 *Willemsens* 2008, p. 11.

328 The same was true for the Non-EU-member states of *Norway, Russia, Turkey* and the *Ukraine*.

*Ireland, Italy, the Netherlands, Northern Ireland, Portugal, Romania, Scotland, Slovenia, Spain*),<sup>329</sup> Such general criminal justice reforms, which were observable in juvenile justice as well, 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 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. The reports from EU-states such as *Austria, Belgium, England and Wales, Estonia, Germany, Ireland, Italy, Northern Ireland, Portugal, Romania, Spain* and the *Non-EU-members of Bosnia and Herzegovina, Norway, Russia, 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).<sup>330</sup> 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.

### *2.1.2. 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.<sup>331</sup> The reports from *Croatia, Denmark, England and Wales, France, Germany, Greece, the Netherlands, Poland, Romania, Scotland, Slovakia, Spain* and *Sweden*<sup>332</sup> 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

329 See for instance *Cavadino/Dignan* 2006; 2007. This aspect was also mentioned in the national reports of the Non-EU-members *Bosnia and Herzegovina, Russia, Serbia, Switzerland* and *the Ukraine*.

330 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; *Dünkel* 2013; 2015.

331 See for instance *Dignan* 2004; *Miers/Aertsen* 2012a, p. 530; *Willemsens* 2008, p. 11.

332 From Non-EU-member states: *Montenegro, Norway, Russia, Serbia* and *Switzerland*.

the deficiencies of traditional criminal justice in meeting the needs of victims<sup>333</sup> was one of the primary driving factors. “Whilst initially victims’ rights movements were focused on promoting victims’ interests to the detriment of offenders’ interests”,<sup>334</sup> today “most victims’ advocates are oriented towards a broader scope of social, personal, and juridical needs of those victimized by crime”.<sup>335</sup> 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.

### 2.1.3. 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).<sup>336</sup>

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,<sup>337</sup> and Basic Principle 12 of the “European Rules for Juvenile Offenders Subject to Sanctions or Measures” (Council of Europe Recommendation No. R. (2008) 11).<sup>338</sup> 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.”<sup>339</sup>

Within our research projects, the reports from *Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, the Netherlands, Poland, Portugal, Romania and Slovenia*<sup>340</sup> 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 been central driving forces for introducing RJ and the “access points” through which it can enter the (juvenile) justice system *per se*.

333 See Aertsen et al. 2004; van Ness/Strong 2010, p. 42.

334 Willemsens 2008, p. 8.

335 Walgrave 2008a, p. 618.

336 See in particular Willemsens 2008 for an investigation into the role of such standards in Europe. See also Miers/Aertsen 2012a, p. 538 ff.

337 Council of Europe 2003.

338 Council of Europe 2008.

339 Council of Europe 2006.

340 From Non-EU-member states: *Bosnia and Herzegovina, Macedonia, Montenegro, Serbia, Turkey and Ukraine*, which underlines the importance of human rights instruments in the process of adjusting to a European Union philosophy of a state governed by the rule of law (*Rechtsstaat*).

This latter issue needs to be understood within the context of European harmonization and EU accession.<sup>341</sup> 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.<sup>342</sup>

#### 2.1.4. Summary

As has been illustrated above and summarized in *Table 1* below, 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. On the contrary, there has indeed been a certain degree of overlap, as the different issues are also interrelated to a certain degree.

341 *Liebmann* 2007, p. 49.

342 See *Lappi-Seppälä* and *Csúri* in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 247, 370f.

**Table 1: Factors influencing the introduction and implementation of Restorative Justice in penal matters in Member States of the EU**

<b>Abolitionist thinking; traditional criminal justice system deemed inappropriate forum for resolving conflicts</b>	<i>Austria; Belgium; Croatia; Finland; Latvia; the Netherlands; Spain</i>
<b>Strengthening victims' rights; victim's movements</b>	<i>Croatia; Denmark; England and Wales; France; Germany; Greece; the Netherlands; Poland; Scotland; Slovakia; Spain; Sweden</i>
<b>Inefficient/overburdened criminal justice system</b>	<i>Bulgaria; Croatia; Greece; Hungary; Ireland; Latvia; Portugal; Romania; Slovakia; Slovenia</i>
<b>Rehabilitation and reintegration over retribution and punishment; diversion</b>	<i>Austria; Belgium; Croatia; France; Germany; Hungary; Ireland; Italy; the Netherlands; Northern Ireland; Portugal; Romania; Scotland; Slovenia; Spain</i>
<b>Reforms in particular in the field of Juvenile Justice or Youth Assistance and Welfare</b>	<i>Austria; Belgium; England and Wales; Estonia; Germany; Ireland; Italy; Northern Ireland; Portugal; Romania; Spain</i>
<b>Curbing custody rates</b>	<i>Estonia; Hungary; Ireland; Northern Ireland; Poland; Romania; Scotland; Slovakia; Slovenia</i>
<b>Compliance with international standards, EU harmonization</b>	<i>Bulgaria; Croatia; Czech Republic; Estonia; Hungary; the Netherlands; Poland; Portugal; Romania; Slovenia</i>
<b>Lack of trust in the judiciary following period of transition</b>	<i>Bulgaria; Czech Republic; Northern Ireland</i>

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* and *Slovenia* 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 background of a perceived lack of trust in the justice system due to a phase of societal transition and conflict.<sup>343</sup>

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 practice, how they are tied into the criminal procedure, and on the quantitative role that they play in a country's criminal justice practice. Accordingly, there is a great degree of variation in Europe in these regards, to which we now turn our attention.

<sup>343</sup> For an elaborate look at the role and potentials of transitional contexts, see *Clamp* 2014. See also *O'Mahony/Doak/Clamp* 2012.

## 2.2 Forms of Restorative Justice in European juvenile justice and their legislative basis

Summarizing somewhat, 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 (see *Sections 2.2.2.1* and *2.2.2.2* below). This is not entirely surprising, as European international standards predominantly focus on mediation.<sup>344</sup> 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. All 36 reports in the research of *Dünkel, Grzywa-Holten* and *Horsfield* (2015) and almost all 30 jurisdictions covered in the present survey of EU-member states 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 2.2.2.1* below). In *Cyprus*, mediation is yet not available, and in *Bulgaria* it is available only for adult offenders.

If we widen the conceptual framework and include practices that reflect the making of reparation to victims and communities without a preceding restorative process, it becomes apparent that *Community Service* is very widespread in Europe, receiving mention in 34 of 36 national reports in the study of *Dünkel/Grzywa-Holten/Horsfield* (2015) and 25 out of 30 jurisdictions of the present EU-member study (albeit with certain reservations in most cases with regard to its restorative nature, see *Section 2.2.2.4* below). Likewise, 31 of 36 authors in the first study 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 restorative processes, like VOM and conferencing, can gain entry to the criminal justice system in most of Europe, as shall become clearer as this *Section* progresses.

Therefore, *Section 2.2.1* 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 2.2.2.1* and *2.2.2.2* respectively), followed by a brief look at “peacemaking circles” that have begun to emerge in some countries (*Section 2.2.2.3*). In presenting these practices, they are placed into the context of the “access-points” described in *Section 2.2.1*, to which we shall shortly be turning our attention. Finally, *Section 2.2.2.4* 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

344 *Zinsstag/Teunkens/Pali* 2011, p. 19.

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.

### 2.2.1. Gateways to the formal 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 reform, linked with a stronger focus on the interests and rights of victims, decision-makers throughout the juvenile 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 by *Dünkel/Grzywa-Holten/Horsfield* (2015), among such conditions we find the condition of having “made reparation” to or having “reconciled” with the victim. 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 *Croatia, Estonia, Latvia, Lithuania, Poland, 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, Spain* 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, Portugal, Spain*).

Likewise, while not as widespread as prosecutorial diversion, in 26 of the countries covered in the study of *Dünkel/Grzywa-Holten/Horsfield* (2015), the *courts have powers to refrain from convicting or sentencing a young 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, 18 of the 30 jurisdictions of the present study reported that courts can regard made reparation, achieved reconciliation or “effective repentance” as a *mitigating factor in sentencing* (*Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Spain, and Sweden*).

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, Slovakia* 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.

31 of 36 reports of the Greifswald study and additionally all three EU-member states not covered by it indicated that their national courts are equipped with *special sentencing options* (special sanctions or measures) that reflect Restorative Justice thinking, most prominently community service (34 of 39 countries covered in both studies, often practised as a condition of probation, e. g. in *Cyprus* or *Malta*) 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 39 reports (concerning both studies together) stated that Restorative Justice approaches were being used in this context on an experimental level.

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).

## 2.2.2. Forms of Restorative Justice

### 2.2.2.1. 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)”.<sup>345</sup> Liebmann defines it as “a process in which an impartial third party helps two (or more) disputing parties to reach an agreement.”<sup>346</sup> 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.<sup>347</sup>

As already indicated in *Section 2.2.1* 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 and Slovakia* and as Non-EU-member states in *Montenegro, Serbia 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.

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 and the snapshots, services that offer VOM can be found in all countries covered in both studies with the exception of *Cyprus*, 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, Malta, 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.

VOM is linked to the criminal justice system in a number of ways throughout Europe. In most of Europe,

<sup>345</sup> See *Council of Europe* 1999.

<sup>346</sup> Liebmann 2007, p. 27.

<sup>347</sup> See for instance *Bazemore/Umbreit* 2001.

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.

### 2.2.2.2. Restorative 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.<sup>348</sup> *“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.”*<sup>349</sup> 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.”*<sup>350</sup> 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, 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.”*<sup>351</sup>

Maxwell/Morris/Hayes<sup>352</sup> state that conferencing *“emphasizes addressing the offending and its consequences in meaningful ways, reconciling victims, offenders, and their communities through reaching agreements about*

348 O’Mahony/Doak 2009, p. 175; Zinsstag/Teunkens/Pali 2011, p. 45; Hayes/Maxwell/ Morris 2006.

349 Doak/O’Mahony 2011, p. 1,736.

350 Zinsstag/Teunkens/Pali 2011, p. 18; see also Zinsstag/Vanfraechem 2012.

351 Zinsstag/Teunkens/Pali 2011, p. 18.

352 Maxwell/Morris/Hayes 2008, p. 92.

*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,<sup>353</sup> not least represented by the great number of participants involved in the process.<sup>354</sup>

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 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.<sup>355</sup> 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

353 O’Mahony 2008.

354 Van Ness/Strong 2010, p. 29; see also Zinsstag/Vanfraechem 2012.

355 For an overview of the developments in the juvenile justice system in *Northern Ireland*, see O’Mahony 2011; Chapman 2012; Zinsstag/Chapman 2012.

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 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”.<sup>356</sup> 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.

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:

356 See the report on *Belgium* by *Ivo Aertsen* in *Dünkel/Grzywa-Holten/Horsfield* 2015.

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.<sup>357</sup> 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.<sup>358</sup> 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.

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

357 See Hagemann 2009, p. 236 ff.

358 See Hagemann 2009, p. 238 ff.; Blaser et al. 2008, p. 27 ff.

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* as a Non-EU-Member state, 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 39 national reports submitted in the two studies (see *Table 2*). 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 2: 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.<sup>359</sup> 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.<sup>360</sup>

### 2.2.2.3. Peace-making circles

One form of restorative practice that is even more seldom in Europe are so-called “peace-making circles”.<sup>361</sup> A peace-making circle is an alternative, inclusive and non-hierarchical approach to conflict resolution that has its origins in ancient tribal conflict resolution rituals.<sup>362</sup> *Canada* can be seen as the birth place of peace-making circles, where they have been used for a long time by First-Nation groups as a means of resolving conflicts.<sup>363</sup>

Compared to other restorative practices, peace-making circles aim to address even broader levels of harm by involving a larger spectrum of people affected by the crime committed.<sup>364</sup> *“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.”*<sup>365</sup> 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. Peace-making 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” peace-making circles involve multiple procedural steps or phases, usually divided into “case

359 In Germany the scope of juvenile justice in general includes young adults, see *Dünkel* in *Dünkel/Grzywal/Horsfield/Pruin* 2011, p. 587 ff.

360 See *Sections 2.5* and *3.2.1.2* below.

361 See for instance *Lilles* 2001; *Rieger* 2001; *Pranis/Stuart/Wedge* 2003; *Stuart/Pranis* 2008.

362 See *Gavrielides* 2007, p. 34.

363 See *Stuart/Pranis* 2008, p. 121; *Dhondt et al.* 2013; *Törzs* 2013.

364 *Fellegi/Szegő* 2013, p. 9.

365 *Törzs* 2013, p. 30 f.

selection”, “healing circles”, “sentencing circles” and “follow-up circles”.<sup>366</sup> 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 progress of the offender.*”<sup>367</sup> 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, under the leadership of the University of Tübingen, Germany, began an EU-funded action research project titled “How can Peace-making Circles be implemented in countries governed by the ‘principle of legality’?”<sup>368</sup> The two year project, running from September 2011 to August 2013, sought to introduce local circle pilots in multiple regions in *Germany, Belgium*<sup>369</sup> and *Hungary*.<sup>370</sup> “*The project aimed at experimenting with [peace-making 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.*”<sup>371</sup> In each country, the partner institutions entered into cooperation with local mediation service providers and established local collaborations in order to hold peace-making 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.<sup>372</sup>

Research results have been published.<sup>373</sup> The circles in *Belgium* and *Hungary* addressed both juvenile and adult offenders, while the *German* project involved only juveniles and young adults in the peace-making circles. This is due to the fact that in Germany, the local mediation provider was specialized in youth matters. A “Handbook for Facilitating Peace-making Circles” has already been published based on the findings from the project.<sup>374</sup> 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.

366 See *Gavrielides* 2007, p. 34 f.; see also *Fellegi/Szegő* 2013.

367 *Gavrielides* 2007, p. 35.

368 For information on the project, see *Dhondt et al.* 2013; *Fellegi/Szegő* 2013; see also the Foresee website, at <http://www.foresee.hu/en/segedoldalok/news/592/bf41d09c06/5/>.

369 The responsible partner institution in *Belgium* is KU Leuven.

370 The *Hungarian* project partner is Foresee Research Group/National Institute of Criminology.

371 *Fellegi/Szegő* 2013, p. 10.

372 *Dhondt et al.* 2013.

373 The final research report is available at [http://www.suggnome.be/pdf/onderzoek/PMC\\_final\\_report.pdf](http://www.suggnome.be/pdf/onderzoek/PMC_final_report.pdf).

374 *Fellegi/Szegő* 2013.

#### 2.2.2.4 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. In the context of the general criminal justice process, community service is used: 1.) as a substitute sanction for adults or juveniles for cases of a specific severity in terms of the term of imprisonment defined by law (*Belgium, Bosnia and Herzegovina, 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*);<sup>375</sup> 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 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-year-old juveniles and 18 to 20-year-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, Finland and Sweden*).

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

<sup>375</sup> In *Cyprus* and *Malta* it is provided as a condition of a probation order. In *Luxembourg*, under the Youth Protection Act principally only safeguarding, educational and protective measures can be applied to juveniles, and no penalties. The Youth Tribunal can, instead of applying reprimand, supervision or placement, decide that the juvenile remains at home and may impose the condition that the juvenile carries out philanthropic or educational work (Art. 1).

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*, the *Czech Republic*, *Germany* or *Slovakia*). 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 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.”<sup>376</sup> *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.”<sup>377</sup>

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.”<sup>378</sup> 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 have, especially on young offenders, linked with the fact that the community receives reparation in return, nonetheless

376 See the Danish report by *Storgaard* in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 200.

377 See the report on *Lithuania* by *Bikelis/Sakalauskas* in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 487.

378 See *Wright* 1991, p. 44.

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.

### 2.2.3. 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.<sup>379</sup> While 38 of 39 countries covered in both studies made reference to the existence of VOM services in their countries at all (*Cyprus* being the exception), only *Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Hungary, Latvia, Malta, the Netherlands* and *Poland* provide nationwide service coverage, as does *Norway* (non-EU). In other countries, for instance the non-EU countries *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.

Virtually all countries covered in this study and the Greifswald study on which it is based 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. 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

379 This is a confirmation of findings from previous research into VOM in Europe, see for instance *Pelikan/Trenczek* 2006; *Miers/Willemsens* 2004; *Mestitz/Ghetti* 2005; *Aertsen et al.* 2004.

practice as – to date – in most of Europe, provision of VOM and conferencing services is geographically constrained.

Community Service is available in the vast majority of countries in Europe, both within and outside the EU. 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 3.2.1.3* below.

## 2.3. Organisational structures

As has become clear from the elaborations in the preceding subchapter, there is indeed a great degree of variation in terms of how restorative measures have been implemented in detail, for instance with regard to the procedures that are in place for referrals between the agencies and services involved, the providers of restorative services, the training and eligibility criteria for mediators/facilitators and the degree of geographical service coverage.

Looking at VOM, there appears to be little uniformity in Europe regarding the agency or body that is responsible for providing the service infrastructure. In *Belgium* this is done by NGOs, while in *Austria* (NEUSTART), the *Czech Republic*, *Latvia* and *Malta* for instance, this is a task of the probation services. Yet other countries have placed the responsibility for providing VOM in the hands of the social services, like in *Finland* and *Estonia*, or of private services like SiB in the *Netherlands*. Finally, some countries (most prominently *Germany*) apply a mixture thereof. VOM providers which are specialized in youth matters are established in a few countries, like in *Germany*, however in most countries the responsible body or agency offers mediation both for adults and juveniles.

Furthermore, there are differences regarding the status of the mediators – they might be volunteers with training like in *Denmark* or *Finland*, professionals like in *Austria*, *Croatia*, the *Netherlands*, trained probation officers like in *Czech Republic*, *Hungary*, *Latvia* and *Slovakia* or a mix thereof. In *Belgium*, mediators are generally full or part time professionals and to a small extent volunteers who receive coaching by professional mediators.

Regarding the professional background of mediators, in most countries a background in the fields of education, social work, sociology, psychology or law can be found. There are noteworthy differences regarding the regulation of the qualification of mediators. While in some countries, a university degree for mediators is required, for instance in *Czech Republic*, *Romania*, *Slovenia*, *Slovakia*, in other countries there is no restricted access to the profession of the mediator, for instance in *Denmark*, *Finland* or *Germany*. In most countries, mediators receive initial training and further in depth-training on mediation in order

to perform their work. In *Austria*, in-depth and long-lasting training provides for high quality standards with respect to the mediator profession. Emphasis is put on interchange and learning from experience while being trained as a mediator. The training programme takes four years overall and is divided into basic training and a further training programme for becoming a certified mediator, both parts including theoretical and practical aspects.

In order to promote unitary practices and to ensure quality standards regarding the mediation procedure and the profession of the mediators, some countries like *Latvia* or *Romania* have established Mediation Councils. These associations are in charge with authorizing mediators and maintain a list of certified mediators. In *Poland*, VOM providers, either institutions delivering mediation services (principally NGOs) or individual mediators (so-called “trustworthy persons” with specific qualifications) need to be listed in the register of the District Court in order to carry out mediation.

Moreover, 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. As described in *Section 2.2* above, the number of countries in which all regions can provide VOM-services is small (*Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Hungary, Latvia, Malta, the Netherlands, Norway* and *Poland*). In the remaining countries, have local or regional initiatives are in place, run by research teams, NGOs or state agencies in certain regions of the country, with significant variation in term of geographic coverage.

In terms of participants of VOM, there are differences with respect to the presence of a third party that may attend the mediation sessions. Regarding the role of parents or other legal representatives, in some countries it is regulated that the parents of the juvenile must participate in VOM like in *Slovenia*, while other stipulate that participation of parents or other legal representatives is optional like in *Finland, Germany* and *Poland*.

In contrast to VOM, conferences involve a larger number of participants from the victim’s and the offender’s side, but also from the community, such as police officers, social workers, teachers, and representatives from the education and health systems. This is an apparent point of consensus in European conferencing implementations, which is no surprise as involving more people is inherent to the conferencing model. The *English* referral order also involves community volunteers in the process. However, due to the reservations as to the “restorativeness” of this measure and to what degree it resembles actual conferencing (see *Section 2.2.2.2* above), the referral order is not highlighted any further in this section.

As already stated above in *Section 2.2.2.2*, what the conferencing approaches in Europe also all have in common is that they (also) seek to target cases of more serious offending. In *Belgium, Ireland* and the *Netherlands*, there no restrictions as to offence severity; in *Northern Ireland* only the most serious cases like murder, manslaughter and terrorist offences are not automatically eligible for a youth conference. The *German* pilot project in Elmshorn also explicitly targets serious crimes.

Accordingly, conferencing is mostly applied at the court-level (insofar as conferencing is linked directly to and mandatorily has effects on the criminal procedure, see below). In *Ireland*, conferencing is available

both in the context of police diversion and at the court-level. At the police level, if 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. 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. Court-ordered conferences differ from diversionary conferences though in that they are facilitated by specially trained probation workers rather than police officers.

The framework is similar in *Northern Ireland*, where there are also both diversionary and court-ordered youth conferences that are directly linked to the criminal process. However, there, conferences are mandatory at the court level except for the most serious offences, while this is not the case in *Ireland*. In *Belgium*, conferences and VOM must be offered in all cases in which a victim has been identified, regardless of the severity or nature of the crime. Unlike the situation in *Ireland* and *Northern Ireland*, where successful fulfilment of conference plans results in closure of the case in some way or another, the *Dutch* own strength conferences can be applied for completely independently from the criminal proceedings, and conference outcomes usually have no bearing on the penal process. The situation is similar in *Belgium*: fulfilling conference agreements does not automatically have effects on the criminal process in terms of diversion or sentence mitigation. If the outcome of conferencing satisfies the public interest in how the offence is responded to, there *need* not be any further action on behalf of the state, i. e. the outcome *can* be considered when making decisions as to the course of proceedings and sentencing. Conferences may be conducted by specially trained independent coordinators (the *Netherlands*), employees of public services (*Belgium, Ireland*) like the probation service (*Ireland*), youth assistance services or specially founded conferencing services (*Northern Ireland*) or by specially trained police officers (also *Ireland*). In *Northern Ireland*, all conferences (both diversionary and court-ordered) are conducted by facilitators who are employees of the special Youth Conferencing Service. In *Ireland*, it is specially trained probation workers from the Probation and Welfare Service who deliver court-ordered conferences. In the *Netherlands*, the so-called “real justice” or “own strength conferences” are provided by “Own Strength Centres”, which are run by Eigen Kracht Centrale, a subsidized private organization. Facilitators are instructed coordinators who follow the “real justice script”. In the majority of pilot projects stated in *Section 2.2.1.2* above, services are provided at the local level by NGOs (*Poland, Ukraine*) and research groups that include trained facilitators (*Germany, Hungary*), which is understandable given the fact that they are projects that are seeking to add conferencing to an already existing juvenile justice system that thus naturally provides no dedicated state-run infrastructures.

Overall, it can be said that implementation strategies are rather heterogeneous when one looks at the details. As shall also become clear in the further course of this publication, the same applies to the use of these measures in practice. It is not possible to precisely pinpoint whether it is “better” to use professionals or volunteers as facilitators/mediators, or whether to place responsibility for providing services in the hands of state agencies (like the probation service or child support services), NGOs or private organisations. Good experiences have been made and difficulties have been encountered with all of these approaches throughout Europe. As shall become clear in the later analysis, rather than attempting to superimpose a detailed one-size-fits-all strategy, it is vital that implementations of RJ take into account and are tailored to the context in which they are applied.

## 2.4 Restorative Justice in (juvenile) criminal justice practice

As already elaborated in *Section 2.1* 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 2*, 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.

In the following subchapters, we investigate the available quantitative data and show the role that RJ plays in practice in numerical, quantitative terms (*Section 2.4.2*) and how these figures have developed over time (*Section 2.4.3*). Prior to doing so, however, it is important to consider the problems that exist in measuring the use and role of Restorative Justice in practice (*Section 2.4.1*). Data refer not only to juveniles, but also to adults or in general, as specific data on juveniles are not always available and painting a wider, more complete picture of the use of RJ in practice is by all means sensible, since the use of RJ with adults in practice is an important contextual factor, as it is indicative of a general acceptance (or lack thereof) of the notion of RJ and what it can offer. Respective age differentiations are made throughout. We also refer to the nine European Non-EU-member states included in the research by *Dünkel/Grzywa-Holten/Horsfield 2015*, as some of the difficulties of “measuring” can be best exemplified in countries that have just recently begun reforming their (juvenile) justice systems and introducing Restorative Justice measures.

### 2.4.1. 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.<sup>380</sup> 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

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380 See *Miers/Willemsens 2004*, p. 155 ff. and *Willemsens 2008*, p. 22 ff. for some challenges in “measuring” RJ in practice.

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 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.<sup>381</sup> 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.

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

381 In this regard, see *Vanfraechem/Aertsen* 2010, p. 273.

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.

#### 2.4.2. Data on the quantitative use of Restorative Justice in practice

With these shortcomings in mind, overall it can be said that, both for adults and for juveniles, 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 2.2.2.4* 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 and young adults were community service. At the same time, its availability for adults (aged 21 and over) 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 persons under the age of 18 (including persons under the age of criminal responsibility (!)) 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 Finnish 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<sup>th</sup> 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* (estimated population 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* (estimated population of 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 diversionary decisions), which appears 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. *Malta* only introduced VOM on a nationwide basis (for all offenders, i. e. juveniles and adults in the same way) in 2012, so statistical data are not yet available.

### 2.4.3. 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%.<sup>382</sup> *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.

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382 As mentioned above, VOM in Germany mostly occurs on the pre-court level (diversion), for which no clear statistics are available. Data reported by *Kilchling* 2012, p. 169 f. indicate that about 4% of prosecutorial diversion cases include mediation, another 5% a compensation (reparation) order. The courts can also practice diversion: about 2% of court-diversionary decisions in 2005 included mediator, another 11% were compensation orders, see also *Dünkel/Păroşanu* in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 312 f.

## 2.5 Research and evaluation into Restorative Justice in Europe<sup>383</sup>

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.”<sup>384</sup> 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.”<sup>385</sup> 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 criminal justice responses.<sup>386</sup> Another meta-study, by *McCold/Wachtel*, came to similar conclusions, indicating elevated levels of satisfaction and perceptions of fairness.<sup>387</sup> 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.<sup>388</sup> Despite certain methodological shortcomings,<sup>389</sup> the overall impression stemming from the studies is that RJ does not have a *negative* impact on re-offending.<sup>390</sup> In a comprehensive meta-analysis *Sherman and Strang* came to the conclusion that in two projects in the United Kingdom a 25% reduction in recidivism among

383 This subchapter covers research not only on RJ and juveniles, but rather research and evaluation for all age groups. Omitting the valuable insights that can be drawn from research into adults would not be advisable. While juveniles form a special group of offenders with special needs and risks, and will thus require that restorative measures are adapted to consider these factors, in essence, RJ is about making reparation to victims and (under a wide definition of RJ) resolving conflicts in an informal, participatory manner, and not about age.

384 Liebmann 2007, p. 28.

385 Liebmann 2007, p. 29.

386 Latimer/Dowden/Muise 2001; see also Umbreit/Coates/Vos 2008, p. 56 f.

387 McCold/Wachtel 2002. Further studies include Campbell et al. 2006; Braithwaite 2002; Umbreit/Coates 2001; Umbreit/Coates/Vos 2008, p. 56 f.

388 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, p. 56 f.; Shapland/Robinson/Sorsby 2012.

389 In this regard, see Bonta et al. 2008.

390 Aertsen et al. 2004, p. 38 f.

violent offenders after participation in Restorative Justice processes could be observed.<sup>391</sup> The effects of Restorative Justice programmes produced less consistency and magnitude of effects on recidivism than was found for violent crime. Effects are even smaller or non-existent if Restorative Justice takes place for “non-victim crimes” such as shoplifting, drink-driving or offences against public order.<sup>392</sup> Beyond a need for more in depth-evaluation, the authors emphasise that negative effects of RJ compared to other sentences and in particular imprisonment were nowhere to be found and that Restorative Justice works better with more serious offences. The reason for this may be consistent with the apparent emotional basis for RJ: that offender remorse for having harmed a victim – perhaps especially victims “like them” rather than socially distant by class, race or income – is what drives any reduction in repeat offending that follows Restorative Justice.<sup>393</sup>

*Bonta et al.*, who also 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.*”<sup>394</sup> 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%).<sup>395</sup> 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%).<sup>396</sup> Finally, research has evidenced that the best outcomes are achieved when a restorative process is involved.<sup>397</sup>

*Sherman/Strang* point out that RJ also has potential to reduce the costs of criminal justice.<sup>398</sup> On the one hand, restorative practices in the context of diversion 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.<sup>399</sup> These deflationary effects can spread across the entire sentencing spectrum and thus reduce the use of costly custodial sentences.<sup>400</sup> Finally, the potential positive effects on recidivism can imply lower costs occurring

391 *Sherman/Strang* 2007, p. 69.

392 *Sherman/Strang* 2007, p. 69 f.

393 *Sherman/Strang* 2007, p. 70.

394 *Bonta et al.* 2008, p. 117. Small but positive significant effects on re-offending have also been reported by *Bergseth/Bouffard* 2007.

395 *Lyness/Tate* 2011.

396 *Schütz* 1999.

397 *Van Ness/Strong* 2010, p. 43.

398 *Sherman/Strang* 2007, p. 86.

399 See the report on *England and Wales* by *Jonathan Doak*. See also *Bateman* 2010; *Horsfield* 2015.

400 See *Horsfield* 2015.

to society at large in the future. This is underlined by the research conducted by *Shapland et al.* (2008), who state that Restorative Justice can deliver cost savings of up to £9 for every £1 spent. According to a model cost-saving analysis by *Victim Support* (2010) for England and Wales, the savings that flow from the contribution made by Restorative Justice to reducing reoffending rates are impressive. According to *Victim Support* – if RJ were offered to all victims of burglary, robbery and violence against the person where the offender had pleaded guilty (which would amount to around 75,000 victims, albeit including adults), the cost savings to the criminal justice system – as a result of a reduction in reconviction rates – would amount to at least £185 million over two years.<sup>401</sup> Direct cost savings for the prison budget could amount to £410 million.<sup>402</sup> “The £59 million it would cost to offer Restorative Justice conferencing only to those 75,000 victims of burglary, robbery and violence against the person pales in comparison to the savings that could be made if a comprehensive Restorative Justice system were put in place.”<sup>403</sup>

## 2.6. Summary

Overall, it can be said that all countries covered both in this study and in *Dünkel/Grzywa-Holten/Horsfield* (2015) provide, in legislation or practice, forms of RJ in the context of resolving criminal conflicts. The landscape is dominated by VOM, 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*. In all other countries VOM services (not legislation) are 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, criminal justice legislation in the vast majority of EU and non-EU European countries makes provision for forms of community service. Likewise, most countries have 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”).

There are a number of predominant and interconnected themes when looking at the key driving factors for Restorative Justice to be implemented. 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

401 See *Victim Support* 2010, p. 29.

402 See *Victim Support* 2010, p. 30: “*Trials of Restorative Justice conferences have been shown to give sentencing magistrates and judges better information about effective sentencing options. Working with the Restorative Justice Council we estimate that it could also generate a saving of 11,000 full-year prison places - the equivalent to saving £410 million of the prison budget (this calculation is based on: a 23 per cent diversion from custody rate; a randomised, control trial funded by the Ministry of Justice; the experience in Northern Ireland; and the Appeal Court cases where case law now states that taking part in Restorative Justice is a mitigating factor; as well as an assumption that those diverted have the average sentence length).*”

403 See *Victim Support* 2010, p. 30.

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.

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 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 most of Europe (both EU and non-EU), among such conditions we find 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, albeit not quite as widespread, 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 about half of the countries covered in both studies. In most countries, courts are equipped with special sanctions or measures that reflect Restorative Justice thinking, most prominently community service, 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. 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 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. The role that 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 and juvenile justice system.

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 2.4* above? Furthermore, what can be done to ensure as far as possible that Restorative Justice is implemented in an effective fashion?

### 3. Restorative justice and juvenile justice – good practices in the European Union

The aim of the ECJJ project “European Model for Restorative Justice with Juveniles” is essentially to find a strategy for effectively implementing Restorative Justice thinking and practices into the juvenile justice arena; to identify approaches that can be universally regarded as good practices in and for Europe and that build on tested, positive experiences.

The question naturally arises as to what constitutes “effectiveness” in this context. On the one hand, a strategy can be deemed effective if it results in high caseloads and plays a less-peripheral, preferably mainstreamed *quantitative* role nationwide in juvenile justice practice. This means that the strategy is effective in allowing referrals to be made to providers of restorative services, and people are taking advantage of this possibility. At the same time, any such strategy needs to have consideration for the legal rights and safeguards of/for victims and offenders. “Effectiveness”, however, also has a qualitative element. As *O’Mahony* says, “more Restorative Justice is not always better”.<sup>404</sup> Are the desired outcomes being achieved? Are the parties satisfied with the process and its outcome? Are agreements being reached and fulfilled, is reparation being made effectively? What about reoffending? Are restorative practices

404 See *O’Mahony* 2009.

playing a positive role in the effective reintegration of offenders? In essence, defining what makes practices “good” requires striking a balance between the quantitative and the qualitative side of the coin. While satisfaction rates have been repeatedly measured as high, they should not be taken for granted as they are reflections of the effectiveness of a measure in its local context, and not of the measure *per se*. Satisfaction rates are the product of the entire RJ experience, from the commission of the offence to the completion of mediation or conferencing agreements and/or the effective receipt of reparation. Accordingly, the way in which these factors are designed on the ground and in legislation has a decisive impact on the ways it is perceived by its clients.

Finally, relevant international standards and recommendations provide good, evidence-based guidelines. Recommendation Rec (99) 19 concerning mediation in penal matters<sup>405</sup> highlight that mediation should be available at all stages of the criminal proceedings (Art. 4) and that mediation services should be generally available (Art. 3). Another important principle refers to the free consent of the parties, which mediation should be based on (Art. 1). Neither the victim nor the offender should be coerced by unfair means to give their consent to mediation (Art. 11). Basic Principle 12 of the “European Rules for Juvenile Offenders Subject to Sanctions or Measures”<sup>406</sup> once more recommends that mediation and other restorative interventions should be available at all stages of criminal procedure, including the stage of serving sentence.

Essentially, for the purpose of the study at hand, good practices are defined as practices that provide parties to criminal offences the general opportunity to voluntarily and freely participate in Restorative Justice measures via which they can resolve their criminal conflicts in a fashion that leaves all involved (offender, victim, state) satisfied with both the process and its outcome, and that facilitates the offenders’ social reintegration.

As has become clear by this point, however, practice is still widely lacking in most of Europe, reflected quantitatively in generally very low caseloads. The first point to address would be to determine why this is the case. What have been central recurring challenges that countries have faced in seeking to introduce restorative measures and to promote their use in practice? Once we have shed some light on these obstacles, we can then seek to find out what countries have done to successfully overcome or even entirely avoid them, and which countries stand out in particular as promising examples in this regard.

### 3.1. 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.

First and foremost, there is the issue of availability – RJ is not available to all offenders at all stages of the procedure.<sup>407</sup> A large number of stakeholders are denied access to VOM on the basis of the severity of the

405 Council of Europe 1999.

406 Council of Europe 2008.

407 As recommended in Article 4 of Recommendation (99) 19.

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 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).<sup>408</sup> 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*”.<sup>409</sup> 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, which in *Germany* clearly is the case with community service orders for juveniles and young adults (being used more as a kind of punishment than as a restorative measure in the large sense, see above *Section 2.2.2.4*). *Van Ness/Strong* state that “*it can seem that inertia has entrenched for good the old ways of thinking and doing in criminal justice.*”<sup>410</sup>

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. A unique example in that respect

408 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.

409 See the *Polish* report by *Zalewski* in *Dünkel/Grzywa-Holten/Horsfield* 2015.

410 *Van Ness/Strong* 2010, p. 141.

is the legislation in *Spain*, where according to a law reform of 2004 mediation in cases of gender violence is expressly prohibited.<sup>411</sup> What becomes apparent from the national reports in *Dünkel/Grzywa-Holten/Horsfield 2015* is that the best way to develop a sound and strong legislative basis is to base that legislation on evaluated, tested experience, rather than via knee-jerk top-down implementations.

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.<sup>412</sup> 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.<sup>413</sup> *Umbreit* speaks of the “risk of McDonaldization” in this regard.<sup>414</sup> 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.<sup>415</sup>

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.<sup>416</sup>

411 See *Giménez-Salinas/Salsench/Toro* in *Dünkel/Grzywa-Holten/Horsfield 2015*, p. 875; the growth of the *Spanish* prison population since the early 2000s is partly attributed to the strict and punitive approach towards domestic violence, see *Cid/Larrauri 2010*, p. 805 ff.

412 See in this regard in particular *Aertsen/Daems/Robert 2006* with further references.

413 See *Vanfraechem/Aertsen 2010*, p. 274.

414 *Umbreit 1999*.

415 *O’Mahony/Chapman/Doak 2002*; *O’Mahony/Doak 2004*.

416 See in particular *Pali/Pelikan 2010*; *Van Ness/Strong 2010*, p. 141 ff.

## 3.2 Identifying “good practices” in the European Union

Where, then, does this leave us in our search for good practices in the implementation of Restorative Justice in the context of state responses to youth offending? Essentially, to provide a Restorative Justice strategy that 1.) plays a more than peripheral role in practice and to which the parties have access at all stages of the criminal procedure, and 2.) that is effective in achieving the desired outcomes (measurable in high caseloads, high levels of satisfaction and successful agreement, reduced court caseloads, reduced reoffending etc., depending on the local context and circumstances). Simplifying somewhat, we can identify three central yet interconnected pillars that are discussed in detail in the remainder of this report, namely:

1. Improving the availability of RJ to the parties per se (see Section 3.2.1);
2. applying a strictly evidence-based approach to developing both policy and practice (Section 3.2.2); and
3. raising awareness as to the benefits of RJ for victims, offenders and communities versus traditional criminal justice processes and responses, and thus building support for RJ at various levels of society, including criminal justice decision-makers (also Section 3.2.2).

### 3.2.1. *The availability of Restorative Justice in the juvenile justice system*

The first suggestion for increasing the role that RJ plays in the practice of the juvenile 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 access to restorative practices (*Section 3.2.1.1*);
2. by introducing new statutory or non-statutory forms of restorative practice that cover more serious offending, in the form of conferencing and circles (*Section 3.2.1.2*);
3. by seeking to implement community service in a less punitive and more inclusive, restorative fashion (*Section 3.2.1.3*); and
4. by expanding the use of Restorative Justice measures in the context of prisons and detention centres (*Section 3.2.1.4*).

#### 3.2.2.1. *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,<sup>417</sup> 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.<sup>418</sup>

Naturally, lifting or loosening eligibility restrictions that are based on offender and offence characteristics (in terms of the offence committed, criminal history for instance) 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 2001 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*”.<sup>419</sup>

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 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.

417 See *Dünkel et al.* 2011; *Dünkel* 2013; 2015; see also *Dünkel/van Kalmthout/Schüler-Springorum* 1997; *Albrecht/Kilchling* 2002; *Doob/Tonry* 2004; *Cavadino/Dignan* 2006, *Junger-Tas/ Decker* 2006; *Munciel/Goldson* 2006; *Hazel* 2008; *Junger-Tas/Dünkel* 2009.

418 Experience has shown that promising outcomes can also be achieved with adult offenders and their victims (For instance in Austria, see *Schütz* 1999; or in the UK, see *Shapland et al.* 2008), 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” (*Willemsens* 2008, p. 8.).

419 *Council of Europe* 2001.

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.

### 3.2.1.2. 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.<sup>420</sup> 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, conferencing came to be introduced into youth justice via wide ranging reforms in *Northern Ireland*,<sup>421</sup> where a model of statutory youth conferences was introduced in 2002. The Youth Conference Service organizes a “diversionary youth conference” if the young person assumes responsibility for the offence and voluntarily consents to participation. Such diversionary conferences at the prosecutor’s level address offences of a more increased severity and/or offenders who have previously come into contact with the criminal justice system, while less serious offences are dealt with through the police diversion system. Furthermore, youth courts are statutorily obliged to refer young offenders who admit guilt and voluntarily give their consent to the Youth Conference Service. In terms of offence severity, the only few restrictions apply with regard to offence severity for young offenders (certain terrorist crimes are not automatically referred to conferencing). Thus, a rather wide range of offence severity can be suitable for 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 *Belgium* conferencing has been introduced on a nationwide scale as a means of court-level diversion in youth justice. As mentioned above under *Section 2.2.2.2*, conferencing, similar to *Northern Ireland*, plays a major role in dealing with youth crime. In *Belgium*, courts have the duty to offer conferences in all cases in which a victim has been identified regardless of offence severity. The completion of an agreement arising from the conference does not automatically result in case dismissal. Emphasis is laid on offering the parties an opportunity to determine through voluntary participation and active involvement in the process their preferred way of conflict resolution. In case the result satisfies the public interest in how the offence is dealt with, further action might not be necessary.

420 For a comprehensive analysis and investigation into conferencing, see *Zinsstag/Vanfraechem* 2012. See also *Section 2.2.2.2* above.

421 See also *O’Mahony* 2011; *Chapman* 2012; *Zinsstag/Chapman* 2012.

Overall, however, besides these two countries, only the *Republic of Ireland* and the *Netherlands* offer conferencing on a nationwide scale (see the elaborations in *Section 2.2.2.2* above), however use in practice remains low in comparison to *Northern Ireland* and *Belgium*. Some could say that the same applies in *England and Wales*, but as already elaborated above in *Section 2.2.2.2*, 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.<sup>422</sup> 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.<sup>423</sup>

Likewise, experiments (action research) with so-called “peace-making circles” or “sentencing circles” have been initiated in a small handful of countries, and bear potential for being an adequate approach to resolving more complex, often more serious offence-related conflicts. While initial experiences have been primarily positive, it will be interesting to see how the EU-funded project “Peace-making Circles in Europe”, headed by the University of Tübingen (see *Section 3.4* above), is further 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 were published in early 2015,<sup>424</sup> which among other issues indicated that experiences had been positive yet different among the participating countries, and a second project phase focusing on evaluating the pilots in terms of participant perceptions and attitudes, follow-up with participants etc. was planned to run from September 2013 to August 2015.

### **3.2.1.3. Reforming community service**

In Europe today, legislative provisions that govern community service are available virtually everywhere (see *Section 2.2.2.4* 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 for juvenile offenders.

422 See for instance *Campbell et al.* 2006; *Sherman/Strang* 2007; *Bonta et al.* 2008.

423 In *Northern Ireland*, *Campbell et al.* (2006) found that 26% of offences in conferencing were either serious or very serious offences.

424 The final research report is available at [http://www.suggnome.be/pdf/onderzoek/PMC\\_final\\_report.pdf](http://www.suggnome.be/pdf/onderzoek/PMC_final_report.pdf).

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).

#### **3.2.1.4. Restorative Justice in prisons and youth detention centres<sup>425</sup>**

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.”<sup>426</sup> Basic Principle

425 The experiences described below also refer to projects targeting primarily adult convicts. It is nevertheless important to include these experiences in the present report, as they bear the potential to be transferrable to juvenile convicts as well.

426 *Council of Europe 1999*.

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 19 of 39 reports gathered in the Greifswald project and the present EU-project made reference to existing examples of RJ in the context of imprisonment (*Belgium, Bulgaria, Denmark, England and Wales, Finland, France, 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, France, 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. Therefore, the legislation in some of the German federal states can be seen as a good practice (see below).

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.<sup>427</sup> Victims can receive closure and peace of mind at the 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

427 For an insightful overview, see *van Ness* 2007.

this rule is essentially the need to incorporate a stronger victim-orientation into correctional settings and sentence planning.<sup>428</sup> However, in practice, approaches to putting these words into action are greatly lacking.<sup>429</sup> 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 adult 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*,<sup>430</sup> for example, in 2001 a pilot project for mediation between adult prisoners and their victims was initiated. It allowed for ‘mediation for redress’<sup>431</sup> 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 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*,<sup>432</sup> some Prison Laws 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. Restorative Justice has been implemented by providing the aim of compensating the victim and restoring the damage to him or her addressed in the basic principles for the execution of prison sentences on the one hand and as a priority means of conflict resolution (instead of disciplinary measures) in cases of intra-prison conflicts between prisoners and/or prisoners and staff members. This is particularly strengthened in the youth prison legislation,<sup>433</sup> but as a general objective in adult prisons

428 For some German insights, see for instance Rössner/Wulf 1984, p. 103 ff.; Walther 2002; Gelber/Walther 2013; as to recent legislation see Dünkel/Păroşanu in Dünkel/Grzywa-Holten/Horsfield 2015, p. 302 ff. and below.

429 Hartmann et al. 2012.

430 See also Aertsen 2005; Gelber 2012.

431 For what “mediation for redress” implies, see the report on *Belgium* by Aertsen in Dünkel/Grzywa-Holten/Horsfield 2015, p. 64 ff.

432 See Dünkel/Păroşanu in Dünkel/Grzywa-Holten/Horsfield 2015, p. 302 ff.; see also Hagemann 2003.

433 See in summary Kühl 2012, p. 255 ff.; Faber 2014.

as well.<sup>434</sup> 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.”<sup>435</sup> The project, which also targets young offenders, is titled “Restorative Justice at post-sentencing level supporting and protecting victims” and ran from 1 January 2013 to 31 December 2014. The aim of this action research was 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.”<sup>436</sup> 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 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 2015.

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.<sup>437</sup> 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.<sup>438</sup>

434 See, e. g. the prison legislation in Baden-Württemberg, Brandenburg, Thuringia and Saarland, see *Düinkel/Păroşanu* in *Düinkel/Grzywa-Holten/Horsfield* 2015, p. 303 f. In addition efforts to make reparation during the stay in prison should be favourably considered when making early-release decisions in Germany (see §§ 88 Juvenile Justice Act, § 57 Criminal Code), see *Düinkel/Păroşanu*, *ibid.*

435 See the project website at: <http://www.rjustice.eu/en/about2.html>.

436 See the project website at: <http://www.rjustice.eu/en/about2.html>.

437 *Stern* 2005.

438 See *Allen/Stern* 2007.

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.<sup>439</sup> 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.<sup>440</sup>

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 sentences.<sup>441</sup> 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*

439 See *Johnstone 2007; Edgar/Newell 2006*.

440 See in detail: *Faber 2014; Kühl 2012*, p. 255 ff.

441 *Robert/Peters 2003; Aertsen 2005*.

*focused on how bullying makes people feel rather than what will be 'taken off you' if you engage in it."*<sup>442</sup>

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.<sup>443</sup> 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 serious crimes where it would operate as an alternative, not to imprisonment, but to some other non-custodial sanction."<sup>444</sup>

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.

### ***3.2.2. The role of evidence-based policy and practice and building support for Restorative Justice***

We have seen in *Section 3.2.1* 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 3.1* 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.

442 Brookes 2006.

443 Edgar/Newell 2006, p. 22 f.

444 Johnstone 2007, p. 17.

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.

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<sup>445</sup> 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.*”<sup>446</sup> 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,<sup>447</sup> 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”),<sup>448</sup> 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.<sup>449</sup> “*Notions of forgiveness and healing, for example, may be relatively foreign to members of the judiciary trained in legal procedures and substantive law.*”<sup>450</sup> 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 diversion rather than another alternative, take it or the making of reparation in general into consideration in sentencing etc.), or by seeking to introduce

445 Vanfraechem/Aertsen 2010, p. 273; *United Nations Office on Drugs and Crime* 2006, p. 81 ff.

446 Van Ness/Strong 2010, p. 149.

447 See Van Ness/Strong 2010, who state that “*evaluation provides a means to test the link between vision and practice*”, p. 151 ff.

448 *United Nations Office on Drugs and Crime* 2006, p. 54 ff.; see also Aertsen et al. 2004.

449 For an interesting example of providing training in Restorative Justice and practices in prisons, see Barabás/Fellegi/Windt 2010; see also *United Nations Office on Drugs and Crime* 2006, p. 55.

450 *United Nations Office on Drugs and Crime* 2006, p. 55.

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.<sup>451</sup>

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.<sup>452</sup> The media play a key role in this regard.<sup>453</sup> 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.”*<sup>454</sup> 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”*<sup>455</sup> 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 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.”*<sup>456</sup>

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,*

451 *Van Ness/Strong* 2010, p. 142; *United Nations Office on Drugs and Crime* 2006, p. 56.

452 *Pali/Pelikan* 2010; *Aertsen et al.* 2004.

453 *Pali/Pelikan* 2010.

454 *Van Ness/Strong* 2010, p. 142.

455 *United Nations Office on Drugs and Crime* 2006, p. 75 f.

456 *United Nations Office on Drugs and Crime* 2006, p. 56.

*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.<sup>457</sup> 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 of 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.<sup>458</sup> 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.<sup>459</sup>

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 *Northern Ireland* at that time.<sup>460</sup> 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.<sup>461</sup> 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”.<sup>462</sup> 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

457 See *United Nations Office on Drugs and Crime* 2006, p. 51.

458 See the report on *Finland* by Lappi-Seppälä in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 254 ff.

459 See the report on *Hungary* by András Csúri in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 370, 383 ff.

460 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.

461 See the report by Dignan/Lowey 2000 on the potentials for Restorative Justice in *Northern Ireland*. See also *Chapman* 2012; *Zinsstag/Chapman* 2012.

462 See *Miers/Aertsen* 2012.

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,<sup>463</sup> 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.*”<sup>464</sup> Reference should be made to Cost Action A21 Restorative Justice Developments in Europe, which undertook several activities all of which aimed at evaluating RJ in terms of policy, practice, research and legislation in Europe.<sup>465</sup> 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).<sup>466</sup> 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.<sup>467</sup> 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.*<sup>468</sup> 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.

463 *Aertsen et al.* 2004, p. 80.

464 *Vanfraechem/Aertsen* 2010, p. 274.

465 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/>.

466 *Vanfraechem/Aertsen* 2010, p. 274.

467 *United Nations Office on Drugs and Crime* 2006, p. 82 f.

468 *Aertsen et al.* 2004, p. 82 ff.

### 3.3. Three case studies worth highlighting

If forced to pinpoint specific countries as such that exhibit “good practices” in Restorative Justice with juvenile offenders in Europe, i. e. that effectively fulfil or have had effective regard to the factors analysed in *Section 3.2* above, three countries come to mind – *Finland*, *Northern Ireland* and *Belgium*. In the discussion above, and indeed throughout the entire report, these three countries have been repeatedly highlighted in all different facets of RJ covered in the study at hand. They can serve as good examples for successfully implementing Restorative Justice measures in European juvenile justice systems, as there RJ is available nationwide, plays a significant role in juvenile justice practice and has been backed up by positive research and evaluation findings.

#### Finland

*Finland* is regarded as one of the birthplaces of European movements towards introducing RJ into the context of responding to offending, with first pilot projects being established in 1983, and subsequent spread to nationwide service provision in the early to mid-2000s.<sup>469</sup> In 2006, the Mediation Act led to the establishment of mediation services throughout the country and was a decisive factor for the wider use of mediation in the years that followed. The new law provided decision makers with more detailed instructions on how to handle juvenile cases. VOM can be applied as a diversionary measure at both the pre-court and the court level, and can serve as grounds for sentence mitigation. VOM can be initiated at any stage of the criminal proceedings. The number of referrals has been continuously high, with more than 2,000 juvenile offenders aged 15-17 being referred to mediation in 2012. Research has shown that participants in VOM in *Finland* are very satisfied with their experience of the mediation process and with the outcome of that process.<sup>470</sup> Research into the perceptions of police and prosecutors on mediation has revealed that the Mediation Act provided more clarification and increased their faith in the measure and thus their readiness to refer cases. Since the Mediation Act came into effect, cases referred to mediation have increased by 35%. Finally, concerning recidivism rates, a study by *Mielityinen* (1999) revealed that reoffending rates were generally lower in the group of offenders participating in mediation (56%) than in the control group (62%).<sup>471</sup>

#### Northern Ireland

The second juvenile justice jurisdiction that can be regarded as exemplary for good practice is *Northern Ireland*. There, as already elaborated in *Sections 2.2.2.2* and *3.2.1.2* above, a system of restorative youth conferencing was put into place for young offenders in the early 2000s in the context of major criminal and juvenile justice reforms in the wake of the end of decades of violence. The conferencing system is embedded into juvenile justice as a pre-sentence diversionary scheme as well as a mandatory court-based intervention. Instead of sending the case directly to court, the prosecutor can refer an offender to the youth conferencing service for a ‘diversionary youth conference’. If deemed inappropriate or if the

469 See the snapshot on *Finland* in this volume.

470 *Iivari* 2010.

471 *Mielityinen* 1999.

offender does not wish to participate in such course of action, the prosecutor can send the case to court. The court then routinely refers the case to the conferencing scheme. This mainstreaming of restorative youth conferencing is unique in Europe, as it makes exceptions from the statutory obligation to refer a case to a youth conference only for crimes punishable with life imprisonment if committed by an adult and for terrorist acts. Uptake of conferencing in practice has been high, with almost 50% of all court cases ending in a Youth Conference Order.<sup>472</sup> Furthermore, experiences with the conferencing scheme in *Northern Ireland* have been positive, measured in terms of high levels of satisfaction among participants and justice system practitioners<sup>473</sup> and promising recidivism rates<sup>474</sup> compared to traditional responses.

## Belgium

Belgium can serve as an example for good practices at almost all levels of the criminal procedure as well as in terms of the methodology applied in developing and planning implementations and the legislative basis of Restorative Justice measures. The country has a surprisingly strong research movement considering its size and population, and the developments in *Belgium* have continuously received strong support from academics of the Catholic University of Leuven, like *Lode Walgrave*, *Tony Peters*, *Ivo Aertsen* and their teams.

Overall, in *Belgium*, first experiences with RJ were made in the 1980s in the form of local pilots that subsequently expanded throughout the whole country.<sup>475</sup> The Youth Justice Act was passed in 2006 and provided a legal basis for both VOM and conferencing with juveniles. The law explicitly prioritises Restorative Justice. The legal approach of the act aims to assist young offenders in assuming responsibility and promotes victim's rights, which is considered to be more appropriate and effective than the youth protection model that had prevailed previously. Through this new legal framework, Restorative Justice programmes with juveniles have been implemented widely and mandatorily in every judicial district all over the country. Mediation is most often used when diverting a case, and police and public prosecutors as well as the court are the main gatekeepers. Statistics indicate a strong increase in the number of juveniles referred to mediation from 2005 (1,620) to 2009 (4,050), followed by a slight drop up until 2012 (3,244). The annual number of juveniles who participate in conferencing is at around 100 cases per year in Flanders (2012: 108) and about 40-50 in the French community (2011: 45).<sup>476</sup> *Belgian* research has revealed high rates of victim satisfaction, and that the vast majority of offenders successfully fulfil the obligations stemming from mediation agreements.<sup>477</sup>

472 See O'Mahony in *Dünkel/Grzywa-Holten/Horsfield* 2015.

473 *Campbell et al.* 2006

474 *Lyness/Tate* 2011; *Campbell et al.* 2006.

475 In adult criminal law and procedure mediation and Restorative Justice measures have been implemented on a nation-wide basis since 1994, when the diversionary model of penal mediation (dismissal of cases by the prosecutor) and in 2005 the court based "mediation for redress" model for more serious crimes were introduced in the law, each after a successful model phase in some districts, see *Aertsen* 2015, p. 49 f.

476 See *Aertsen* in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 70.

477 See in detail *Aertsen* in *Dünkel/Grzywa-Holten/Horsfield* 2015, p. 74-80 with further references.

The good experiences in *Belgium* are not limited to mediation and conferencing. Flanders has introduced a special fund that enables juveniles to pay compensation to their victims. This fund is available – within the context of a mediation process – to juveniles who are economically unable to reimburse their victims. Offenders can work voluntarily for non-profit organisations and are paid from the fund. These earnings are then passed on to the victim.<sup>478</sup> Thus, *Belgium* also provides valuable insights into how community service can be made more “restorative” than is the case in most of Europe today.

Finally, regarding Restorative Justice at the prison level, interesting experiments have been developed in *Belgium* with mediation-oriented meetings between prisoners and their victims on the one hand, and the development of a nation-wide fund from which prisoners are paid for voluntary work (within the prison setting) so as to enable them to pay compensation to their victims, on the other. *Belgium* is one of the few countries to have implemented such structures at the prison level as a nation-wide strategy (*Germany* and *Scotland* are also worthy of mention in this regard, see already *Section 3.2.1.4*).

The individual experiences made in each of these three countries, and the research conducted along with them that underlines and helps to understand those experiences, can indeed serve as good examples for others who wish to achieve similar outcomes by similar means. All three serve as good examples for providing RJ on a nationwide scale at all stages of the procedure. *Belgium* and *Northern Ireland* are pioneers in Europe when it comes to the implementation of nationwide conferencing schemes also for more serious offences, the application or consideration of which is mandatory, and research and statistics show that the measures have been received well in practice and by participants. *Belgium's* innovative approach to community service and the use of RJ in prison contexts is likewise very interesting. Finally, all three have a solid legislative basis that is the result of testing and evaluation.

However, when taken together, the *Belgian*, *Finnish* and *Northern Irish* experiences also highlight the vital importance of local context in designing restorative strategies, as has already been elaborated in *Section 3.2.2*. The system of one country cannot simply be transferred to another. Instead, as described earlier, any legislative and practical implementation of restorative measures should be based on approaches that have been tested in the environment in which they are to be applied, and that are confirmed as achieving the desired outcomes in that context. The consequences of the Framework Decision 2001 that required member states to legislate for VOM had greatly differing consequences in *Finland*, where a long-standing tested system of practice was placed on a statutory footing (resulting in higher numbers of referrals), while in *Hungary*, legislation was hurried and implemented primarily top-down (low referrals for juveniles). Accordingly, restorative initiatives need to be based on action research and continuously evaluated and adapted so as to achieve optimal outcomes, as is practiced particularly vigorously in *Belgium*. Likewise, as already stated above, prior to the introduction of conferencing in *Northern Ireland*, the feasibility and adequacy of RJ for the *Northern Irish* context (following decades of “The Troubles”) was the subject of in-depth evaluation,<sup>479</sup> the chosen model then piloted and tested prior to nationwide roll-out. The way it was implemented in detail there thus also differs from the approach applied in *Belgium* (that was also subject to intense prior piloting), for instance in terms of who provides

478 For similar structures in some German federal states, see the snapshot on *Germany* by Dünkel/Păroşanu in this volume, with further references.

479 See Dignan/Lowey 2000.

the service and how inter-agency cooperation is organized, however the impression from both countries is that their systems are working rather well for them. On the same note, while in *Finland* mediators are volunteers, in *Belgium* they are highly professionalized. Yet, VOM uptake has, in absolute numbers at least, been rather high in both countries in European comparison. Therefore, it is important to refrain from knee-jerk reforms and to devote great thought, time, effort and financial means to developing strategies that are tailored to the local circumstances. In *Germany*, for instance, a country that is large both geographically and in terms of its population, there is more than likely a great degree of variation between different states and even municipalities, so that imposing a “one size fits all” blanket strategy could prove to be a massive compromise that has negative effects on outcomes. In practice, in *Germany* mediation services are provided by different sources, some by NGOs, others by Youth Welfare Services or Social Services, others again by the probation service, depending on the local circumstances at hand. In closing, in all three countries there was (at the time of introduction) and still is a strong will among policy-makers and practitioners to legislate for and make use of restorative practices. In *Northern Ireland*, reform was driven by a desire to deformalize juvenile justice and to strengthen faith in the justice system in a time of “societal transition” after decades of conflict. The public there is well aware of the availability of RJ, not least because it is a mandatory measure at the court level, and offenders and victims are informed of its existence, and thus particularly open to RJ and its informal nature. In *Belgium*, too, decision makers are bound by law to seek to consider restorative options as means for resolving juvenile offending cases. Finally, the Finnish legislator was open to passing the Mediation Act in 2006 and thus to the consequences that doing had. Whether this willingness to make appropriate policies and provide suitable legislation was due to the penal or social climate of the time, due to increased knowledge of RJ among policy makers, decision-makers and the general public, or external pressures stemming from international instruments, cannot be precisely discerned. However, overall this indicates once again that the best results can be achieved through a bottom-up strategy of reform through practice that utilizes action research techniques to devise appropriate and effective local and national implementation strategies that should always include an element devoted to raising awareness and disseminating the results from that evaluation.

## 4. Conclusion and recommendations

The ECJJ project titled “European Model for Restorative Justice with Juveniles” seeks to highlight and promote good practices and promising strategies for implementing Restorative Justice with juvenile offenders in the EU more widely, effectively and adequately. The function of the publication at hand is to provide a comprehensive overview of the current RJ landscape and to subsequently highlight strategies and experiences that are good (or at least highly promising) for overcoming the central problems that countries in Europe today face when seeking to introduce and sustain RJ measures in or alongside their juvenile justice systems.

Overall, juvenile justice has in fact been one (but by no means the only) central driving factor for RJ reform in Europe over the last 25 to 30 years (see *Section 2.1*). What has resulted from these reforms has been a primary focus on Victim-Offender Mediation, which is provided in all countries covered in this study with the exception of *Cyprus* (see *Section 2.2.2.1*), and in all 36 countries covered in the

study by *Dünkel/Grzywa-Holten/Horsfield* (2015). It is used first and foremost in the context of diversion or as grounds for mitigating sentence, mostly for less serious forms of offending that would result in diversion anyway (*Section 2.2.1*). Conferencing is far less widespread (see *Section 2.2.2.2*), provided to any degree by only 13 of the 39 countries covered in both studies, and on a nationwide scale only in four (five if one includes the questionable “referral order” from *England/Wales*). Conferencing is used in particular also for more serious forms of crime, not least because the time and effort involved in preparing and facilitating meetings with so many more participants than in VOM is far greater, and thus seldom worth the effort in minor cases (danger of net-widening). Some countries are currently experimenting with peace-making circles (see *Section 2.2.2.3*). Moving from restorative processes to a wider definition of RJ, almost all countries provide for community service in some form, albeit very rarely in a fashion that can be deemed restorative (see *Section 2.2.2.4*). Finally, most countries allow for decision-makers to take made reparation (or attempts to make reparation) without the involvement of a restorative process like VOM or conferencing into consideration when deciding whether or not to charge an offender or in sentencing (*Section 2.2.1*).

The ways in which Restorative Justice measures have been implemented vary significantly throughout Europe, with marked differences emerging in terms of geographical service coverage (*Sections 2.2 and 2.3*), who is responsible for providing services, the status of mediators/facilitators (volunteers or professionals, for instance), eligible cases and the consequences of successful RJ measures on the process (*Section 2.3*). This heterogeneity continues when one regards the quantitative role of RJ in juvenile justice and criminal justice practice – while there are some highly positive exceptions (see below), in most of Europe, RJ remains on the margins of the formal system in terms of its application in practice (*Section 2.4*). This is rather unfortunate, given that research and evaluation into RJ has measured high rates of satisfaction among participants in RJ measures and promising effects (or at least no negative effects) on rates of re-offending compared to control groups (*Section 2.5*).

When asking ourselves why this is the case – why RJ plays such a marginal role and why countries have yet to move it from the periphery closer to the centre of practice – a number of recurring and interlinked challenges and problems emerge (*Section 3.1*). Most prominently, central issues relate to the (lack of) overall availability of RJ measures in practice, as well as to the dependence of practice on justice system decision-makers, the inadequacy or lack of clear legislative provisions and a lack of information and knowledge of the benefits and prospects of RJ among (and for) not only these practitioners, but also policy-makers, offence stakeholders and the general public.

In order to resolve these issues – i. e. in order to move RJ more to centre stage – it makes little sense to pinpoint meticulously detailed implementation elements (for instance whether volunteer mediators are “better” than professionals, or whether services are better “provided” by NGOs, state agencies or private bodies) that all countries should put into practice in their local contexts, as it is precisely these contexts that define “what works” in a country. Accordingly, we instead close by summarizing a number of key recommendations.

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. *We therefore recommend that access to Restorative Justice not be restricted on grounds of offence severity, offending history and offender characteristics. 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. *Sherman/Strang* highlighted in their research that better outcomes are in fact achieved in cases of more serious offending.<sup>480</sup> In this regard, conferencing has proven to be a viable and promising tool 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 peace-making circles. *We therefore recommend that wider Restorative Justice strategies should promote initiatives to introduce conferencing and peace-making circles into the juvenile justice systems.* In this regard, reference should be had to the experiences made in *Belgium and Northern Ireland* when considering the development of youth conferencing schemes.

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.* Good examples for how this can be approached can be found in *Belgium and Germany* in particular, as well as in *Hungary, Portugal* and the *UK*.

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

480 See *Sherman/Strang* 2007, and *Section 2.5* above.

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.*

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