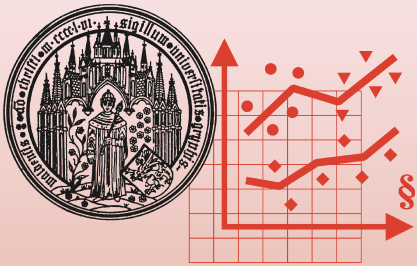
Schriften zum Strafvollzug,
Jugendstrafrecht und zur
Kriminologie

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

Band 50/1



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

Restorative Justice and Mediation in Penal Matters

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

Vol.1

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Introduction

Frieder Dünkel, Joanna Grzywa-Holten,

Philip Horsfield

There is an apparent consensus in Europe that Restorative Justice (RJ) can be a desirable alternative or addition to ordinary criminal justice approaches to resolving conflict. 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.[1] Accordingly, throughout Europe, the number of countries that have introduced RJ into the criminal justice context over the past few decades is perceived to have been increasing continuously. Research into the field has increased almost exponentially, and international standards and instruments from the European Union, the Council of Europe and the United Nations have increasingly been devoted to RJ over the last 15 years.[2]

1 See for instance *Latimer/Dowden/Muise* 2005; *Sherman/Strang* 2007; *Shapland et al.* 2008.

2 For instance Committee of Ministers Recommendation Rec (99) 19 concerning mediation in penal matters (*Council of Europe* 1999); Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings (*Council of Europe* 2001); 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); Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime; Council of Europe Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice (*Council of Europe* 2003); Council of Europe Recommendation No. R. (2008) 11 on European Rules for Juvenile Offenders Subject to Sanctions or Measures (*Council of Europe* 2008); Council of Europe Recommendation No. R. (2006) 2 concerning the European Prison Rules (*Council of Europe* 2006), and most recently Directive 2012/29/EU of the European Parliament and of the Council of

The consensus reaches its limits, however, when one regards the ways in which RJ has been legislated for and put into action "on the ground", the reasons underlying its introduction, and its role in the practice of the criminal justice system. While in some countries, RJ stands on a more stable footing and plays a more prominent role in the criminal justice procedure and practice, other jurisdictions have struggled (or not even sought) to move RJ from the margins of the criminal justice system.

From 1 July 2011 to 30 June 2013 the Department of Criminology at the University of Greifswald, Germany, chaired by *Professor Dr. Frieder Dünkel*, conducted an international comparative study titled "Restorative Justice and Mediation in Penal Matters in Europe – a stock-taking of legal issues, implementation strategies and outcomes in 36 European countries". The study was initiated by an application to the European Union that was subsequently approved for funding under the "Specific Programme Criminal Justice 2007-2013". Additional funding was also kindly provided by the University of Greifswald/Mecklenburg-Western Pomerania, Germany.

The project needs 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). There is, however, no clear-cut definition of what RJ actually is.[3] 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.[4] Rather than regarding crimes as conflicts between offenders and the state, RJ seeks to give the conflict back to the true stakeholders.[5] 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.[6] The

25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

3 For a more in-depth look at the conceptual background of RJ, see the comparative analysis in *Chapter 38* of Volume 2.

4 *O'Mahony/Doak* 2009, pp. 165 f.; *Doak/O'Mahony* 2011, p. 1,717; *Strickland* 2004, p. 3.

5 *Willemsens* 2008, p. 8.

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

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 indiginious cultures and traditions all over the world.[7] 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*.[8] 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.[9]

The overall objective of the study was to compile a comprehensive overview of the European RJ landscape, taking a closer look at the state of affairs in a total of 36 European jurisdictions. We wanted to know what there is in Europe today in terms of RJ in penal matters, what the driving forces have been for introducing RJ, how it has been implemented in legislation and on the ground, and what role it plays (central or peripheral) in criminal justice practice. Likewise, acting on the assumption that RJ is a desireable alternative or addition to the criminal justice system, we sought to identify key factors that have proven to be beneficial or a hindrance to putting RJ on a stable, sustainable footing and attributing it a more than peripheral role in criminal justice practice, as well as solutions for overcoming these obstacles based on experiences from other European countries.

In order to take stock, the Greifswald research team commissioned national reports from authors (practitioners, academics, representatives of NGOs and relevant Ministries) in each of the participating countries that cover a wide range of topics and issues. In order to facilitate comparability, the authors were requested to adhere to a predetermined report structure comprising five chapters that were structured as presented in *Table 1* below.

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

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

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

Table 1: Structure of the national reports

Chapter 1: Origins, aims and theoretical background of RJ
The authors were asked to provide a brief overview of forms of RJ available in their country, the relevant reform history in theory and practice, the contextual factors that served as motors for reform and the role of international standards.
Chapter 2: Legislative basis for RJ at different stages of the criminal procedure
The second chapter was devoted to sketching out the points at which RJ can gain access to the criminal procedure (pre-court level/diversion; court level; while serving prison sentences) differentiated between adult and juvenile criminal justice, identifying the preconditions for their applicability, the respective decision-makers, legal safeguards and the consequences on the criminal procedure of participating (successfully) in RJ measures.
Chapter 3: Organisational structures, restorative procedures and delivery
The authors were asked to provide descriptive accounts of the different restorative processes and practices that are available in their countries, in terms of: the course of restorative processes including case referral mechanisms; participants to the processes; organizational structures; strategies of interagency communication/collaboration; agencies/bodies responsible for conducting RJ measures; training of mediators; sources of funding; level of geographic coverage.
Chapter 4: Research, evaluation and experiences with RJ
The fourth chapter was devoted to a presentation of statistical data that can give an insight into the role that RJ plays in criminal justice practice, as well as to summarizing findings from national research and evaluation into the field of RJ (descriptive inventory research, action research, recidivism analyses, participant satisfaction surveys etc.).
Chapter 5: Summary and outlook
A summary of the key issues and findings, good and bad experiences, questionable or promising practices, obstacles and future outlook.

The second step was to create a snapshot of what forms of RJ exist in Europe, how widespread they are, how they tie in to the formal criminal procedure (if at all), how exactly they have been strategically and organizationally implemented, the role they play in criminal justice practice, and what factors have been decisive in attaining that role. What is there in Europe today? What role does RJ

play in criminal justice practice in Europe? What have been recurring problems that countries have faced in introducing sustainable restorative justice initiatives that are not limited to the outermost margins of criminal justice practice, or rather that are used closer to their full quantitative potential? What have these obstacles been? And what can be (and what has been) done in order to overcome those obstacles? The study at hand sought to make a contribution to answering these questions.

In order to resolve them, besides referring to the reports, a first project conference was held in *Greifswald*, Germany, in May 2012, where the participants congregated for the first time to present the state of affairs in their countries and to exchange their views on what factors pose the greatest obstacles to RJ today. At a second project conference, held in *Gdańsk*, Poland, in May 2013, the project participants discussed these specific issues in more detail, and a number of recurring conclusions and viewpoints came to light that served to guide the focus of our further analysis.

Some established scholars and researchers (for instance *Ivo Aertsen* from KU Leuven and the *European Forum for Restorative Justice*)[10] have indeed questioned the need for "yet another" inventory-contribution to a pool of research that is already "very wide but not very deep", calling instead for an increased focus on in-depth "action research" as a means for identifying what works in specific social, economic, political, legal and cultural contexts.

Indeed, a range of previous studies (for instance *Miers/Willemsens* 2004; *Mestitz/Ghetti* 2005; *European Forum for Restorative Justice* 2008; *Pelikan/ Trenczek* 2008; *Mastropasqua et. al.* 2010; most recently *Miers/Aertsen* 2012; or the publication "European Best Practices of Restorative Justice in the Criminal Procedure", published 2010) have been conducted using a similar methodlogical approach and similar objectives in mind – to create a snapshot of RJ in Europe, and to subsequently draw conclusions from comparisons of approaches, problems and solutions so as to be able to inform best practices for future (research) endeavours, be they legislative, practical or both.

However, to counter this argument against the renewed inventorization of restorative justice in penal matters, one should not omit the fact that the field has been characterized by a high rate of evolution, as has been exemplified in the studies referenced above. As *Walgrave* writes, "*it is a commonplace that restorative justice is expanding rapidly*".[11] It was deemed more likely than not that, since the publication of these previous studies, significant developments in theory and practice will have taken place. New laws will have come into force, the catchment area of local practice initiatives might have been expanded

10 So stated at the second project conference, held in Gdańsk, Poland, from 9-12 May 2013.

11 *Walgrave* 2008, p. 1. See also *Pelikan/Trenczek* 2008.

(potentially to a nationwide provision) since the past studies, or alternatively such initiatives might in the meantime have entirely ceased to exist as a result of changed economic, political, cultural or social contexts.

Likewise, such contextual factors might well have affected the role that RJ plays in practice, the quality of services and the problems that countries have been facing in their attempts to put restorative justice schemes on stable and sustainable foundations. In other words, the lack of rigidity in the field of restorative justice, as in the precise definition of the concept in general, makes continuous updates of the picture that we have of the landscape equally as important as more in-depth evaluation and action research that seeks to identify and implement best practices in a particular context.[12] In light of Article 34 of Council of Europe Recommendation R (99) 19, which calls for Member States to "*promote research on, and evaluation of, mediation in penal matters*", it was likely that, in the meantime, appropriate statistical data and research results had become available, thus providing more material on which to base assessments of effectiveness, desirability and potential than had previously been the case.

There are always new lessons to be learned, even if those lessons were to serve "merely" as confirmation that the problems countries are facing had remained virtually the same. That would be an important finding in itself, as it could serve as an indication that previous strategies to address these problems had either not worked, had been misunderstood or implemented inadequately or not been tried at all. So in brief: there is nothing to lose in reassessing the situation. The fact that the European Commission shared this view by promoting this project serves only to solidify this perception.

A particular characteristic of the Greifswald study that makes it different from past studies is that it covers a wider scope. First and foremost, the Greifswald study sought to compile information on RJ in the context of penal matters from a very large pool of countries in order to provide as complete a picture as possible. A total of 36 European countries are represented in the study.

Further, the scope was wider because, unlike in the majority of the previous comparable studies, the focus of investigation was not restricted to narrow definitions or conceptualisations of what should fall under the term "restorative justice" in the context of the study. Rather ambitiously, the Greifswald team opted for a conceptual framework that incorporated both "encounter" and "outcome" oriented definitions of RJ. The definitions of "restorative processes" and "restorative outcomes" as provided in Articles 2 and 3 to Resolution 2002/12 of the Economic and Social Council of the United Nations[13] on basic principles on the use of restorative justice programmes in criminal matters provided the starting point. According to Article 2 of the resolution, a restorative

12 See *Vanfraechem/Aersten* 2010.

13 *United Nations Economic and Social Council* 2002.

process is "*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.*" Article 3 reads "*Restorative outcomes are agreements reached as a result of a restorative process. [They] include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.*" These definitions cover restorative practices like victim-offender-mediation and restorative conferencing that involve a facilitated encounter between victim and offender, in which the parties to the offence voluntarily and actively work together to mutually agree an approach to resolving it, for instance through reparation.

Table 2: Countries covered in the study

Austria	Greece	Portugal
Belgium	Hungary	Romania
Bosnia-Herzegovina	Ireland	Russia
Bulgaria	Italy	Scotland
Croatia	Latvia	Serbia
Czech Republic	Lithuania	Slovakia
Denmark	Macedonia	Slovenia
England/Wales	Montenegro	Spain
Estonia	The Netherlands	Sweden
Finland	Northern Ireland	Switzerland
France	Norway	Turkey
Germany	Poland	Ukraine

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, harm has been repaired. 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. Nonetheless, in order to be included, they have to be performed voluntarily, implemented in a manner that is neither stigmatizing nor repressive, and should not to be classed as forms of punishment, but rather as interventions that serve to foster offender responsibility and reintegration through the experience of making amends.

Applying this wide conceptual framework for what should be regarded as "restorative" was not without its pitfalls. However, at the same time, it was envisaged that this scope would allow for a more complete picture of the state of affairs in Europe today that does not exclude a certain understanding of the concept right from the outset.

The publication at hand, consisting of two volumes totalling more than 1,000 pages, is a comprehensive database of insights into the European RJ landscape. It includes individual accounts of the state of affairs of RJ in 36 European countries. These accounts have been drawn together in a comprehensive analysis in the last chapter of Volume 2, which provides an overview of that RJ landscape, in terms of what forms of RJ there are in Europe today, how widespread they are, how they tie in to the criminal procedure and what the driving-force for their introduction has been. *Chapter 38* also investigates the role that RJ plays in the practice of the criminal justice system, and provides a comparative look at what the central obstacles to RJ have been, and what can be done, based on European experience and research, to overcome them. We hope that politicians, practitioners, legislators, researchers, students but also the general public all over Europe are attracted to this material, and that we can thus make a contribution to moving RJ, and all the potential it brings for offenders, victims and communities, away from the periphery of how offences are responded to, and more into the foreground.

Finally, we would like to extend our deepest gratitude to the European Commission for approving and subsequently funding the project. Particular thanks go to *Mrs. Isabelle Louis* for her collaboration, cooperation, patience and support through the course of the study. Our thanks also go to the Ernst-Moritz-Arndt-University of Greifswald for its part in funding the project. Likewise, the Greifswald team would like to extend its thanks to all contributing authors and to all speakers at the two project conferences. Our deep thanks also go to *Prof. Dr. Wojciech Zalewski* and the Univserity of Gdańsk for hosting the conference in *Gdańsk*. Our deepest thanks to *Mrs. Kornelia Hohn* and *Ms. Sandra Paul* for their support in the course of preparing the final manuscripts for publication. Last but not least, we would like to thank our official project partners for their support and fruitful insight throughout:

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Austria

Robert Gombots, Christa Pelikan

1. Origins, aims and theoretical background of restorative justice

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

Austria has a longstanding nationwide practice of Victim-Offender-Mediation (VOM), called *Tatausgleich* (originally termed *Außergerichtlicher Tatausgleich*, ATA, until 2004). VOM is governed by legal provisions of the Juvenile Justice Act (since 1988) and the Criminal Procedure Law (since 2000). VOM in Austria is to be understood literally as 'only' involving mediation between victims and offenders. However, there is potential for supporters of both victims and offenders to be involved in the procedure as well. The practice is exclusively pre-trial and diversionary; there are at present no other kinds of RJ interventions available in the public (state) sector. However, a pilot project on family conferencing is currently underway (see *Section 5* below).

The 'diversion package' of the amendment to the Criminal Procedural Law that came into force on January 1st 2000 had also introduced the possibility of community service (*gemeinnützige Leistungen*). It is often regarded as belonging to the realm of RJ. And it does indeed contain reparation as an important element of RJ: reparation performed by the offender for the benefit of the wider community, or the society. We will not deal with this diversionary measure in this place. According to our understanding an essential feature of RJ is missing, namely the active participation of both the victim and the offender, or the process orientation that is constitutive of RJ.

1.2 Reform history

The history of RJ interventions in Austria can be traced back to the establishment of a first pilot project in the juvenile justice system in 1985. The overwhelming success of this pilot project and the great interest it had excited within the Criminal Justice System (CJS) and with the wider public resulted in the inclusion of provisions for an out-of-court offence compensation as part of the new Juvenile Justice legislation. This major reform was included into the Juvenile Justice Act, which was passed in Parliament and came into force on 1 July 1988.

Already as early as 1987, when the success of the pilot project with juveniles became apparent, it was suggested that the out-of-court approach to conflict resolution should be quickly extended to the general criminal law.[1] However, a new pilot project targeted at adults was not launched until 1991. The design was quite similar to the project with juvenile offenders, although more courts were involved in the new pilot project and the range of offence types covered by the programme was more restricted. Altogether, working with adult offenders turned out to be more difficult: victims and alleged offenders alike were less open to this new approach to resolving their conflict, albeit the overall degree of participation was still high (86% of the alleged offenders, 84% of the victims).[2] Throughout the mid-nineties, a growing number of courts were included into the programme thus expanding its scope beyond that of a pilot project.

In 1999, the new legislation including ATA for adults was finally passed by Parliament and came into force at the beginning of 2000. The reforms introduced a larger 'diversion package' of which VOM was only one of several newly founded diversionary paths. The others were community service, a fine and a period of probation with or without probation assistance by a social worker (*Bewährungshelfer*).

In addition to the amendment to the Criminal Procedural Law new provisions were inserted into the Probation Act, regulating the specific tasks and responsibilities of the mediator (*Konfliktregler*). Several amendments came with the reform of the Criminal Procedural Code in 2008 (see *Section 2.2* below).

1.3 Contextual factors and aims of the reforms

In Austria the idea of VOM was brought up in the context of the debate about a new Juvenile Justice Act that had been on and off the political agenda since the late seventies. The initiative was taken predominantly by juvenile judges,

1 *Pilgram* 1994; *Schroll* 1993

2 The remaining 14% of offenders, respectively 16% of victims include also those persons that could not be contacted at all.

together with public prosecutors in the field of juvenile justice, and by the Probation Service Association (Association for Probation and Social Work) – now 'NEUSTART'.

The impetus for reform came from a strong feeling that the repertoire of responses to deviant behaviour of young people was a rather restricted one and unduly severe. It must be added that these deliberations and debates took place in a climate of decreasing juvenile crime rates and alongside a noticeable tendency to deal with minor offences at the level of the public prosecutor's office by not proceeding with prosecution, i. e. by just dropping the charge. Yet this practice in turn bred discontent or at least uneasiness. Were there no more appropriate and carefully thought out responses than just dropping the case, especially where the victim was more severely affected – responses that at the same time would avoid the detrimental and stigmatising effects of conviction?

At that time, concepts and practices of diversion already existed in other countries. However, the Austrian Probation Service – being a semi-autonomous agency at that time – did not want to simply adopt these concepts (like, for example, the Munich "Brücke" model of "work instead of punishment") because they perceived a certain danger of them being used as an agency of control inside the CJS, i.e. as a supervisor of orders of the court. At that time this role was not in line with the Austrian Probation Service's understanding of its own role in the context of criminal policy. Thus, an "alternative to the alternative" was called for.

At the theoretical level, the Vienna Institute for the Sociology of Law and Criminology (IRKS) was both influenced by and influential in disseminating at the policy level *Christie's* notion of the re-appropriation of conflicts.[3] These proposals and contributions materialised in the form of the first pilot project initiated and managed by a special working group within the Association for Probation Service and Social Work. Three court-based projects were set up in which victims and young offenders should seek to resolve their conflict with the assistance of a social worker, a *Konfliktregler*. The working group set out to make links with public prosecutors and judges handling juvenile cases at these courts.

Right from the beginning the so-called "*Begleitforschung*" (accompanying research) was to investigate ongoing work within the pilot project. The research report was presented in 1986, followed by a publication of the results together with several related articles in a special issue of the "Kriminalsoziologische Bibliografie".[4] At that time it was obvious that the pilot project was to be regarded as a success: it worked and it worked surprisingly well, especially in

3 *Christie* 1977.

4 *Haidar et al* 1988.

terms of the willingness of the victims to co-operate and to participate in VOM. They accepted the new approach and the vast majority approved it as beneficial. The pilot project was thus continued. Simultaneously the draft for the new Juvenile Justice Act was revised and concrete provisions for conflict resolution were included to make this new instrument applicable over a wider range of cases of juvenile delinquency. In the course of intensive discussions with legislators, the concept of "conflict resolution" underwent some changes and modifications. In the end, the text of the law no longer used the term "conflict". It had become "Out-of-court offence compensation" (*Außergerichtlicher Tat-ausgleich*, ATA), embracing a broader understanding of the 'restorative' effort.

As already stated, it proved more difficult to arrive at the next step – the introduction of VOM as the core piece of an amendment to the Criminal Procedural Law. Despite the undeniable proof that this intervention worked, opposing forces rallied when plans for incorporating this new intervention into the Criminal Procedural Law became more concrete. Objections were voiced by two different groups: the conservative party and some representatives of the CJS on the one hand, and representatives of the women's movement, more specifically the women's shelters, on the other. The latter were not against VOM in general, but thought that this procedure should not be applied in domestic violence cases (a debate that is still on-going). On the other hand, we see that the practice of VOM in Austria is to a considerable extent constituted of cases of partnership violence – and the efficacy of this intervention has been researched intensively (see *Section 4.2* below).

Trying to characterise the spirit that carried the introduction of VOM into the CJS, we might speak of a genuine European model of a true alternative to the criminal procedure – promoting the active participation of both victim and offender, striving for reparation and thus eschewing punishment and 'working through' the conflict by attending to the concrete experience of the people involved, of doing and done-to, of harming and being harmed. It was thus committed to the principles *Christa Pelikan* had declared constitutive of restorative justice: the participatory, the reparative and the social (or 'life-world') element. However, at the same time, this Austrian practice of VOM stayed well connected to the CJS, and the public prosecutors remained the gate-keepers (or the 'masters of the procedure', as they preferred to call themselves). To withdraw from prosecution was – and still is – the predominant mode of reaction when an agreement is reached as a result of VOM. Due to the strong support it had received from the social sciences, VOM in Austria remained, for a long time, committed to the 'third path' of reacting to wrongdoing.[5]

It was this alliance of social science, of a strong probation-service and a number of influential members of the judiciary, the prosecutors and of policy-makers that were ready to enter these new paths that carried this innovative

5 *Frehsee* 1991; *Rössner* 1993; *Walter* 1994.

model of intervention. These people shared the excitement of trying out something new and they shared the experience that these new ways did indeed 'work' and produce the effects they had hoped for.

An array of favourable conditions provided the indispensable background for this reform endeavour to succeed. The 'miraculous' part is that the success of the first pilot project came unexpected, albeit hoped for – and in addition: it is always a bit of a miracle if the right persons, the right ideas and certain favourable socio-political structures come together at the right place and at the right time.

An important feature of the Austrian VOM is that it is a professional model. This stems from the vital role the 'Association for Probation and Social Work' played in carrying out *Konfliktregelung* (conflict regulation/resolution). The *Konfliktregler*, i.e. the mediators of the association, were social workers who had acquired their specific qualification and their professional profile initially through 'learning by doing' in the course of the pilot projects and with the assistance of its accompanying research. It was evident and it was stressed explicitly that this professional profile had to be different from that of the 'probation officer'. Mediators had to attend to the requirement of standing 'between' offender and victim acting as instigators or catalysts that enabled the parties to take care of the conflict and the matters arising from the act of wrongdoing. It was deemed a highly demanding task – standing up to the paradox of finding its optimal professional expression in making oneself redundant, remaining in the background and bringing the capacities of the parties to find a solution themselves to the fore.

What is still completely absent in Austria is any kind of community involvement. While it was never considered during the phases when the pilot projects were planned and carried out, it has become a deliberate decision to stick to the 'professional model'.[6] A discussion of the role and meaning of community involvement can be found in *Christa Pelikan's* treatise 'On mediation procedures' ('*Über Mediationsverfahren*').[7]

1.4 Influence of international standards

From what has been described so far, it might have already become apparent that the Austrian model of VOM that had quickly become a nationwide practice for juveniles, and twelve years later for all offenders, was apt to serve as a 'good practice example' for other countries, specifically for the civil law countries (as opposed to the common law countries).

6 *Hofinger/Pelikan* 2005; *Pelikan* 2007.

7 *Pelikan* 1999.

This happened indeed when the 'Committee of Experts on Mediation in Penal Matters' was set up by the 'European Committee on Crime Problems' (CDPC) of the Council of Europe and began its deliberations in November 1996. Together with Germany, Norway and the UK, Austria belonged to those participants that could draw on actual experience with VOM; but apart from Austria only Norway could boast a nationwide practice. In the course of four three to four day-sessions that lasted into the year 1999 the Austrian experience proved a valuable source of influence on the drafting of the recommendation, especially with regard to the relation between VOM and the CJS. The insistence on the autonomy of the mediation service that is stated as a recommendation in the first section draws to a large part on the Austrian practice as a guiding line.

However, when three years later *Christa Pelikan* on behalf of the Criminological Scientific Council (CSC) to the CDPC undertook a follow-up study that was to assess the influence the recommendation had exerted in Member States of the Council of Europe[8], it became obvious that developments in Austria had come to a standstill. Most importantly, the recommendation to establish VOM at all stages of the CJS that is included in this document has never been considered. VOM remains restricted to a diversionary mode with the discretion to apply it being exercised almost exclusively by the public prosecutors. Thus, looking at the further development of restorative justice procedures, Austria's role within the 'movement' has changed from that of a forerunner to a latecomer.

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

2.1 The diversionary path of delivering VOM in Austria

After the Diversion Package with VOM as a core piece had come into force on 1 January 2000, another major amendment of the Code of Criminal Procedure came into effect that was mainly aimed at significantly strengthening the position of the victim. This reform of the Code of Criminal Procedure of 2004 (*Strafprozessreformgesetz* 2004/BGBl 2004/119) as well as the Accompanying Act for this law (*Strafprozessreformbegleitgesetz* I/BGBl 2007/93) not only reorganised the criminal procedure in Austria. It in fact brought about a completely new definition of the victim's position within this criminal procedure.[9] The interests of the victim and the sensitivities of the victim had become a focus of concern.

8 *Council of Europe* 2002.

9 In the meantime, further changes have been made, the latest in the "Accompanying Act for the Budget" (*Budgetbegleitgesetz*) 2009 (BGBl 2009 I 2009/52).

As stated in *Section 1.1* above, the manner VOM fits into the Criminal Justice System follows the diversionary path. This implies that criminal law agencies, in the first instance public prosecutors, exercise their discretion at the beginning as well as at the end of VOM procedure.

Figure 1: Referral and processing of criminal cases in VOM

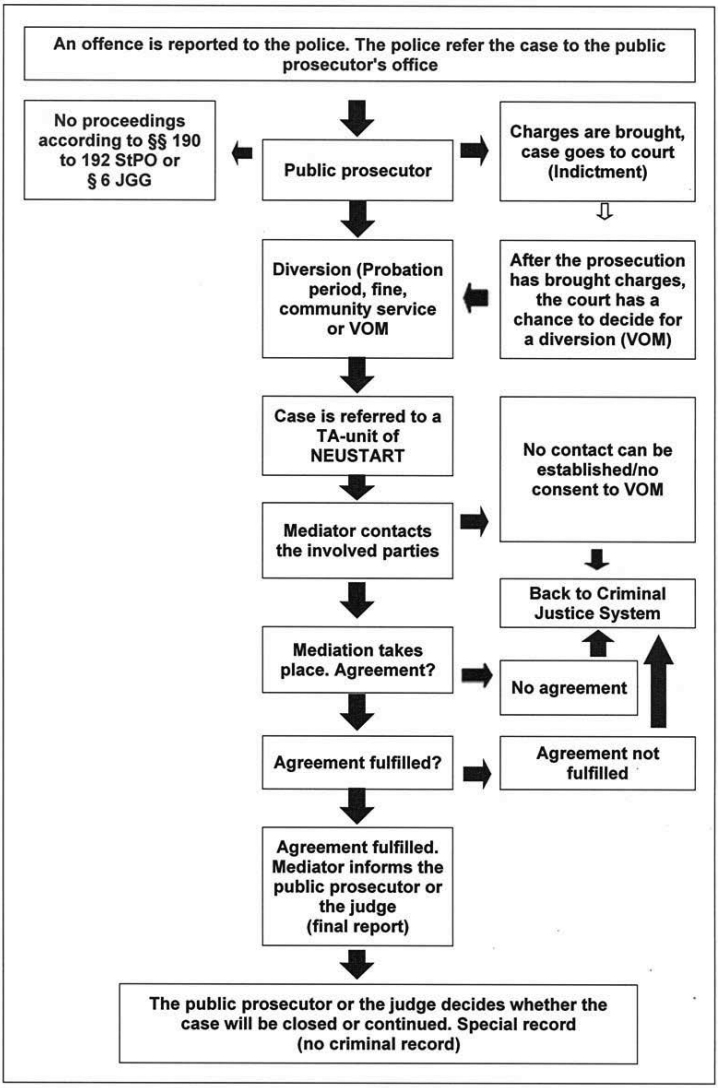


Figure 1 shows the flow of criminal cases referred by prosecutors and/or courts to the VOM-offices. The central (gate-keeping) role of the public prosecutor's office is clear and so is the subsidiary function of the courts in making referrals. The box marked "diversion", which also lists the diversionary measures available, pertains to the phase of decision-making by the public prosecutor's office. The same process happens – but only as a subsidiary consideration – at the level of the judge's decision-making in the way indicated in the relevant box. The figure also shows that whenever the VOM process comes to a halt – either due to a lack of contact with the parties, the failure to come an agreement or the non-fulfilment of the agreements despite repeated admonition by the VOM office – the case has to be returned to the referring agency.

In any case, the public prosecutor, or the judge, is called upon to exercise discretion as to whether to discontinue proceedings or to draw up an indictment respectively to continue proceedings.

2.2 Pre-court level

The basic legal prerequisites for diverting a case, provided in § 198 StPO, are:

- no serious culpability on the part of the suspect,
- a maximum range of punishment for the offence of five years,
- adequate clarification of the facts and circumstances, and
- no loss of life.

If these conditions are met, victim-offender mediation, community service, a fine, or a period of probation with or without probation assistance can be applied. A further prerequisite for a referral to VOM is that legally protected interests of the victim (health, property etc.) have been directly affected. Since, as a rule, the victim's emotional and material needs are best met by VOM, this might be the first choice in cases where a personal victim is involved. It is recommended that the prosecution choose VOM as a form of diversion in cases where the victim's interests benefit most from it. Apart from these general prerequisites for diversion (§ 198 StPO), the following special prerequisites for VOM (§ 204 Abs. 1, 2 StPO) apply:

- The suspect is willing to take responsibility for the incident, i.e. the offence and to face up to its causes;
- The suspect will take measures as deemed appropriate under the circumstances to compensate for the consequences of the offence;
- If necessary, the suspect will take on commitments that show his willingness to abstain in the future from behaving in a way that led to the offence;

- The victim approves of VOM; this does not apply in cases where the suspect is a juvenile (§ 8 Abs. 3 JGG).

2.3 Court level

In those cases where the public prosecutor has brought charges, the court has yet another chance to divert a case. Under the given general prerequisites outlined above, the court may, of its own motion or at the application of either the victim or the offender, propose VOM (or any of the other diversionary measures stated above). It can do so until the end of the trial and terminate them with a ruling. The public prosecutor may lodge a complaint against this, but after bringing charges it is no longer entitled to decide on a diversionary measure itself. Diversion by the court is only allowed for offences with ex officio, not for such with private prosecution (§ 199 StPO).[10]

2.4 Legal regulation of the work of the mediators (Konfliktregler) and the rights of victims and offenders in VOM

The work of the mediators, their responsibilities, their rights and obligations are regulated by the "Law on Probation Services" *(Bewährungshilfegesetz*: § 29a BewHG). It states that the mediators have to support all parties in reaching the reconciliation of interests. They contact the suspect and the victim and inform them about the nature of VOM, its general content and process, as well as about the impact of this process, first of all regarding further legal proceedings and consequences, but also about its potential influence on psychological well-being and on social relationships.

The rights and the obligations of the victim and the suspect are contained in the Code of Criminal Procedure. There it is stated that until criminal proceedings are finally discontinued, the suspect retains the right to ask for a continuation of the criminal procedure at any time (§ 205 Abs. 1 StPO). A final withdrawal of the prosecution depends on the payment of a fee, a lump sum (§ 388 StPO) to the state authorities. This lump sum is determined by the public prosecutor and amounts to a maximum of 250 €. Essential for the assessment of the lump sum is that the compensation of damages will not be jeopardized. All diversionary measures – including VOM – will be recorded in a central register for a period of five years after the discontinuation of the proceedings. This register is intended to guide and inform future diversionary decisions. The

10 Offences with private prosecution constitute an exception from the principle of legality prevailing in the Austrian (inquisitorial) CJS. These offences leave the right for prosecution solely in the hands of the injured party, which has to act as a private prosecutor.

victim is to be informed by the mediators about his/her entitlement to be accompanied by a confidant. In addition, he/she has to be informed about suitable victim protection facilities. The mediators are to discuss any possible demands or expectations on the side of the victim and protect his/her interests (especially the compensation of damages, an apology and the prospect of the offender's willingness to abstain from acting and behaving again in the way that led to the offence being committed). As soon as a restorative arrangement has been agreed between the offender and the victim, the mediators have to report this to the public prosecutor or the judge and monitor compliance with the agreement. A final report will be written as soon as the offender has fulfilled his/her obligations, at least to a degree where, taking his/her overall behaviour into account, it can be assumed that he/she will continue to abide by the agreement or if a successful mediation can no longer be expected (§ 204 Abs. 4 StPO). It is possible that the prosecutor draws up an indictment despite a "positive" outcome of VOM. However this happens very rarely in practice, and there exist no regulations that require "successful" mediation to be taken into consideration in sentencing. Interestingly, it happens more often in practice that prosecutors drop cases even though VOM has failed.

3. Organisational structures, restorative procedures and their delivery

3.1 Organisational structures of VOM

The Austrian model is one of direct mediation between victim and offender, a model that *Kilchling* and *Loeschnig-Gspandl* term 'mediative restitution'. It is aimed at reaching a solution that meets the interests of both sides, in particular concerning compensation for any material damage as well as for the emotional aspects connected to the criminal act and its context. "The regular form of victim-offender mediation in Austria is implemented as a form of case dismissal (discontinuation of the procedure) by the public prosecutor or the judge. In principle, application or non-application of mediation is at his/her discretion".[11] While the public prosecutor is the gatekeeper to mediation, responsibility for its implementation lies with the TA-unit of the association NEUSTART, the sole provider of VOM services in Austria. This association is an autonomous body subsidised by the Ministry of Justice. It is a private association with its own management and supervisory committees. The headquarters are based in Vienna with two chief executive officers (directors) responsible for the entire organisation. There are nine regional offices. Each of the regional offices is managed by a director who is responsible for all aspects of contact with the prosecutor and

11 *Kilchling/Loeschnig-Gspandl* 2000, p. 312.

the court, for personnel, and for supervision of the quality standards to be met in case work. In each of these offices there is a head of the VOM department (*AbteilungsleiterIn*) that reports directly to the director.

Besides VOM, NEUSTART offers a wide range of social services that are related to the CJS: probation, after-care, job-counselling for former inmates etc. The Ministry of Justice contributes about 90% of the financial support.[12]The association's national character, its quality standards and the description of the entire VOM-process ensure a relatively high degree of conformity to common standards and practices. NEUSTART works closely with prosecutors and judges and pays particular attention to a proper introduction of new appointees to the ethos of a national policy on mediation.

3.2 The Practice of VOM

The following basic steps have been established for VOM-procedures:[13] The public prosecutor – screening his/her files, consisting mainly of the reports drawn up by the police – decides if a case looks suitable for VOM and, if so, sends the file to the local TA office. There it is presented at the next case conference. It will be discussed whether the case is suitable from a social worker's point of view and can be dealt with by VOM. A single or a pair of mediators will "take on" the case. As the next step, the mediator responsible for the case establishes contact with the offender and invites him/her, usually by letter, to the TA office for a personal interview. During this interview, the purpose and the procedural status of VOM is explained and the readiness of the alleged perpetrator to "own up", i. e. to accept responsibility and to participate in the mediation attempt, is explored. In many cases, the offender's perception of the incident is assessed for the first time as well as the circumstances of the occurrence, his/her relationship to the victim (the relational distance), and the consequences the incident has had so far.

The same procedure is followed regarding the victim. It is of prime importance to explore the expectations of the victim, starting with what prompted him or her/her to notify the police. It is equally important to assess the victim's capacity to fulfil one of the most important requirements of any mediation, i. e. to stand up for his/her own interests. If there is a power imbalance – as there almost inevitably is, at least to some degree – it is the task of the mediator to help and support the weaker party in gaining the strength

12 In 2012 the proportion is 91.1%. Additionally, NEUSTART is supported by other ministries (0.1%), federal governments and communities (5.1), and even the Austrian Labour Market Service (0.02%). 3.8% comes from revenues of the NEUSTART GmbH. Source: NEUSTART.

13 There exists a kind of internal manual for public prosecutors that provides guidelines for ‚selecting' and for processing cases that are referred to VOM.

required to participate fully, independently and equally in the mediation process. Usually, the victim has been forced for quite a long time to suppress and control his/her emotions, fears and feelings of apprehension. The interview can result in unleashing them for the first time, which in turn might force the mediator to devote quite a lot of time and careful attention to coping with them.

The order of contact can be reversed if there is good reason to do so, e. g. if the participation of the victim, in the case of domestic violence, seems doubtful, and the involvement of additional victim support agencies might be advisable. Attempts to contact the parties must be repeated; if no contact can be established, the case is sent back to the public prosecutor's office. The same applies whenever one of the parties rejects participation in the mediation procedure. The procedure can be stopped at any stage during the mediation process. As a consequence, the formal criminal process will be resumed. In most instances this means putting the case at the public prosecutor's discretion once more. Depending on the case, the individual interviews with the victims and/or offenders can also be repeated. In between interviews or just before the mediation session the parties can be advised to consult a lawyer, seek legal support or consult with free services (addresses of which can be provided). It is also possible that two mediators work together – as is the case with domestic violence between partners (see below) Working towards the agreement (conflict resolution or compensation plan) starts the moment the first interview takes place. In a number of cases, the first individual contact proves sufficient to trigger an autonomous conflict resolution process between the two parties: they make an agreement without further assistance by the social worker. The social worker then simply informs the public prosecutor (or the judge) that agreement has been reached and provides an outline of its content.

In the majority of cases, a mediation session (*Ausgleichsgespräch*) takes place, led by the social worker in charge – again only if both parties agree to do so. The steps during this session are roughly the same as those that characterise mediation in general. However, due to the very special nature of mediation within the criminal law context, they are somewhat abbreviated. Usually they are:

- *Mutual exchange of information.* The practitioners in Austria regard this step as very important. The mediator should ascertain that all participants start from a mutual vantage point. Since the mediator is the person who has all the information that has emerged so far, sharing this knowledge should be the starting point. He/she will also make sure whether the participants do "speak the same language".
- *The assessment of the problem at issue.* Vast differences in the perception of the conflict or of the incident and its consequences can be analysed from both sides. These differences and the emotions behind them have to be brought forward and recognised by the other party. The concept of recognition encompasses not just the cognitive or mental

aspect, but also the emotional understanding of what transpires during presentation and assessment of the problem.

- *Exploration of options or of possibilities concerning the content of the agreement.* In the criminal context, the process runs the risk that during this step either one of the parties expects the mediator to present a solution or that financial compensation is offered very quickly by the offender as a means of resolving the conflict. Thus, any further search for and examination of damages, losses, fears and hurt is avoided. In this context, the question is frequently raised as to whether it is preferable to concentrate on the relational and emotional aspects of conflict resolution, which in turn will set the stage for talking about financial compensation, or whether reaching an agreement about financial compensation will pave the way for a better understanding and a solution on psychological and emotional level. The way the Austrian VOM-practitioners see it, the answer mainly depends on the conditions presented in the course of working with each specific case. By and large VOM follows a comprehensive approach taking into account all aspects that appear relevant to the parties.
- *Talking about and deciding on controls and liabilities following from the agreement and the steps to be taken.* When an agreement is reached and a written statement is drawn up and signed by the parties, and when compensation or advance smart-money payments have been handed over immediately, the mediator makes his/her final (second) report to the public prosecutor in charge. This written report contains a brief outline of the facts and problems initially presented, the steps taken and the content of the reached agreement.

In cases where compensation is to be paid in instalments, or where the agreement relates to future behaviour or specific conduct the offender has promised – in case of violence in an ongoing relationship – a certain waiting or control period is to be observed. The final report is drawn up only once the requirements of the agreement have been met or at least one or two instalments of payment have been received and confirmed .As already outlined above, the public prosecutor (or the referring judge) can then decide whether prosecution is to be dropped or continued.

For working with specific types of offences, special techniques and methods have been developed. The following designs and methods are applied in Austria[14]:

- *Standard method.* Before direct mediation takes place, the mediator invites the offender and the victim for separate interviews. If both agree

14 *Watzke* 1997.

to search for a mutual out-of-court solution, the proper mediation session takes place. This approach is used most frequently.

- *Indirect mediation.* Depending on the constellation of the conflict or the parties, methodology may vary. (a) 'Shuttle Mediation': after separate initial meetings have been conducted, one or two mediators will mediate between the conflict parties, either orally or in writing. There is no personal interaction between the parties themselves. (b) 'Without victim' or working with a 'proxy victim': The process focuses on norm clarification, sometimes with a so-called 'proxy victim' taking over the victim's (ethnic) community or a social worker who takes over the role of the respective 'other' (e. g., in cases of racist incidents).
- *Mixed double.* This setting was initially designed for partnership violence only, but is now also used for conflicts in other forms of close relationships, e. g. in the (extended) family. The main characteristic is that two mediators work on the case together using the device of the 'mirroring of stories' (*Geschichtenspiegel*). Another special aspect of violence in relationships is that, in contrast to the "usual" mediation process that focuses on the incident that constitutes the offence, neither the (violent) history nor the future of the relationship can be excluded from the discussions and the search for 'restoration'.
- *Tandem.* No individual interviews take place. Instead, the session starts with the victim or the offender telling his/her story to the mediator while both sit back-to-back so that they cannot see each other. If an agreement to continue VOM is reached, a triangular dialogue (*Dialog im Dreieck*) is arranged. The conversation is still reduced to one of the conflict partners and the mediator at a time, while the other partner is just listening. A direct mediation session can only be held if a basis for constructive conflict resolution is established.
- *Groupwork.* One or two mediators facilitate the group talks during the intervention, they work with the potentials in the group structure or work on the deficits in the subculture of groups. A potential imbalance between the suspects and the victims can be reduced via the method of the "Relay cycle".
- *Relay cycle (Staffelrad).* This method is used when working with groups of offenders. Again, individual interviews take place, first with the victim, then with the group. If the group is willing to assume responsibility, a mediation session is held: one offender after the other meets the victim and apologizes. In the end, all the involved persons gather to talk about reparation.

Summing up, we can state that the process of mediation in criminal matters and the array of methodological instruments applied tend towards a short-term intervention. The TA is intended to work towards a situational change and a

change of the conditions of communication and interaction rather than to effect reform and rehabilitation of the offender. On the other hand, the mediator gives more guidance in the mediation process and he/she has to abide by the normative legal framework more strongly and closely than say a family or business mediator. It should be added that VOM-services in Austria offer quite a variety of methodological approaches and, moreover, of individual styles of mediation work. Whilst uniformity of method does not seem desirable, the spirit of social work and criminal policy should be shared by everybody working within the Austrian VOM-services. The achievement of this goal is in itself something to be continually striven for.[15]

3.3 Recruitment and training of mediators

Since methodological sophistication is quite high in Austria it forms an important part of the training of mediators. Though no code of ethics for mediators or explicit standards for judicial conduct exist, one can rightly assume that the highly detailed initial and further training that mediators working in the field of criminal law must undertake guarantees certain quality standards for VOM. At present, a degree either as a social worker, lawyer, psychologist, sociologist or some similar professional degree is required to apply for a job as a mediator in criminal matters – a combination of qualifications being an advantage. During the pilot phase of the project, only experienced probation workers were considered eligible to undertake this new kind of professional work, whereas now mediators are recruited from a wider range of professions. The only way to become a mediator for VOM is via the TA-units of NEUSTART. The main responsibility for recruiting mediators rests with the heads of the VOM departments of the regional TA offices. He/she makes the final decision to accept a candidate for training after examining the application files and conducting a personal interview. Thus, there is a kind of exclusive route for working as a mediator inside the CJS.

Due to the history of the Austrian TA, the professional profile has developed predominantly though lessons learned from experience. The overall orientation of mediation work and the standards of professional practice emerged by conducting VOM and by reflecting on that work – by exchanging experiences and through concurrent research. The training schemes for mediators used inside the criminal justice system at present still mirror this historical experience. Currently all newly recruited mediators are required to undergo initial training as well as follow-up training. The training programme consists of two parts: a first one for “beginners” to acquire basic qualifications and a second part to become a certified mediator in penal matters. Both parts comprise training at a

15 *Watzke* 1997.

theoretical and practical level. The training is very important and lasts longer than in other European countries, currently altogether four years. It starts with one year of in-service training at a TA-office which is organised like an apprenticeship, where the newcomer first watches and then works together with an experienced mediator until he/she handles cases on his/her own. Alongside the training, there are three weeks of tuition (two dedicated to methods, one to criminal and civil law). During the three following years, the new mediator works full-time, while attending courses for five weeks per year (these courses are again based on methods as well as criminal and civil law). Individual supervision of up to two years is provided for beginners and further visits at other institutions can be arranged. Advanced and continuing training is offered as part of the comprehensive programme of NEUSTART. At least one week a year can be used to attend seminars. As part of that programme, on-going exchange between members of the public prosecutor's office and the judiciary and TA social workers about specific topics are arranged. Once internally fully accredited, the mediator is almost entirely occupied with working for VOM. Only a small number also work as probation officers. There is no strict difference between working with juveniles or with adults – a separation of services takes place only insofar as some mediators in an office focus on one of these groups. While there are volunteers working as probation assistants, there are no such volunteers or lay mediators conducting VOM.

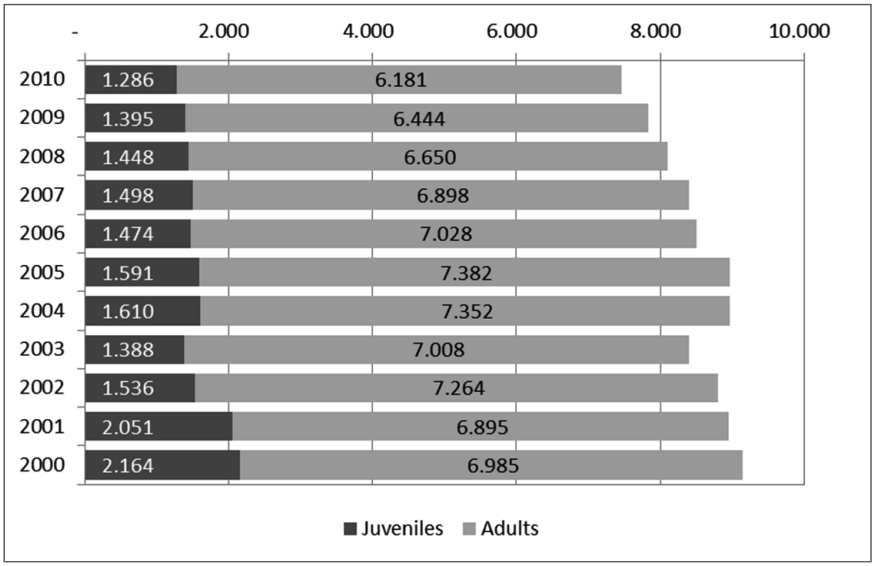
4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

NEUSTART compiles statistical data on the use of VOM, which help to visualize the extent of its application and the importance to be attributed to VOM in the Austrian CJS. The statistics compiled by NEUSTART are based on individuals (offenders). The total number of newly opened (offender's) files in 2010 was 7,467 (juveniles: 1,286; adults: 6,181). *Figure 2* shows how VOM case numbers developed between the years 2000 and 2010. In the adult group the case numbers declined substantially over five years, from 7,382 cases in 2005 to 6,181 cases in 2010. Since the pilot project "*Außergerichtlicher Tatausgleich für Erwachsene*" started in 1992 and was legally implemented with the Amendment to the Criminal Procedure Law of 2000, the number of VOM cases involving adults peaked in 2005. Since the introduction of VOM through said pilot project (1992: 669 cases), the case numbers climbed steadily (1997: 3,478). Ten years after the introduction of VOM for adults the number of cases per year was already 7,264. They stagnated until the mid-2000s and then declined.

The juvenile group (14 to under 18 year-olds) shows a different trend. Since the pilot project "*Konfliktregelung im Jugendstrafrecht*" was introduced in 1985, the case numbers rose continuously until they peaked at 2,727 offenders in 1997. This was followed by a slightly fluctuating stagnation until the beginning of 2000 (2,164), and a subsequent strong decline from 2004 onwards from 1,610 cases handled in 2004 to 1,286 in 2010.

Figure 2: New cases 2000 to 2010



Source: NEUSTART, statistical records.

The impact of the amendment to the Criminal Procedure Law in 2000 and especially the introduction of an array of diversionary measures that competed with VOM have not yet been thoroughly researched. We do have some figures pertaining to juveniles though.

In 2005, according to the Sicherheitsbericht 2009 (Bericht der Bundesregierung über die Innere Sicherheit in Österreich – Teil des Bundesministeriums für Justiz)[16] – *1.522* young offenders were sent for VOM; community service was applied in 1,192 cases involving juveniles; a probation period with or without duties was issued in 600 cases; in 529 cases juvenile offenders were fined. In 2009 only 1,288 VOM cases were counted, while community service was offered in 1,523 cases, probation periods amounted to 1,317 and in 340 cases

16 Statistik Austria 2009.

juveniles were dismissed after a fine. In 2009 all cases of 'diversion with intervention' (including VOM) accounted for 23% of all youngsters that came to the attention of the public prosecutor; 11% were convicted by the courts and the greatest percentage was handled by a suspension of the charge or a dismissal without any further intervention. (dismissals acc. to § 190 StPO; no crime, or no/ insufficient evidence for prosecution).[17]

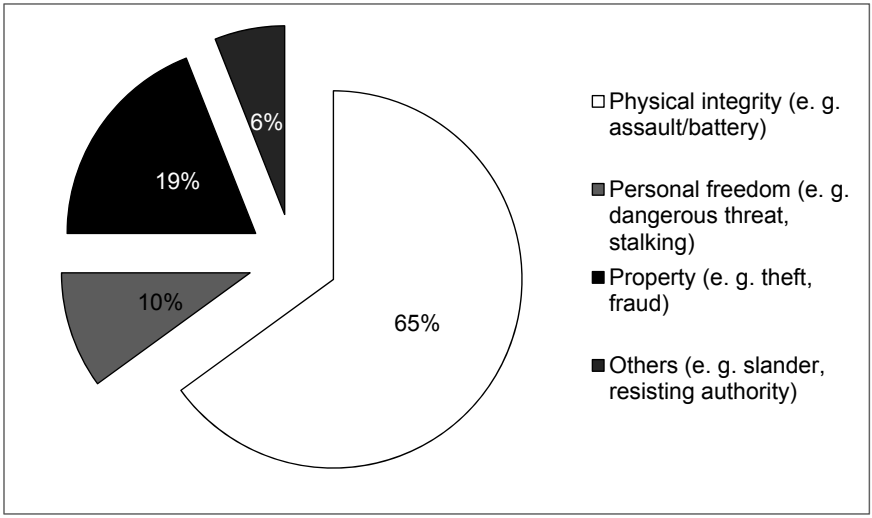
As concerns the kinds of offences and the types of conflicts dealt with by VOM, the statistics compiled by the VOM services use only a very rough division of offences into legal categories: offences against physical integrity (e. g. assault/battery, etc.), offences against personal freedom (e. g. threatening behaviour, stalking, etc.), offences against property (e. g. theft, fraud) and 'others' (including sexual coercion, slander, resistance to authority). Taking a first glance at the relation between these legal categories, it is interesting to note that mediation in criminal matters is mainly used for offences against physical integrity – for juveniles as well as for adults (*Figures 3* and *4*).

In 2010, in the juvenile group this offence segment amounted to 65%. For two out of three cases, the underlying reason for mediation was minor or serious physical injury, a fight or brawl, etc. 19% of the cases dealt with offences against property and 10% with offences against personal freedom.

Comparing juveniles and adults, one major difference in the offence categories dealt with by the mediators stands out: the percentage of offences against property that are referred to VOM in the juvenile group amounted to 19% in 2010, while in the *adult* group this segment accounted for only 11%. Both groups have a very high share of offences against physical integrity, amounting to four out of five cases for adults.

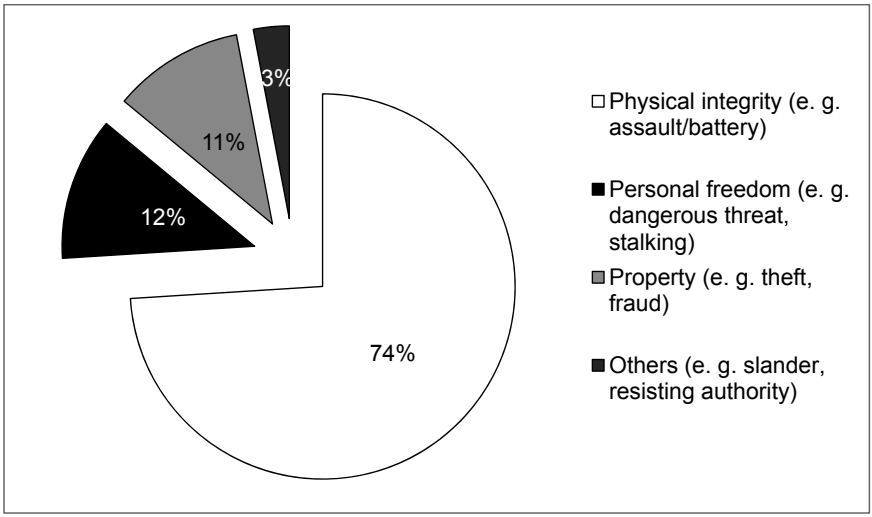
17 *Bruckmüller/Pilgram/Stummvoll* 2010.

Figure 3: Type of crime, juveniles 2010



Source: NEUSTART, statistical records.

Figure 4: Types of crime, adults 2010



Source: NEUSTART, statistical records.

Another category that we regard as being of importance focuses on the victim-offender-relationship or, as it is sometimes called, on 'relational distance'. Here the NEUSTART-statistics makes a distinction between partnership conflicts, family conflicts, neighbourhood conflicts, conflicts at the workplace (labour relations), conflicts in school, other conflicts where the parties know each other (i. e. friends), situational conflicts (i. e. conflicts arising out of a brief encounter in a special situation: brawls or fights in public places or related to traffic situations), stalking, and conflicts where no persons are involved. The respective figures for 2010 are as follows.

For the juvenile group the share of situational conflicts was highest in 2010, amounting to 57%, followed by other conflicts where the parties knew each other (19%). 12% of conflicts occurred in a school context, 6% inside the family and 2% in a partnership. In another 2% of cases no physical persons were involved.

Table 1: Type of offence/conflict according to relational distance, juveniles and adults, 2010, in %

	Juveniles	Adults
Work	1	3
Family	6	10
No persons involved	2	1
Neighbourhood	1	6
Partnership	2	23
School	12	1
Situational	57	42
Friends etc.	19	13
Stalking	0	1

Source: NEUSTART, statistical records.

The overall breakdown for the adult group was similar, yet bore distinct differences. Even though situational conflicts were the most frequent reason for a referral to VOM (42%), there was a significant difference concerning conflicts in middle-range or close relationships. For 23% of the cases that were referred to NEUSTART by the public prosecutors (or the court), the offence stemmed from or occurred within an intimate or partnership relationship. 13% were other conflicts where the parties knew each other. 10% of cases involved conflicts in a family context. Neighbourhood conflicts were even more frequent than in the

juvenile group, amounting to 6%. 3% of cases dealt with a conflict at the workplace and only about 1% of all cases did not involve any (physical) persons at all.

4.2 Findings from implementation research and evaluation

The statistical records of NEUSTART count referrals from public prosecutors (and judges) and they discern cases where an agreement has been reached and those where they had to inform the public prosecutor's office about negative results. Negative outcomes can be due to the offender refusing to assume responsibility, to her/him not fulfilling the terms of the agreement or to committing another offence during the working period of the TA. Moreover, a negative result is registered when no contact could be established with either victim or offender or when participation in VOM was declined by one of them. Finally, a negative result is also filed when the mediators deem the case to be unsuitable for this type of intervention. In any case, discretion lies with the public prosecutor to decide on the further procedure, but dropping the charge is almost always the reaction when an agreement is reached in the course of VOM. It has to be said though that concrete figures are missing so far.

From its very beginning, research, initially in the form of accompanying research, has played an important role in Austria and has made a major contribution to the establishment of the intervention.

The results of the accompanying research of the first pilot project had – as already mentioned – found the intervention to be an overwhelming success, especially with regard to offender and victim participation rates and to the rate of agreements/settlements achieved that resulted in a discharge of the case by public prosecutors. These results became apparent both at the level of quantitative and qualitative data. Within the pilot project with juvenile offenders the participation rate of the young offenders was about 90% and the (voluntary) participation of victims was even higher, with only 4% of those contacted being unwilling to co-operate. One important result was that the probability of having the conflict resolved and an agreement reached was considerably higher when direct contact between victim and offender was established. The overall rate of successfully resolved conflicts, i. e. cases that had resulted in an agreement and its fulfilment, was about 75% of all cases referred to VOM. It amounts to about 90% of the cases where the ATA-bureau had succeeded in establishing contact with the offender.[18]

The picture was, as we had expected, somewhat different with regard to adults. Here we found about 85% of the alleged offenders and the same percentage of victims prepared to participate in VOM, resulting altogether in

18 *Pelikan/Pilgram* 1988, pp. 98-108.

72% of the cases referred to VOM being carried by the will of both parties to join in the mediation effort. Of these, as many as 86% ended up with some kind of agreement. The interest in achieving symbolic reparation and restoring the balance was more pronounced than the desire to achieve material compensation, both for victims and offenders. This, of course, stems from the fact that the majority of cases were located in the immediate close social environment and concerned petty and minor physical damages and threats. Also with adults, although face-to-face encounters in mediation were never forced upon the parties, those cases where direct mediation did take place showed a rate of compliance that was considerably higher than for cases where there was only indirect mediation.[19]

Important aspects of the results of the accompanying research did find confirmation through a piece of comparative research executed by *Marianne Löschnig-Gspandl* and *Michael Kilchling* as part of the research programme of the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Breisgau. They compared the practice of VOM in the Austrian province of Styria on the one hand and at the TOA-practice in Baden-Württemberg in Germany on the other hand. There was a difference regarding the type of offences referred to the respective VOM-agencies, with the majority of offences being offences leading to physical injury and property offences in Austria, and offences against personal honour in Baden-Württemberg. The most relevant findings pertain to the readiness of victims and offenders to co-operate, to the mode of the mediation procedure applied, and to levels of victim satisfaction. 72% of the alleged offenders and 74% of the victims that were referred in Germany were willing to co-operate, compared to 93% of offenders and 92% of victims that were referred in Austria. In Styria direct mediation was the predominant mode (73%); in Baden-Württemberg direct mediation occurred in only 36% of the cases. In Styria an agreement was reached in 85% of cases; this was 75% in Baden-Württemberg. 87% of the victims in Styria were satisfied, while this was 65.5% in Baden-Württemberg.[20]

With regard to the topic of recidivism there exists a well designed piece of quantitative research that was conducted by *Hannes Schütz* as early as 1998.[21] Its qualities are derived from the fact that a control group was established, and from the length of the observed and controlled time period (three years). As to the profile of the cases included, the researcher restricted his scrutiny to cases of minor assault (*leichte Körperverletzung*) and – as concerns the reaction of the court (control group) – to the sentence of a fine. In total, the study covered 361 VOM cases and 7,952 court cases. The comparison of all cases pointed to a

19 *Hammerschick/Pelikan/Pilgram* 1994, pp. 129-153.

20 *Kilchling/Löschnig-Gspandl* 1998.

21 *Schütz* 1999.

recidivism rate of 14% for the VOM cases and 33% for cases that had resulted in the imposition of a fine. When looking at perpetrators with a previous conviction, the difference became less pronounced: 30% for the VOM cases versus 47% for the court cases (compared to 10% for those without a previous conviction who had been to VOM and 22% for those having received a fine).

More recently, *Veronika Hofinger* and *Alexander Neumann* of the IRKS carried out a study on '*Legalbewährung*', i. e. avoiding re-conviction in the aftermath of having benefited from one of the range of interventions offered by NEUSTART (VOM, community service and probation assistance).[22] Regarding VOM, data on referrals, modes of handling the case and on the reaction of the prosecutors and courts were collected and analyzed. The collated data showed that in 2005 40% of all cases were so-called 'situational' conflicts, i. e. conflicts between persons with no prior relationship (mostly fights, brawls, minor assaults, dangerous threat, etc.), a quarter of all referrals were cases of partnership violence, about 8% involved other family conflicts, 6% were conflicts in the neighborhood or between friends and acquaintances, and workplace or school conflicts together accounted for only 4% of all referrals. The vast majority of cases referred for VOM involved offences against physical integrity (more than 85%), while property offences and offences against personal freedom constituted the remaining 13% to 15%. It is also worth mentioning that almost a third of the persons involved in VOM participated as both victim and offender.

According to the NEUSTART records, in more than two thirds of all cases VOM was registered as having been successful. Interestingly, the charge was dropped by the public prosecutor in 78% of all cases which implies that negative VOM outcomes need not necessarily result in an indictment.

In order to establish differentiated recidivism (or rather reconviction) rates the researchers drew on both the records of NEUSTART as well as the official criminal record. Reconviction within a 2,5 to 3,5 year period was investigated. The results proved quite remarkable: of all VOM clients/offenders, regardless of whether or not mediation was deemed successful, only 16% were reconvicted during the observation period. For those offenders who were able to reach an agreement in the course of the VOM procedure, 14% were reconvicted within the period of observation, compared to 21% for those cases resulting in a negative VOM outcome. As is to be expected, the respective specific rate for juveniles was decidedly higher: 37%; it is 28% for young adults and only 10% for adult clients. The re-conviction rate was especially low (11%) in cases involving partnership conflicts (see more below). *Hofinger* and *Neumann* also attempted to pitch these figures against results from the general statistics on re-

22 *Hofinger/Neumann* 2008.

conviction.[23] For comparison they referred to the three-year reconviction rates for the offence of minor/common assault. Looking at different sanction subgroups, they discovered that for all of them the reconviction rate after VOM had been distinctly lower than the reconviction rate following the imposition of a court-ordered sanction, including fines, the least intrusive sanction available to the courts. The overall three-year reconviction rate following court sentence was 41% compared to 15% after VOM.

One has to be aware though that these highly favourable results can be attributed to the fact that the public prosecutors use their discretion to refer those cases to VOM that are promising or most likely to be suitable for this type of intervention. The clients of VOM are better educated, they are older und generally more 'middle-class' than the average of people who are sentenced by the courts for the commission of criminal assault.

In addition, important evaluation studies have been conducted that deal with the effects of VOM in cases of partnership violence. Rather elaborated research of that kind was done at the IRKS, resulting in a two-volume research report that was published in 2000.[24] This project was placed (similarly to what happened with the accompanying research of the initial pilot project) within a legal policy context and was associated with the effort to introduce the 'diversion package' as part of a reform of the Criminal Procedure Law. More specifically, it was intended to provide information on the effects of VOM in domestic violence cases. It was commissioned by the Ministry of Justice and funded in cooperation with the Ministry of the Interior and the Ministry of Family and Youth Affairs. Already at that time a considerable percentage (about 25%) of VOM cases involved domestic violence. This fact met with the critique of the protagonists of the women's shelter movement who demanded the introduction of a clause as part of this diversion package that would rule VOM non-applicable to these cases.

The more specific aim of the study was to produce a list of criteria that would guide case selection and placement, i. e. assist public prosecutors in their decision-making with regard to these cases. Instead this research resulted in a 'typology of the restorative process' that describes the efficacy of the VOM procedure according to different constellations of cases and the power relation that marked them.

It became obvious that VOM procedures are effective mainly as a reinforcement of dynamics that have already been set in motion, i. e. of change and of efforts that were brought about either by both partners, or by the woman alone as a consequence of the occurrence of violence that was made public by

23 *Statistik Austria* 2009; see also *Pilgram* 2004.

24 *Hönisch/Pelikan* 2000; an English version is published on the website http://www. restorativejustice. org.

calling in the police. The VOM procedure is apt to address deeper relational power structures, to make them visible and to reinforce their transformation. It is only very rarely the case that VOM is the initiator for a process of relational change, or of a conversion or reformation of the alleged perpetrator. This, however, holds true for both the criminal procedure and for VOM.

About ten years later a follow-up study on VOM in cases of partnership violence was commissioned by NEUSTART.[25] Having concluded the first study by proclaiming, somewhat flippantly: "Men don't get better, but women get stronger!" we could now perceive the following:

- The efficacy of VOM in cases of partnership violence is still to a large part due to the empowerment of the women victims, but now, albeit to a smaller percentage, also due to an inner change, to insight and following from that a change of behaviour on the side of the male perpetrators.
- These achievements cannot be understood except as part of comprehensive societal change – a change of collective mentalities, regarding the use of violence in intimate partnerships.

The follow-up study consisted of both a quantitative and a qualitative part, directed exclusively at the VOM effort and addressing only the female victims. The central results that could be derived from the study were the following.
Regarding the *quality* of the VOM-process, the majority of women had the impression that they were listened to, and that they are met with understanding and support by the mediators. Only between 14% and 22% responded that they felt to have encountered little or no understanding.

In terms of women's perception of what happened to the perpetrators during the VOM process, 81% of women felt that the behaviour of their (ex)partners – their having committed an offence – was taken seriously by the mediators and social workers involved. 57% of the women said that their (ex)partner had understood in which way and to what extent he had hurt the woman – including emotional harm and suffering (38%: rather not; 5% not at all). Finally, according to the women, remorse was seen in and felt by only 40% of the men.

The follow-up study also set out to measure what happened following the VOM process – what relational changes occurred. 40% of the respondents were separated from their partners and had no further contact at all; 28% had separated but did have contact – mostly for reasons of parenthood; 32% were still living together. However, it should be pointed out that of those partners that were separated, 58% had already separated or were in the process of separation at the time VOM took place (32% and 26% respectively).

The results indicated that VOM had contributed to bringing about separation in almost 50% of those cases at least to some degree: 65% of these women said that they felt more self-assured and stronger as a result of the VOM-process and

25 *Pelikan* 2010a; *Pelikan* 2010b; *Pelikan* 2012.

thus empowered to follow through with the separation, for 55% the process had contributed to convince them that separation was the best thing for them to do. Of those women who still had contact to or who were still living together with their (ex)partner, two thirds reported to be living free of violence in their relationship with the (ex)partner. Just under one third had experienced further incidences of violence, 15% of them repeatedly. Among all women responding, 83% experienced no further violence, while 8% had suffered repeat victimisations. Of those women who reported no further violence from their (ex)partner, 80% contended that VOM had contributed to this effect – in 40% of those cases even to a substantial degree. This contribution was brought about by way of direct or indirect empowerment: 40% stated that their partner had changed as a result of going through the ATA.

Concerning the largest group of cases where a *further empowerment of women had taken place*, the women were very certain of their rightful claim to a partnership free of violence, and especially the young women regarded the interventions and reactions of the agencies of the CJS as a matter of course. The barring order and the eviction order as instruments for protecting vulnerable partners in personal relationships received high levels of acceptance.

These results have to be regarded against the wider societal backdrop. Both stories of the empowerment of women and stories of an inner change of men happen against the foil of a change of horizons of societal expectations, of a new collective mentality. The expectation of keeping violence out of intimate relationships has become a matter of course and has acquired wider acceptance within (Austrian) society.

Against this background, VOM is apt to effectuate the next decisive step: men are induced to move from: 'Violence must not happen within an intimate relationship' towards the insight: 'I have been acting violently. I have – physiccally and emotionally – hurt my partner.' Thus, as an effect of VOM two major changes take place. There is the empowerment of women – mainly as a reinforcement of changes that have already been initiated. Secondly, one can also see that men *can* change, also as an effect of participating in the VOM-effort.

5. Summary and outlook

As has already been indicated in the course of this report, the main problem that Austria has had to face in recent years has been a certain degree of standstill in the development of restorative justice in its criminal justice system. There is the impression that there has been a loss of interest in this mode of reacting to crime since its strong and truly impressive beginnings – a degree of complacency regarding what has been achieved and a conviction that, as pioneers, we can rest on our laurels.

Nonetheless, several impressive facts remain. There is nationwide coverage, and in international European comparison the number of referrals (ratio per 100.000 inhabitants) is still relatively high (74 in 2010; in 1997 it was 92; Norway 2007: 180 (about half of them 'criminal' cases); Finland 2010: 288).[26] In addition, as can be seen most clearly in cases of partnership violence, a certain routine has been established with the public prosecutors. They have accumulated experience and developed a feeling for the cases and the constellations that are appropriate for referral. Notwithstanding this fact, for NEUSTART sensibilization and generating interest for RJ among the prosecutors and the courts remains an on-going and in fact never-ending task.

The mediators of NEUSTART do have an impressive panoply of rather sophisticated methods at their disposal in order to deal with different types of conflicts and different constellations of persons affected by those conflicts. Finally, the use and implementation of these methods, especially in cases of partnership violence, has been quite well researched. We have acquired knowledge on the effects of the RJ interventions in use on people's minds and people's lives – effects that go even beyond statistics on recidivism.

In the upcoming months a new initiative shall be launched piloting restorative conferencing in various contexts. One of the three envisaged models to be piloted shall also include victims and their supporters. Again, as had previously been the case with victim-offender-mediation, this endeavour shall accompanied by evaluative research. The Institute for Criminal Law and Criminology at the University of Vienna has been commissioned to carry out this research.

The pilot will be located in the 'probation'-section of NEUSTART; it started in Spring 2012 and is limited to two years and to 60 conferences at maximum. The aim is to activate the resources of the concerned families and their social network and to assist young offenders' (re)-integration into society. Three different conferencing forms will be tested during the pilot project:

- Conferences with participation of victims (so-called 'reparation conferences' – "Wiedergutmachungskonferenzen");
- Conferences for dealing with social problem situations of the offender (without victims);
- Conferences that should support the integration of an offender following his release from prison on probation.

NEUSTART has decided to follow the path of offender-oriented conferences, restricting the application to juveniles predominantly out of strategic and budgetary considerations; at present it appears easier to obtain additional resource within the probation unit than for pure restorative measures and instruments.

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26 The basic figures are taken respectively from the NEUSTART's annual report for Austria; from *Hydle/Kemeny* 2010 for Norway and from personal communication provided by *Aarne Kinnunen* of the Minstry of Justice of Finland; computed by IRKS.

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Belgium

Ivo Aertsen

Introduction

This chapter presents an overview of restorative justice in Belgium as it appears at the end of 2013. Restorative justice in Belgium mainly takes the form of victim-offender mediation, both in juvenile justice and in adult criminal law. However, the conferencing model is also present, as are peacemaking circles at an experimental level. Restorative justice in Belgium is relatively well known, and many endorse its values and principles. However, as we will see, this does not necessarily result in a broad application of restorative justice in practice.

In the following sections, we first present the recent history of restorative justice in the country and explain in which societal context the programmes were started and further developed. Then the various legal frameworks for restorative justice in Belgium are discussed in more detail in *Section 2*, from the pre-court to the post-sentence level, both for juveniles and adults. *Section 3* deals with the organisational structures for restorative justice and restorative justice processes. Figures and research on restorative justice are summarised in *Section 4*, and we end with some conclusions and reflections on the future in *Section 5*.

1. Origins, aims and theoretical background of restorative justice

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

Anno 2013, restorative justice (RJ) is well established in Belgium. Restorative justice interventions are widely available both in the field of juvenile justice and adult criminal law. The various types of programmes – victim-offender mediation

(VOM) and family group conferencing (conferencing) – all adopted a legal basis during the 1990s and early years of the new century. 'Restorative justice interventions' are usually understood in their narrow sense and therefore restricted to programmes of victim-offender mediation and conferencing. However, some argue to broaden the scope of restorative justice and to also include – under certain conditions - court imposed reparation orders, community service and even victim assistance.[1] For the sake of clarity, and taking into account definitions promoted through international guidelines,[2] we have limited the Belgian overview to the core types of *restorative justice interventions*, namely victim-offender mediation and family group conferencing. At the same time, it is true that in Belgium *restorative justice values and principles* are adopted by many agencies and professionals working in the broad field of crime control and criminal justice, without applying mediation or conferencing practices as such themselves.

In Belgium, the following RJ interventions are available throughout the whole country (i.e. services are present in each of the 27 judicial districts) and regulated by law: in the field of juvenile justice, mediation and conferencing; in the field of adult criminal law, 'penal mediation' and 'mediation for redress'.[3] The main difference between penal mediation and mediation for redress lies in their scope of application: whereas the former is conceived as a type of diversionary measure for less serious crimes at the level of the public prosecutor's settling of the case, the latter can be applied to crimes of all degrees of seriousness at the consecutive phases of the criminal justice process including the administration of the sentence. Finally, also regulated by law and applicable to both minors and adults, but not implemented in a uniform way throughout the country, is the practice of mediation under the system of 'municipal administrative sanctions'. Besides these legally established restorative justice interventions, the origins, legal frameworks and functioning of which are discussed in more detail in the following pages, a few other types of mediation programmes for minor crimes operate without a legal basis, and they are only available in some parts of the country: mediation at the police level and mediation

1 *Walgrave* 2000.

2 Most important here is to refer to the 2002 UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, where 'restorative outcomes' are defined as resulting from 'restorative processes', i. e. processes where at least victim and offender participate.

3 'Conferencing' is only available for juveniles, for which the legal term is 'herstelgericht groepsoverleg' (hergo) in Dutch and 'concertation restauratrice en groupe' in French. 'Penal mediation' refers to the legal terminology of 'bemiddeling in strafzaken' (Dutch) or 'médiation pénale' (French). 'Mediation for redress' ('herstelbemiddeling' in Dutch, 'médiation après poursuite' in French) is sometimes also translated into English as 'restorative mediation' or 'the general offer of mediation'.

by the justice of the peace. Finally, an experimental project on peacemaking circles was set up in the period 2011-2013.

For a good understanding of the following overview of restorative justice programmes, it is important to keep in mind the federal state structure of Belgium, and the ongoing process of state reform which grants more competences to the Communities and the Regions. Under the Constitution there are three cultural Communities (the Flemish, the French and the German) and three economic Regions (the Flemish, the Walloon and the Brussels Region). Brussels conurbation has a bilingual status. Whereas the Federal State keeps its main competence for matters such as justice, national defence and international relations, the Communities are responsible for 'person-related' and social matters. Obviously, restorative justice finds itself in-between these two spheres of competence. However, at the end of 2011 a new state reform process began, which will ultimately pass juvenile justice and the administration of community sanctions and measures for adults from the federal level to the Communities and Regions. The organisation of the court system remains federal competency. The number of judicial districts ('arrondissements') will be reduced to 12 in the course of 2014.

1.2 Reform history and contextual factors[4]

1.2.1 Juvenile assistance

The history of restorative justice in Belgium begins with the development of mediation practices within the domain of juvenile assistance. The first mediation initiatives with juveniles started in the late 1980s, both in Flanders and Wallonia. It was a handful local NGOs who initiated pilot projects and who took the lead during the following ten years. These small scale initiatives witnessed expansion towards the end of the 1990s. Until 2006, they were operating within the framework of the Juvenile Justice Act of 1965. This law was clearly based on a rehabilitative philosophy (the so-called ‘protection model’) and did not contain explicit references to mediation. Hence, it is within a context of educational objectives that juvenile assistance services, both in the Flemish and French Community, became interested in setting up mediation schemes. For many years, however, the number and practice of mediation programmes for juveniles remained rather limited. Several reasons can be mentioned for this rather hesitant development: the strong identification with a strict (offender oriented) educational role by many social workers, the mixing up of mediation with community service and other educational measures, and the lack of a clear

4 More detailed information about the origins and general development of restorative justice in Belgium can be found in: *Aertsen* 2000, 2004, 2006; *Willemsens* 2004; *Van Camp/De Souter* 2012.

legal framework and of well-defined policies at the national and the regional level promoting and funding mediation programmes.[5] This context hindered a breakthrough of victim-offender mediation programmes for many years.

A new impetus was given in 1999 when the Flemish government, after a resolution by the Flemish Parliament on the further development of the juvenile assistance sector, decided to implement 'restorative justice programmes' in each judicial district. Under the general notion of 'restorative justice', three models were promoted: victim-offender mediation, community service and training programmes. Local NGOs received subsidies to realise these three types of practices, which are most frequently carried out by one and the same organisation. More or less the same policy was followed by the French Community and the Walloon Region, which resulted in a wider implementation of restorative justice programmes throughout the country.

In the meantime, more precisely in 2000, on the initiative of the KU Leuven Institute of Criminology a conferencing pilot project in the form of an action-research was initiated in four different locations. The approach was based on the New Zealand model of family group conferences, but in the Belgian initiative it was decided to mainly address more serious offences.[6]

Repeatedly, legislative initiatives were taken at the federal level during the first years of 2000 to amend the 1965 Juvenile Justice Act. In these proposals, mediation and conferencing were given a clear and central position. However, differences in vision on the future of juvenile justice between the southern and the northern part of the country hampered reaching a political consensus for years. The Walloon strongly defended a youth protection model, whereas the Flemish were more in favour of a legal rights and/or restorative justice approach. Societal unrest caused by the murder of Joe Van Holsbeek by two juveniles finally resulted in the adoption of a new Youth Justice Act by the Federal Parliament in 2006. The Youth Justice Act 2006 clearly prioritises restorative justice options, mainly in the form of mediation and conferencing, although rehabilitative and punitive measures are part of the legal provisions as well. 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.[7] Through this new legal framework, restorative justice programmes with juveniles have been implemented widely and mandatorily in every judicial district all over the country.

Finally, a so-called Compensation Fund must be mentioned as well. This was established by the NGO Oikoten in 1991 and was implemented later in

5 *Aertsen* 2006, p. 69.

6 *Vanfraechem* 2005, 2007; *Vanfraechem/Walgrave* 2004a; 2004b.

7 *Put/Vanfraechem/Walgrave* 2012, pp. 88-89.

every Flemish province on the basis of local formal agreements (but without a legal framework). 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 then will be passed to the victim.[8]

1.2.2 Adult criminal law

Belgium, contrary to developments in many other countries, has witnessed a much stronger and rapid growth of restorative justice in adult criminal law than in the field of juvenile justice. Two main models of victim-offender mediation have been initiated in the early 1990s, whereas other, related practices have been developed as well. However, socio-political contexts and objectives have been orienting the implementation of the respective models in divergent directions.

Penal mediation

The political context of the early 1990s favoured a quick start of the new practice of 'penal mediation' in Belgium. After a short experimental period on the initiative of one of the Prosecutors-general, penal mediation adopted legal status in 1994. The ease by which this (and other) legislation took place must be seen against the background of the political situation of those days. Confronted with the success of the extreme right party 'Vlaams Blok' during the parliamentary elections of 1991, the federal government felt urged to develop multi-faced policies in order to tackle insecurity problems in society and to regain public trust. Penal mediation, a diversionary measure at the level of the public prosecutor, was part of the governmental strategy. This legislative initiative had at least a double official aim: on the one hand, providing a quick social reaction to common 'city crime' and, on the other hand, paying more attention to the victim. In minor criminal cases, for which a penalty of over two years imprisonment does not seem necessary to the public prosecutor, the law offers the possibility of imposing on the suspect one or more conditions or measures which, when complied with, result in the extinction of the public action. However, mediation is only one of the possible measures within this legal framework (the others being counselling, training and community service) and therefore, the term 'penal mediation' as a generic title for this new legal procedure was clearly mistaken. Inspiration for this new Belgian law was found in France, where 'médiation pénale' was already being applied with a similar orientation already for some years.

8 *Van Garsse* 2007; *Van Doosselaere/Vanfraechem* 2010, p. 59.

Penal mediation is applied in each judicial district from within the public prosecutor's office. 'Justice assistants', who are civil servants in the so-called 'Houses of Justice' under the Ministry of Justice, play a central role in the mediation process. Quantitatively, the legal system of penal mediation has developed quite fast.

Mediation for redress

'Mediation for redress' goes back to a 1993 initiative of the KU Leuven Institute of Criminology, in partnership with the local public prosecutor and a NGO working with victims and offenders.[9] Victimological and penological research findings, together with emerging international publications on restorative justice, formed the basis for this initiative. The pilot project aimed at developing a concept and a method for mediation for more serious crimes, which do not qualify for a conditional dismissal or for 'penal mediation'. Not being a diversionary measure, the purpose was to also study the impact of this type of mediation on the decision making processes by the public prosecutor and the judge, and more generally to find out how and to which extent this restorative approach could challenge the retributive rationales of the criminal justice process. After an experimental period of three years, the project adopted a more definitive status. It became a national programme, received funding from the Ministry of Justice, and gradually the model was transferred to other judicial districts. Two umbrella organisations, the Flemish NGO Suggnomè and the Walloon NGO Médiante became responsible for the implementation of the model throughout the country. Apart from the high level nature of crimes dealt with, a particularity of 'mediation for redress' was the consistently built-up and bottom-up approach through the establishment of local partnerships which support and direct the programme.

In 2005, mediation for redress adopted a legal status, in order to establish legally the model in each judicial district. The law considers mediation as an offer to victims and offenders that can be made at each stage of the criminal justice process, including the administration of the (prison) sentence, and independently of the nature and the degree of seriousness of the crime. The mediation work is carried out by professional mediators who are employees of the two aforementioned NGOs and who have offices at each judicial district.

Mediation at the police level

Since 1996, mediation programmes have been set up in some Flemish cities and in various municipalities of the Brussels Region. The total number of

9 *Peters/Aertsen* 1995; *Aertsen* 1999; *Van Garsse* 2001; *Aertsen* 2004, pp. 214-220; *Lauwaert* 2008, pp. 67-86.

programmes has never been higher than 11. This model took form within or in a close cooperation with local police departments. Common features of these programmes were their main focus on minor property (and violent) offences with clearly specified financial or material damages, for which a (rapid) settlement can be reached. The mediators are civil servants, not policemen. The programmes are supported by federal government funding related to security and employment policies. The mediation programmes at the level of the police are based on divergent ideologies, going from civil dispute resolution over community policing to zero tolerance.[10]

Restorative justice in prisons

The option to integrate restorative approaches in the criminal justice system as a whole, which initially inspired the 'mediation for redress' programme in 1993, resulted in 1998 in a pilot project and action-research in six prisons by the criminological institutes of the universities of Leuven and Liège in order to develop a restorative justice approach to be applied during the administration of the prison sentence.[11] In 2000, the Minister of Justice decided to implement this restorative justice model in each prison of the country. The most important instrument to realise this was the appointment of a full time 'restorative justice advisor' in each prison, operating at the level of prison management. His/her task was not to work on a case-by-case basis with inmates and victims, but to support within the prison system the development of a culture, skills and programmes which give room to the victims' needs and restorative answers. 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.[12] However in 2008, the function of restorative justice advisor was abolished on the initiative of the Ministry of Justice. The reasons for this rather unexpected withdrawal, after eight years of practice and a lot of international attention, are not clear.[13] The function of restorative justice adviser was transformed into a more general one to assist the prison governor in general management tasks.

In 2001, in cooperation with the then restorative justice advisors, the NGO Suggnomè started a pilot project for mediation between prisoners and their

10 *Lemonne/Aertsen* 2003; *Aertsen* 2009.

11 *Robert/Peters* 2003; *Aertsen* 2005.

12 *Hodiaumont* et al 2005.

13 According to the official version, eight years of development had integrated restorative approaches sufficiently in daily prison life. For many field workers and other experts, the decision to abolish the function of restorative justice advisor was premature (see also *Aertsen* 2012).

victims. Two independent mediators, based in the local 'mediation for redress' services, offered mediation on request of the inmate, the victim or the victim's family. The programme, which received additional funding from the Flemish Community, focused on serious crimes, including cases of rape, armed robbery and murder. With the law of 2005 coming into practice, the programme became part of the general mediation for redress offer. Hence, mediation is now available in all prisons of the country.

1.2.3 Other contexts for mediation

Two other programmes, where mediation can be offered after crime, have to be mentioned.[14] 'Prorela' refers to a project initiated in the region of Antwerp in 2002 where the justice of the peace – who is a civil judge – in close cooperation with the local police and the public prosecutor, offers mediation for crimes which emerged in a relational context, i. e. between adult persons who are familiar to each other (family members, neighbours, etc.). Crimes dealt with include slander, not respecting maintenance allowance or visiting rights after divorce, violent incidents between neighbours or colleagues, etc. The project has been taken up by a few other judicial districts of the Flemish region, without being nationally implemented.

Another context for mediation originated when in 2004 the system of municipal administrative sanctions, introduced by the law of 1999, broadened its field of application. Municipal administrative sanctions (GAS) give local municipal authorities the competence to impose fines or to take other measures against petty offences and acts of public nuisance. The purpose of the new approach was to show a quick reaction to forms of anti-social behaviour and to lighten the workload of the courts and the police. The whole procedure is applied by a municipal civil servant without intervention of a judicial authority. Within the system of municipal administrative sanctions, also mediation can be offered, which is even mandatory when the offender is a minor. Eight out of ten municipalities have adopted the GAS system, but a new enlargement of its field of application in 2013 has been criticised by various groups in society because of its excessive use for all types of so-called disturbing behaviour by juveniles.

1.3 Societal influences and international standards

The broad development of restorative justice in Belgium, as sketched above, has taken place against a social and political background which might - at least

14 Moreover, also in the field of civil law in Belgium various mediation programmes and practices exist, which often have their own legal and institutional frameworks, such as neighbourhood mediation, family mediation, commercial and social mediation. This broad field of mediation falls beyond the scope of our overview.

partly - apply to other countries in Western Europe as well. Typical - but again not unique - for the Belgian situation has been the role of specific incidents that caused major social unrest. The notorious Dutroux case of 1996 might have been the most important one: after the kidnapping and murder of four young girls, important failures of the functioning of police services and criminal justice agencies came to light, which resulted in a 'white march' of 300.000 indignant people in the streets of Brussels in October 1996. A Parliamentary Investigation Commission was established, which finally resulted in a whole reform movement including new legislation in the following years. The lack of empathy towards the plight of victims of crime and their relatives was identified as one of the main issues. Some of the outcomes of the reform process were the Law of 12 March 1998 reinforcing the legal position of victims in criminal justice proceedings, and the Law of 5 March 1998 introducing hearing and information rights for certain types of victims in the procedure of granting conditional release for prisoners, which were further extended by the Law of 17 May 2006. In this victim-sensitive climate, other initiatives and especially those related to restorative justice have also been able to flourish.[15]

Another factor of importance in the early development of restorative justice in Belgium has been the role of academics. As mentioned above, it were mainly institutes of criminology that initiated and accompanied pilot projects in the form of action-research for different types of RJ programmes. This was only possible on the basis of the long-standing relationship and cooperation that was built since the 1970s between some of these institutes of criminology and 'the field', and the leading position that experts with a degree and experience in criminology had been taken at the central governmental policy level.

It has also mainly been academics and NGOs who have introduced existing international standards in the field of victim policies and restorative justice in Belgium. Some of them had played an active role in the preparation and drafting of these standards at UN or European level, and this all might help to understand why these international instruments had a strong influence in the implementation of RJ in Belgium indeed.[16] This was the case for the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002), the Council of Europe Recommendation R(99)19 concerning Mediation in Penal Matters, and the EU Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (replaced by Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime). For example, the law of 22 June 2005 on mediation (for redress) was clearly inspired by the definition of mediation and the basic

15 *Daems/Maes/Robert* 2013, pp. 248-249.

16 For the impact of European regulation on the practice of mediation in general, see for example *Pelikan* 2004.

principles as put forward in Recommendation R(99)19 of the Council of Europe. The established legal frameworks for RJ in Belgium also complied with art. 10 of the EU Council's Framework Decision of 2001, in particular with § 1 on the promotion of mediation and § 2 that prescribed the possibility for the court to legally take into account the outcomes of mediation. Besides this, there has also been – maybe to a lesser extent at policy level - attention for the position of the victim in RJ processes, as dealt with by international instruments as the Council of Europe Recommendation Rec(2006)8 on Assistance to Crime Victims and EU Directive 2012/29/EU, which both in separate sections promote safeguards for victims when participating in RJ processes.

2. Legislative basis

At present, as summarised above, different types of RJ programmes – mainly victim-offender mediation and conferencing – have adopted a legal basis in Belgium. In short, restorative justice practices can be legally applied both with juvenile and adult offenders, for all types of crime and degrees of seriousness, and in all phases of the criminal justice process. In what follows, we will present the legal frameworks in more detail, as they operate throughout the consecutive stages of the criminal justice process. Since some of the legal frameworks apply to all the phases, some repetition in the overview is unavoidable.

2.1 Pre-court level

2.1.1 Adult criminal justice

Local mediation at municipal level

The laws of 13 May 1999 and 17 June 2004, most recently modified by the law of 24 June 2013, have introduced a system of municipal administrative sanctions (GAS) that allows municipal councils to adopt a local police regulation to determine penalties or administrative measures to be imposed for certain breaches of local regulations, acts of public nuisance or (a limited list of) petty offences. Possible 'sanctions' include an administrative fine (max. 350 euro for adults), the suspension or withdrawal of a licence or the closing down of a business. As possible 'alternative measures' for the administrative fine, municipalities can include in their local regulations 'community service' or 'local mediation'. A central figure in the system of municipal administrative sanctions is the 'sanctioning official', a municipal civil servant who, after an incident has been reported by a police officer or by another officially mandated person, has the legal competence to impose a fine or another sanction, or an alternative measure, as mentioned above. The alternative measure of 'community service'

(consisting of maximum 30 hours training or unpaid work for social benefit) can be proposed by the sanctioning official on the request or with the consent of the 'offender'. If the community service is completed successfully, no administrative fine can be imposed anymore. The administrative measure of 'local mediation' can be proposed by the sanctioning official on the condition that (1) its procedure and rules have been determined in a municipal regulation, (2) the offender expresses his consent, and (3) a victim has been identified. 'Local mediation' has been defined by the law as 'a measure that permits the offender, with the help of a mediator, to repair or compensate the damages, or to relieve the conflict'. The reparation or compensation is freely to be discussed and decided upon by the parties. The mediation is performed by a mediator who has to comply with minimum standards to be determined by government, or by a mediation service officially certified by the municipality according to governmental rules. If the offer of mediation has been refused, or the mediation fails, community service or an administrative fine can be imposed. When the sanctioning official decides to start a procedure, he has to inform the offender in written form about the incident and its (legal) qualification, and about his legal rights: the right to express his objections in a written form or orally, the right to be assisted or to be represented by a lawyer, and the right to have access to the file. The law furthermore prescribes the steps and timing of the procedure. Both the offender and the municipality have a right to appeal against the decision of the sanctioning official with the police court, but only regarding the administrative fines, not regarding the measures of community service or mediation. A record of all the imposed administrative sanctions and alternative measures must be kept by the municipality, consisting of elementary data about the person, the incident, the sanction, and other items.

Penal mediation

Penal mediation at the level of the public prosecutor has been introduced by the law of 10 February 1994 as the new article 216ter of the Code of Criminal Procedure (further referred to as CCP). This legal provision adds one other model to the diversionary measures available to the public prosecutor: it allows the public prosecutor to dismiss a case under certain conditions. The public prosecutor can call upon the offender and, in so far as he considers that the offence has not to be punished by a sentence of over two years imprisonment or a more severe sanction, he can request the offender to repair the damage caused by the offence and to deliver the evidence of this repair. As the occasion arises, the public prosecutor can call upon the victim and mediate about the compensation and the arrangements for it.

More precisely, the law defines four possible conditions that have to be met by the offender in order for the public prosecutor to cease prosecution. The conditions to be proposed by the public prosecutor (separately or cumulatively)

are: reparation of the damages to the victim, medical or psychological treatment for crime related personal problems, training or community service. As may be seen, reparation of the damages to the victim (including the possibility of mediation) is only one of four possible applications of this law. Therefore, as already mentioned above, the term 'penal mediation' as a title for the whole legal procedure in general is misleading.[17]

For penal mediation, there are no limits to referral on the ground of the judicial qualification of cases. Besides what is already mentioned above, other conditions to refer a case are: (1) the offender has to recognise his responsibility for the crime; (2) the offender is willing to cooperate in a penal mediation procedure; (3) the prosecution phase has not yet passed to another stage in the criminal justice process (e.g. the start of a procedure before the investigating judge or the treatment at court level). If the penal mediation procedure is completed and the offender fulfils the conditions including, if applicable, the agreement with the victim, the prosecution officially extinguishes by a formal report of the public prosecutor. If the penal mediation procedure is not completed (if the condition(s) is (are) not met), the public prosecutor is free to prosecute or to dismiss the case.

As can be noticed, the whole procedure of penal mediation occurs under the authority of the public prosecutor. However, the law (and subordinate regulation) stipulates that the case work is done by 'justice assistants', which are persons with a social work background operating under the direction of the 'Houses of Justice' within the Ministry of Justice. The justice assistant engaged in the process is also bound to professional secrecy. Participation by victim and offender in the process of penal mediation is, for each of the four measures, on a voluntary basis. They do not have a legal right of appeal against the decision of the public prosecutor to dismiss or to prosecute (in case of failure) the case after the penal mediation process.

Mediation for redress

'Mediation for redress' is the type of victim-offender mediation that initially focused on more serious crimes, and that during its experimental period was applied only after a decision by the public prosecutor was made to bring the case to court. However, since its adoption by law of 22 June 2005 it represents the

17 This was also the opinion of the Council of State in its comments on the draft law. According to the Council, the penal mediation procedure is not intended to work out an agreement between persons. Apart from that, the public prosecutor is not in the position to function as a neutral mediator, since he is a party in the judicial handling of the case. The Council of State also warned about possible confusion when, in the future, mediation on its own would be introduced, following foreign examples (*Aertsen* 2000, p. 258).

'general offer of mediation' in adult criminal law.[18] The law introduced new provisions on mediation in the Preliminary Title of the Code of Criminal Procedure and in the Code of Criminal Procedure itself, and makes mediation possible throughout all stages of criminal procedure (investigation, prosecution and trial), including the execution of sentences. The law neither specifies nor excludes certain types of offences as suitable for mediation.

The new Art. 553, § 1 CCP, stipulates that *"every person who has a direct interest can request mediation at any stage of the criminal procedure*". Art. 553, § 2 CCP urges public prosecutors, investigating magistrates and judges to supervise the dissemination of information on the availability of mediation to the parties in criminal proceedings. This must allow victims, offenders and others with a direct interest to ask for mediation. Also, the public prosecutor or the judge can propose mediation when they judge such an offer opportune, but they can never impose it on one of the parties.

A definition of mediation is inscribed in art. 3ter Preliminary Title CCP:

"Mediation is a process that allows people involved in a conflict, if they agree voluntarily, to actively participate and in full confidentiality in resolving the difficulties that arise from a criminal offence, with the help of a neutral third person and based on a certain methodology. The goal of mediation is to facilitate communication and to help parties to by themselves come to an agreement concerning pacification and restoration."

In this definition, mediation is described as a process guided by principles such as voluntariness, confidentiality, active participation, neutral support and communication. The law does not provide a detailed and strict procedure according to which mediation must be undertaken. As stated in the explanatory memorandum, the parties themselves should determine the course of mediation. Each mediation process is unique in the sense that it reflects the individual expression and needs of the parties. In the explanatory memorandum with the law, the notions of 'pacification' and 'restoration' are presented as follows: 'pacification' aims at restoring the peace and quiet, both in relations between the parties involved in the conflict and in the relation to society. The notion of 'restoration' should be considered in its broadest sense and can include the repair of both material and immaterial losses (in the common law, both pecuniary and non-pecuniary losses).[19]

The legal framework considers mediation to be a process parallel to, but independent of, the criminal proceedings. At certain points, non-binding links are established between that process and the criminal proceedings. The mediation service can inform the prosecutor of a demand for mediation and in such a case, further ask the prosecutor for authorisation to consult the judicial

18 *Van Camp/De Souter* 2012.

19 *Van Camp/De Souter* 2012.

file (Art. 553, § 3, section 2 CCP). The results of and agreements made during a mediation process are not automatically communicated to the judge. It is up to the parties to decide whether they wish to bring any material to the judge's attention. Moreover, *if* "*there are elements of the mediation that are being brought to the knowledge of the judge, this is noted in the judicial decision. The judge can take these into account and if so, he notes it in his decision*" (Art. 163 and 195 CCP). Despite the possible links between the mediation process and the criminal proceedings, the confidentiality of the mediation process should always be guaranteed. This guarantee is secured by the following elaborate provisions of Art. 555 CCP:

"§ 1. The documents drawn up and the communications made within the framework of the intervention of the mediator are confidential, except for those communications to the judicial authorities upon which the parties agreed. They cannot be used in criminal, civil, administrative, arbitration or any other procedure to resolve conflicts and they are unacceptable as evidence, even as complementary judicial evidence.

§ 2. Confidential documents that are nevertheless communicated or used by a party in breach of confidence are ex officio excluded from the judicial debates.

§ 3. Except for obligations imposed by law, the mediator may not reveal facts of which he has gained knowledge in his position. He may not be called as witness in criminal, civil, administrative, arbitration or any other procedure in relation to the facts of which he gained knowledge in the course of mediation."

Mediation for redress is offered and organised by private non-profit organisations, who have set up a close cooperation with criminal justice authorities. The law of 22 June 2005, completed by a Royal Decree (26 January 2006), determines which organisations according to which criteria can be recognised by the federal Minister of Justice in order to operate as mediation services. Another Royal Decree of 26 January 2006 stipulates on the establishment of a Deontological Commission for Mediation (the organisation of mediation services is dealt with below).

2.1.2 Juvenile justice

Local mediation at municipal level

For minors, the system most recently regulated by the law of 24 June 2013 as explained above for adults, applies. However, within this legal framework further specific arrangements for minors are the following: (1) municipal administrative sanctions and alternative measures can be imposed from the age of 14 years onwards; (2) the administrative fine is limited to 175 euro; (3) the parents or legal guardian of the minor have to be informed and a special regulation for parental involvement preceding the mediation, community service or administrative fine can be adopted; (4) in all cases, an offer of mediation has

to be done by the sanctioning official; (5) the parents or guardian may, on their request, accompany the minor during the mediation; (6) a lawyer must be appointed with the help of the bar association and the lawyer can be present during the mediation procedure; (7) community service has a maximum duration of 15 hours; (8) appeal against the decision of the sanctioning official can be exercised with the youth court.

Victim-offender mediation

The reformed Youth Justice Act (YJA) of 2006 offers the legal framework for both mediation and conferencing.[20] At pre-court level, mediation can be proposed by the public prosecutor, whereas at court level the judge can refer to both mediation and conferencing (see below). The YJA 2006 sets out the overall framework of the youth justice system including the juvenile's legal rights, and contains a series of possible interventions on the young person and his/her parents after an act 'defined as an offence' has been committed by a minor (i.e. a person younger than 18 years). However, restorative options are clearly prioritised by the new Act: "mediation and conferencing are considered to be the primary responses to youth crime".[21]

Besides proposing mediation, the public prosecutor can refer the juvenile to a youth care service, issue a warning, refer to the youth court, or drop the charges. He can also refer the case to the youth court judge asking for further social enquiries. However, what is important here is to notice that the public prosecutor (as the youth judge) *has to* offer the young person, his/her parents and the victim the possibility of mediation (or, for the judge: conferencing), as soon as a victim is identified. A referral to the youth court can only be made when the offer of mediation is done or if the reasons for non-referral to mediation are explicitly explained. The parties are invited to mediation by the public prosecutor (or to conferencing by the judge) by letter, a copy of which is sent to the mediation service (which is part of an NGO in the field of juvenile assistance).

The principles of voluntary participation and confidentiality are fully inscribed in the law. If an agreement is reached, this (without proceedings) is sent to the public prosecutor (or to the judge in case of conferencing) and must be accepted by the prosecutor (or the judge) unless this would be contrary to public order. The fulfilment of an agreement does not prevent the case being brought to court (if the public dimension of the offence needs to be addressed as well). If no agreement is reached, judicial authorities and other persons are not

20 In fact, it concerns two legal initiatives: the law of 15 May 2006 and the law of 13 June 2006. For more details, see *Put/Vanfraechem/Walgrave* 2012.

21 *Put/Vanfraechem/Walgrave* 2012, p. 88.

allowed to use the process or results of mediation to the detriment of the juvenile. The implementation of the agreement is reported to the judicial authorities by the mediation service, after the parties were given the possibility to comment on the draft of the report. According to the law, a proper implementation of the agreement should be taken into account in judicial decision making.

2.2 Court level

2.2.1 Adult criminal justice

Mediation for redress

According to the law of 22 June 2005, mediation for redress can be applied at all stages of the criminal justice process, including the sentencing stage. This means that even when the case is being dealt with by the court, parties still can initiate mediation, or the judge can refer a case to mediation. No one type of crime is excluded. The same rules and principles (confidentiality and others) apply as at the pre-court level, and the mediation is organised by the same mediation service (NGOs). A written agreement or other information can only be transmitted to the court with the consent of both victim and offender. The judge can take the efforts or the results of mediation into account in his sentencing decision, but is not obliged to do so. As mentioned before, mediation for redress represents a restorative justice model that as such operates parallel to the criminal justice procedure, but that can, nevertheless, interact with the criminal proceedings by supporting or challenging criminal justice decision making.

2.2.2 Juvenile justice

Victim-offender mediation and conferencing

Here again, the same legal framework as at the pre-court level applies, namely the Youth Justice Act of 2006.[22] At the level of the youth court, both mediation and conferencing can be proposed, besides one or more other measures that can be decided upon by the youth judge (a reprimand, supervision by the youth court social service, or placement in a secure institution). Additionally, special conditions can be imposed by the youth judge regarding, for example, school attendance, training, or house arrest, and referrals can be made to programmes regarding educational guidance, community service, or engagement in a personal 'positive achievement' or a 'written project'. In a general way, the youth

22 *Put/Vanfraechem/Walgrave* 2012.

judge has to justify his/her orders and judgements extensively and - most important here - he/she must follow an order of preference, giving first priority to the restorative offer (mediation or conferencing) and second, if the former is not possible, to the juvenile's written project.

Mediation and conferencing are organised by the same juvenile assistance services as the ones that operate at the level of the public prosecutor. The procedures for referring cases to the mediation/conferencing service and for reporting back, and the implications of (not) reaching an agreement, are explained above as well (see *Section 2.1.2*).

2.3 Post-sentence level

2.3.1 Adult criminal justice

Restorative justice in prisons

Although, according to the law of 22 June 2005, mediation can also be offered – e. g. on the victim's or offender's request – during the implementation of a community sanction such as probation or community service, it has been offered in a more systematic way during the administration of the prison sentence. As mentioned above (under *Section 1.2.2*), restorative justice has gained wide attention in Belgian prisons since the late 1990s. The national programme on RJ in prisons, which appointed a RJ advisor in each prison, was regulated by circular letter of 4 October 2000 by the Minister of Justice. The objectives of this programme and the tasks of the RJ advisors (who disappeared in 2008) have been described above. In this respect, it is relevant to refer to the Belgian law of 12 January 2005 on the administration of prisons and prisoners' rights, which is based on 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.[23]

Reference has already been made to the offer of mediation during the administration of the prison sentence. After an experimental period, this type of mediation became part of the general offer of mediation according to the law of 22 June 2005. The law explicitly mentions that each person with a direct interest can request mediation also during the administration of the sentence (art. 553 § 1 CCP). The mediation is organised by the same NGOs as mediation for redress.

23 *Dupont* 1998.

2.3.2 Juvenile justice

Mediation, conferencing and other restorative measures

The Youth Justice Act 2006 promotes mediation, conferencing and other restorative actions by the juvenile at the preparatory phase (public prosecutor) and the court phase (youth judge). These restorative measures (and others) have been conceived for application in the natural environment of the juvenile (in a certain order of preference, see above). Placement in an open or closed institution can only be ordered by the youth judge under strict conditions. Although the law does not stipulate on the relevance or the possible use of restorative measures (mediation and conferencing) during placement of the juvenile, in practice is does not seem to be excluded.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

Mediation at the municipal level (juveniles and adults)

As mentioned above (see *Sections 1.2.3*, *2.1.1* and *2.1.2*), within the legal framework of municipal administrative sanctions (GAS), mediation can be applied by way of response to different forms of anti-social behaviour, both for juveniles and adults (it *must* always be offered for minors). It is usually a municipal civil servant who will organise the mediation in a practical way, besides other measures he/she can apply. There is no one uniform system of mediation available, since all municipalities are free to adopt their own model, according to their local regulations and taking into account the legal framework. One important observation is that this type of mediation is also used in cases of victimless crime, or when there is no personal victim, for example in the case of vandalism or damages to public infrastructure (making water is a typical example) or shoplifting. In such mediation cases, the victim's role is often played by a representative of the public service or private company, or the 'mediation' takes place between the offender and the sanctioning official. The outcome can be financial restitution, offering apologies or performing services for the victim or the victimised institution. In some cases, in order to implement this type of mediation, (smaller) municipalities are offered support (staff) by the province government.

Mediation under the Youth Justice Act (juveniles)

The Youth Justice Act 2006 resulted in officially establishing and expanding the organisational framework and procedures for both mediation and conferencing as they have been developing as pilot projects since the 1990s (see above *Sections 1.2.1*, *2.1.1* and *2.2.2*). Both models of restorative justice for minors are now available all over the country, i.e. in each judicial district.

Cases suitable for mediation are mainly identified at the offices of the public prosecutor and – to a lesser extent – the youth judge. Victim and offender – and in case of a minor also his parents – are invited to mediation by a letter from the public prosecutor or the youth judge. Herein, the parties are asked to enter into contact with the local mediation service, which is part of an NGO active in the field of youth assistance. These NGOs are officially recognised and fully subsidised for this work by respectively the Flemish Community and the French Community or Walloon Region. The mediation process is guided by a staff member – the mediator – of the NGO. The mediators are all professionals (full time or part time employed and paid by the NGO), their background being mostly that of social worker, educator or criminologist. Only in one judicial district (Leuven) a group of volunteer mediators operates within the local mediation service, as they are coached by the professional mediators. The mediators all receive initial and ongoing in-service training and all work in team.

The mediation itself follows a structured process, starting with individual talks and eventually home visits to both parties separately, followed by a face-to-face meeting in more or less half of the cases. When there is an agreement reached between the parties, this will be sent to the referring judicial authority together with a limited written report by the mediator.

Penal mediation (adults)

Penal mediation as legally introduced in 1994 is offered by the so-called justice assistants from within the public prosecutor's office and is available in each judicial district (see *Sections 1.2.2* and *2.1.1* above). This type of mediation is applied as a diversionary measure in cases of relatively minor crime, for which the public prosecutor would not require a penalty of over two years of imprisonment. The cases are selected by the public prosecutor, after which the parties are contacted by the justice assistant and the mediation process and/or the other measures are carried out. The mediation process often focuses indirectly (not face-to-face) on the financial/material reparation, but also a dialogue including explanation of what happened and apologies can take place. At the end of the mediation process, the justice assistant will report to the public prosecutor and in the positive case (completion of the agreement and/or the other conditions) the file will be dismissed officially. In case of non-completion,

the public prosecutor can continue the procedure, but is not obliged to do so (he still may dismiss the case).

The mediators (justice assistants) are in fact probation workers. As civil servants they operate under the Directorate-General Houses of Justice (Ministry of Justice) and locally they are part of the house of Justice, which exists in each judicial district. However, according to the current State reform process in Belgium, the DG Houses of Justice will be brought under the competence of the Communities in 2014. This means that soon all the justice assistants will be civil servants no longer under the federal ministry of Justice, but under the Flemish respectively French Community. This will be the case not only for their mediation tasks, but also for all other legal duties the justice assistants have in the broad field of non-custodial sanctions and measures.

Justice assistants, also those specialised in penal mediation, are usually social workers. They receive their training (in mediation) within the DG Houses of Justice.

Mediation for redress (adults)

Contrary to 'mediation at the municipal level' and 'penal mediation', 'mediation for redress' as initiated in 1993 and finally established by law in 2005, can be offered during all phases of the criminal justice process, including the execution of the (prison) sentence, and for all types of crime independent of their nature and degree of seriousness (see *Sections 1.2.2, 2.1.1, 2.2.1* and *2.3.1* above). Therefore, mediation for redress is the restorative justice model in Belgium with the widest scope of application. It is available throughout the country, in each judicial district. Two NGOs are responsible for the local organisation of mediation for redress: Suggnomè in the Flemish Community and Médiante in the French Community. Both organisations are officially recognised for this task by the federal ministry of Justice, and fully subsidised by this authority as well. However, according to the current State reform process, also this type of mediation including its funding will be brought under the competence of the Flemish respectively French Community in 2014.

As already stated, cases for mediation for redress can be selected at all stages of the criminal justice process. According to the law, all parties with a possible interest in mediation must be informed about this offer by the police or judicial authorities. In practice, however, most cases are identified at pre-sentence level, within the public prosecutor's office. From there, files are referred to the local mediation service (which operates under the NGO Suggnomè or Médiante), after a letter has been sent out by the public prosecutor to victim and offender. In this letter, the offer of mediation is explained, and information is given on how parties can contact the mediation service. Depending on local arrangements, it is sometimes the mediation service who takes the initiative to contact the parties.

The mediation process itself runs in the following structured way: first the mediator talks separately to victim and offender, often by way of home visits. In this phase, the mediator starts an indirect communication between victim and offender, which can result in a direct, face-to-face meeting (which only takes place in approximately 30% of the cases). The focus of this type of mediation - also because of the often more serious nature of the crime - is very much on the non-material aspects and the dialogue between parties. Most important seems to be asking for, and explaining the reasons and circumstances of the crime, the background of the offender(s) and why the offence happened, on the one hand, and clarifying the consequences of the crime for the victim and his surroundings, on the other hand. These non-material elements, eventually together with a financial settlement, can be included in a written agreement between victim and offender (which happens in almost 50% of the cases). The drafting of this agreement is facilitated by the mediator, who, after explicit consent by both victim and offender, can send the agreement to the referral body (mostly the public prosecutor). If one of the parties does not agree with the communication of the agreement (or an information on the lack of agreement) to the referral body, then the mediator is legally spoken not allowed to do so. The latter is to be considered as a formal requirement related to the principle of confidentiality in mediation, also vis-à-vis judicial authorities. If the judicial authorities are informed, then the agreement (or the lack thereof) can, but does not necessarily, influence the further decision making process by public prosecutor and judge.

As mentioned before, 'mediation for redress' is offered by two NGOs which operate in an autonomous way, but in close cooperation with judicial authorities. Their local mediators, present in each judicial district of the country, are (part time or full time) paid employees on the basis of subsidies received from the ministry of Justice. The mediators have a university degree (often criminologists), and they receive their initial and ongoing training within their organisation. The full salary and operational costs are covered by the subsidies of the ministry of Justice.

Of interest is the type of organisation of the services for mediation for redress. They are managed by local partnerships at the level of the judicial district. These formal partnerships are composed by representatives from the municipality, the house of Justice, victim support, the local police, the public prosecutor, the court, the bar, the prison and, if available, a research or academic institution. In some districts, also the juvenile mediation scheme and other restorative justice initiatives are included in this partnership, in order to better support and guide the implementation of restorative justice in a coordinated way. This multi-agency model is founded on a written ‘protocol’ of co-operation, signed by all partners, in which the general aim and objectives of the partnership and the respective responsibilities are stipulated.

3.2 Conferencing (juveniles)

When the youth judge is considering a conference (according to the legal framework, see *Section 2.2.2*), he will usually first ask for advice from the youth court social service. After a positive advice, the juvenile court can refer the case to the local NGO for youth assistance which is also responsible for victim-offender mediation (see above, these are the same NGOs, as they are recognised and subsidised by the Flemish and French Communities). Within the NGO, a facilitator ('moderator') starts working on the case. He will first examine, during preparatory meetings with the parties separately, if conferencing is possible. As a first step, the facilitator will determine, during a home visit, whether the offender is willing to cooperate. If this is the case, the facilitator will discuss which support persons the juvenile and his parents would like to bring to the conference. If the juvenile is not prepared to participate, the NGO will inform the youth judge within 48 hours. If the juvenile is willing to participate, the victim will be contacted and also he/she can bring support persons to the meeting. If the victim is not prepared to participate, he/she can be involved through writing a letter with regard to the consequences of the offence and his/her expectations, or the victim can be represented by another person or by a victim support worker.

The conference itself is guided by the facilitator (sometimes two facilitators) along several phases without following a pre-defined script. Usually also a police officer attends the conference, in order to represent the public interest. He/she will start by reading the official police report, explaining what the offence was about. Then, the victim, the offender and the persons who support the parties are given the opportunity to tell their story and to ask questions, with the intention to come to an agreement. The facilitator tries to ensure that all the parties communicate with each other in a direct way. If necessary, he/she can structure and summarise the conversation but only to keep the clarity for all the parties. The goal of the conference is to come to an agreement or a plan, in which the juvenile (and other persons) commit themselves to repair the damages and/or to undertake specific actions. In order to draft the plan, often a 'private' phase is included in the meeting, where the parties discuss their ideas separately, before exchanging them with the other party in the plenary meeting again. When the parties come to an agreement, this will be sent by the facilitator to the juvenile court, where the juvenile court still has to give his approval (what usually happens effectively).

As mentioned above, the conference facilitators are staff members of the youth assistance services that also employ the mediators. Due to the limited number of conferences carried out (*see below*), the same persons are acting as mediator or as conference facilitator depending on the case. The facilitators have the same educational and professional profile as the mediators; they are often social workers who receive specific training on conferencing within their

organisations. At some places (Leuven), volunteers have been involved in the conferencing process in order to support one of the parties.

3.3 Specific types of reparation

Compensation Fund (juveniles)

As mentioned above (*Section 1.2.1*), a compensation fund for juveniles and their victims was established in 1991 and became operational in the Flemish part of the country.[24] When, during mediation, it appears that the young offender has no financial resources to reimburse the victim, instead of asking his parents to come up for the damages, he/she is given the opportunity to do some voluntary work for a non-profit organisation, for which he/she is paid by the fund. Then, the juvenile will hand over his earnings to the victim. The fund is sponsored by private donors on the one hand, and by province governments on the other. This way, the community is involved, not only by making means available to the offenders and the victims and by creating opportunities for voluntary work, but also by the operation of a committee that handles the requests for intervention by the compensation fund.

Young offenders can apply to the fund under certain conditions and in the following way:

- The juvenile offender admits having committed a criminal offence;
- The young person is willing to pay compensation;
- The juvenile has issued an agreement with the victim reached after mediation;
- Together with the victim he/she examines how the compensation can be paid;
- The fund only intervenes for the damages that are not covered by a private insurance;
- The young person writes a letter to the committee of the compensation fund where he/she motivates his/her request;
- The members of the committee decide whether to approve the application; the committee takes into account the personal motivation of the applicant, the opinion of the parents, the expectations of the victim and the position of the mediator.

If the application is approved, the juvenile himself needs to look for work that is voluntary, possibly with the assistance of the mediator. When he/she finds a suitable organisation, the necessary arrangements will be made in terms of

24 The Dutch name is 'Vereffeningsfonds'.

working days and hours and specific tasks. The whole arrangement is laid down in an agreement to be signed by the parties.

The whole process of making use of the compensation fund is supported by the mediators of the NGOs in the field of juvenile assistance as referred to above. The compensation fund operates on the basis of local arrangements at the level of the provinces and is not regulated by law.

3.4 Restorative measures in prisons

Compensation Fund for prisoners

A similar compensation fund as for minors exists for adult convicted prisoners (post-sentence) and their victims in the Flemish part of the country.[25] The same principles apply and the voluntary work, in this case, is done within the prison on behalf of external non-profit organisations. In some case, the voluntary work can be done outside the prison. The project is run by the Flemish NGO Suggnomè (responsible for mediation for redress) in cooperation with the federal ministry of Justice, the provinces and services for social work. Also for this fund, a committee has been established to evaluate the applications by prisoners, which take place in the context of a mediation process with their victims. Also this fund is not formally regulated by law.

4. Research, evaluation and experiences with restorative justice

4.1 Figures

Integrated statistical data covering all restorative justice programmes in Belgium do not exist. We have to rely on the data as they are collected by the respective organisations at federal or regional level and as they are presented in their annual reports. In a few cases, overview studies have been made for certain programmes over a longer period of time. In what follows, we present a compilation of figures as we have been able to compose on the basis of the above mentioned sources. The figures as mentioned below cannot easily be compared between restorative justice programmes, since the counting criteria can differ: for example, 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.

25 Dutch name is 'Herstelfonds'.

Mediation at the municipal level

Some figures on the application of mediation at the municipal level (within the GAS system) are provided by the federal government which subsidises the employment of local mediators in some cities (27 mediators in 2010).[26] In 2009, these mediators dealt with 3,799 cases. In 42% of the cases parties agree to start mediation, after which 74% reaches an agreement. The agreement can contain apologies and personal reparation towards the victim, but also all kinds of unpaid work and tasks for public services. In only 20% of the cases, the offender involved in this type of mediation is a minor.[27]

Victim-offender mediation with juveniles

As can be read in *Table 1*, the total number of mediation cases in the field of juvenile assistance in Flanders fluctuates around 3,000 to 4,000 per year.

Table 1: Number of cases referred to mediation with juveniles in the Flemish Community (2005-2012)

2005	2006	2007	2008	2009	2010	2011	2012
1,620	2,147	3,449	4,349	4,050	3,770	3,998	3,244

The caseload for local mediation services varies from approximately 100 to 600 cases per year.

Most young offenders in mediation are male (almost 90%) and most of them (about 75%) are between the ages of 14 and 17. About 30% of the offenders are of non-Belgian ethnic origin. About 75% of the victims involved in mediation are physical persons, of which two thirds are men; about 25% of the victims are legal entities (public institutions, shops or companies). The main types of offences included in mediation are physical assault (around 25%), damages/vandalism to properties (about 25%), theft (about 30-35%) and shoplifting (about 4%). Around 90% of all mediation cases are referred by the office of the public prosecutor, around 10% by the youth judge. Of all referred cases, in around 50% the mediation process is not started after a first contact with one or both parties; in 40% the mediation process is totally run, of which

26 These 27 mediators are also offering services to neighbouring municipalities and therefore have a much wider reach than just 27 cities. But the figures mentioned here do not present a complete picture for the whole country, since in many municipalities this type of mediation is done by non-subsidised local civil servants.

27 *Opfergelt* 2012.

the majority (80%) also reaches an agreement with the victim. This agreement is almost always fully complied with by the juvenile (90-95%). Direct mediation (face-to-face) is only done in a minority of the cases (around 20-30%, with considerable fluctuations over the years); most cases are dealt with through indirect communication (shuttle mediation).

For the French Community, about 1,500 cases per year are referred to the mediation services, of which about 80% are selected by the office of the public prosecutor and 20% by the youth judge (figures for 2011). This means that for Belgium the total annual number of mediation cases with juvenile offenders is about 5,500 (at least for 2011).

Conferencing with juveniles

The total number of cases of conferencing remains rather limited, despite the legal framework that was created in 2006. The total number of conferences referred to all services together in the Flemish Community ranges from 44 (2007) to 114 (2009) and 108 (2012). The big majority of offenders in conferencing is male (96%, for Flanders, 2010) and 75% of them is age 15-17. The nature of the offences involved in conferencing is more serious than in mediation: these are (for Flanders) mainly acts of theft with violence, armed robbery, physical assault and blackmailing. Of all cases referred by the youth judge for conferencing, only 25% results in a conference effectively (figure for 2010; this was higher for the previous years). The main reason why a conference is not started is the lack of interest or willingness from the side of the victim. When a conference is taking place effectively, it almost always ends in an agreement or an 'intention declaration' by the juvenile. In 17% of the conferences no victim participates, and in 37% there is no additional support person for a participating victim; in almost all cases one or both parents of the juvenile offender is present and in about 50% of the cases another family member or support person for the offender participates as well; a police officer is present in 92% of the conferences, a lawyer in 82% (figures for Flanders, period 2007-2010).

For the French Community a total of 145 cases was referred to conferencing in the period 2007-2010; the number was 45 in 2011, for which in total 25 victims were involved. In all cases, 55% of the victims agreed to participate. Most cases included violent offences (70%) and in 60% of the cases the offence was committed in group. Most of the juveniles involved in conferencing are first offenders of Belgian origin and have a relatively stable family and school background.

Penal mediation (adults)

Yearly, around 6,000 cases in Belgium apply for penal mediation. The year 2011 accounted for 6,732 referred files. Most penal mediations involve property crime (30% in 2011) or violent crime (47% in 2011). Similar percentages are found throughout the years.

Table 2: Number of cases referred to penal mediation in Belgium (1995-2011)

1995	1997	1999	2001	2003	2005	2007	2009	2011
5,393	6,765	6,583	6,012	6,107	6,377	6,304	6,616	6,732

Among the participants in penal mediation, the majority of offenders (82%) is male, while almost as much males (44,6% in 2011) as females (41,1% in 2011) appear on the victim's side (the remaining percentage concerns legal entities). Most penal mediations are cases with only one victim involved (67,7% in 2011). In 2011, around 15% of cases had no (identified) victim, 11% had two victims and 3% had three.

In 2011, of the 6,133 that actually started penal mediation, 2,755 (or 45%) were discontinued during the mediation process. An equal number (2,704 or 44%) was successful, while 434 (or 7%) of the mediation cases failed. A successful mediation almost always results in a discontinuation of the criminal proceedings (92.8% in 2011). The mediation cases that are discontinued at one point or the other during the mediation process result in a dismissal of charges (23.1% in 2011), prosecution (26.5% in 2011) or are forwarded to the competent magistrate for information purposes (37.9% in 2011).

The above mentioned figures refer to the whole package of interventions under the legal title 'penal mediation' at the level of the public prosecutor. This means, only part of these figures concern mediation between victim and offender in the proper sense of the word. Of all cases selected by the public prosecutor for 'penal mediation' (around 6,000 per year), around 35-40% results in mediation (direct or indirect) with the victim.[28] In the other cases of 'penal mediation', a measure of therapy for the offender is applied (10-15% of the cases), community service (up to 20%) or training (20-25%).[29] These measures can be combined as well. According to our estimation, mediation with the victim

28 Higher percentages (up to 60%) are mentioned in some sources.

29 'Mediation' in penal mediation in many cases has to be considered as a process of negotiation, with the help of the justice assistant, between the public prosecutor on the one hand, and the offender on the other.

in the context of 'penal mediation' takes place in no more than 4,000 cases per year, for the whole country.

Mediation for redress (adults)

1) Flemish Community

At present, mediation for redress accounts for some 2,000 requests annually, of which in about 90% of the cases mediation is started effectively (*Table 3*).

Table 3: Number of cases referred to and started by mediation for redress in the Flemish Community (2002-2012)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Referred	394	432	639	857	948	858	1,232	1,329	1,316	1,860	2,065
Started	251	303	548	642	823	746	1,104	1,191	1,196	1,685	1,882

In 2012, for the 1,882 cases started, in total 5,187 persons were informed about the offer of mediation (2,991 victims and 2,196 offenders), of which 3,051 persons were interested effectively. This finally resulted in 1,233 mediation files where both victim and offender were interested in mediation and whereof finally in 963 cases both parties participated in mediation effectively. In 22% of the cases (in 2012), victim and offender had a family relationship. In 38% of the cases, the offence concerned a violent crime, in 32% a property crime. Violent crimes include rape and murder cases. In about 40% of the concluded mediation files, an agreement is reached between victim and offender. In about 25% of all concluded mediation files (in 2012), a direct mediation (face-to-face) takes place. The other cases are done indirectly. For the years 2002-2011, the proportion of direct mediation in the total number of cases ranged from 10 to 25%. This means that the overwhelming majority of all cases in mediation for redress concern indirect mediation.

Over all the years, most victims are informed of the offer of mediation for redress by the office of the public prosecutor or by the mediation service itself. Most of the concluded cases are handled during the criminal investigation phase (pre-trial). This is a persistent trend since 2006. However, it must be noted that more and more cases are also being dealt with in the phase of the administration (execution) of the (prison) sentence: 45 cases in 2006, rising to 163 cases in 2011.

Among the participants, the offender seems to be mainly of male gender (about 90% of the cases for the consecutive years), while almost as many males as females appear on the victim's side. Most victims are between 30 and 50

years old, while most offenders are either between 18 and 25, or between 30 and 40 years of age.

The written agreements deal with compensation for material damages in the majority of the cases, but also non-material elements are often included: in most cases some kind of expression of sorrow or offering of apologies is made. Other elements that sporadically appear in the agreements are: the start of therapy (for the offender), the promise to avoid contact with each other, and the appreciation of the mediation process. In 2011, about 15% of participants noted their own point of view in the agreement.

The average duration of a mediation runs between 117 and 139 days, starting with the showing of interest and ending with an agreement.

2) French Community

The number of requests for mediation for redress in the French speaking part of the country has almost doubled between 2006 and 2011: from 637 cases in 2006 to 1,121 in 2011. The number of actual performed mediations rose from 412 in 2006 to 779 in 2011.

Table 4: Number of cases referred to and started by mediation for redress in the French Community (2006-2011)

	2006	2007	2008	2009	2010	2011
Referred	637	827	1,096	1,316	1,379	1,121
Started	412	538	822	897	923	779

More than in the Flemish part of the country, mediation cases in the French Community are referred in the post-sentence phase. In 2011, 45.7% of all cases was referred during the administration of the prison sentence, and 9% during the phase of remand custody.

Whereas in the late 1990s the number of offenders in mediation was always (slightly) higher than the number of participating victims, in 2003 and 2004 participating victims outnumbered the offenders (278 to 179 in 2003, and 452 to 337 in 2004) (no figures are available for the years thereafter).

If the offender does not spontaneously ask for mediation (328 times in 2011), the most common sources to refer to mediation are: probation services (146 times in 2011) or internal prison services (126 times in 2011). A victim can be referred to mediation by the house of Justice (32 times in 2011). However, most requests come from the victim him/herself (53 times in 2011).

Going back to charts from 2003, 59.7% of all mediation cases ended in an agreement, containing details on material reparation (10%), relational redress (22%) or commenting on the usefulness of the conversation (68%).

4.2 Research and evaluation

Both theoretical and empirical research on restorative justice has been carried out in Belgium since the early 1990s. Many of the studies and projects were initiated from within the University of Leuven (Leuven Institute of Criminology), but the universities of Brussels, Gent and Liège also contributed various projects in the 2000s. In what follows we list the most important research projects, without having sufficient room to be exhaustive or to go into detail. We are only presenting the completed research projects, knowing that various studies are still going on at this moment (end of 2013). We also cannot deal with the numerous master theses of students in criminology and other disciplines who have studied specific aspects of mediation or other restorative justice practices in Belgium. Finally, we only include projects specifically on Belgium, excluding the various European or international projects in which Belgium has been a partner since the late 1990s.[30] For this reason, also the European FP7-project ALTERNATIVE, coordinated by the University of Leuven, is not presented, and the same applies to *Restorative Justice: An International Journal*.[31]

Theoretical research and PhD projects

A joint doctoral research project on 'The development of a theoretical frame for restorative justice from an ethical and social perspective' was carried out by *Johan Deklerck* and *Anouk Depuydt* (2000-2004), who focused on two main

30 For the international and European projects where Belgium was a partner, we refer to the information on the website of the European Forum for Restorative Justice (http://www.euforumrj.org). European projects have been dealing with, for example, the position of the victim in restorative justice practices, the role of desistance of crime in restorative justice, and the applicability of restorative justice to cases of sexual violence. For a complete overview of research projects carried out at the Leuven Institute of Criminology, see: 'Restorative Justice related research at the Leuven Institute of Criminology, 2000-2013' (http://www.law.kuleuven.be/linc/onderzoek/LINC_RJ_-Research_Brochure_2013.pdf).

31 The FP7-project ALTERNATIVE (2012-2016) examines in a partnership of seven research institutes from six countries both theoretically and empirically how through restorative justice processes new understandings of 'justice' and 'security' can be developed (http://www.alternativeproject.eu). Restorative Justice: An International Journal was launched in early 2013 on the initiative of the Leuven Institute of Criminology, from where also the coordination is done (http://www.hartjournals.co.uk/rj).

research questions: (1) In which way can 'linkedness' be an ethical frame of reference for processes of restorative justice between victim and offender? (2) In which way can ‘integration-disintegration’ be a model for the analysis and the orientation of processes of penal change towards the principles of restorative justice?[32] A post-doctoral research project by *Erik Claes* dealt with 'Punishment and sentencing in a constitutional democracy' (2005-2009), and aimed at elaborating a coherent normative theory of criminal punishment that (1) could offer sufficient guidance for sentencing practices; (2) help define the role of the judiciary power in relation to other institutional actors (including restorative justice practitioners).[33] From within the Belgian research scene, *Lode Walgrave* might be best known as restorative justice scholar internationally. Most of his theoretical insights are presented in his book 'Restorative justice, self-interest and responsible citizenship' (2008) where he developed a maximalist conception of restorative justice based on an outcome-oriented definition and presenting restorative justice as a fully fledged alternative to the punitive apriorism.[34]

Both theoretical and empirical research have come together in a series of doctoral research projects at the universities of Leuven, Brussels, Gent, Liège and Maastricht. For Leuven, the doctoral project by *Ivo Aertsen* (1996-2001) can be mentioned, in which he focused on a theoretical elaboration of a procedural model of restorative justice, as applied to victim-offender mediation for more serious crimes.[35] *Inge Vanfraechem* carried out her PhD research on the applicability and evaluation of a model of family group conferences in Flanders (2000-2004).[36] At the university of Brussels, *Ann Raes* in her PhD project studied 'penal mediation' and 'penal transaction', in particular the extent to which the participatory, consensual and negotiated aspects led to a communicative model of justice different from the classic, horizontal criminal justice process.[37] *Katrien Lauwaert* obtained her PhD from the University of Maastricht with her dissertation on ‘Procedural Safeguards in Restorative Justice’, dealing with legal principles such as the presumption of innocence, proportionality and legal assistance on the one hand, and restorative justice principles such as neutrality, confidentiality and voluntariness on the other hand; for this project, she carried

32 *Depuydt/Deklerck* 2005.

33 *Claes/Foqué/Peters* 2005.

34 *Walgrave* 2008; see also, amongst many other publications: *Walgrave* 2000; 2002; 2003.

35 *Aertsen* 2004.

36 *Vanfraechem* 2005; 2007; *Vanfraechem/Harris* 2003; *Vanfraechem/Walgrave* 2004b; *Vanfraechem/Lauwaert/Decocq* 2012.

37 *Raes* 2006.

out empirical research on 'mediation for redress' in Flanders.[38] A comparison between mediation for young and adult offenders from the perspective of social work practice formed the subject of a PhD by *Lieve Bradt* at the University of Gent (2005-2009).[39] *Vicky De Mesmaecker* for her PhD project in Leuven (2007-2011) focused on 'Perceptions of justice and fairness in criminal proceedings and restorative encounters' for both victims and offenders, aiming at investigating the relationship between restorative justice and procedural justice theory.[40] *Daniela Bolivar*'s PhD research (2007-2012) studied the victim's experience of 'restoration' when participating in victim-offender mediation, for which she undertook empirical research both in Belgium and Spain.[41] From her side, *Tinneke Van Camp* did empirical research on victim-offender mediation and conferencing both in Belgium and Canada for her PhD project at the Université de Montréal; she examined which factors besides procedural justice contribute to victim satisfaction with restorative justice.[42]

At the University of Liège, *Christophe Dubois* carried out his PhD research on the functioning of restorative justice and the restorative justice advisors in four Belgian prisons from a sociological perspective.[43] An ethnographic approach was used by *Bart Claes* when investigating for his PhD at the Free University of Brussels the notion of 'restoration' within the social life of the Central Prison of Leuven.[44] At the University of Gent finally, *Nikolaos Stamatakis* defended his PhD on the perception of restorative justice by prisoners, drawing on some historical and religious roots of restorative justice, and on the basis of a quantitative empirical study in several prisons across Belgium.[45]

Empirical research

An overview of empirical research on restorative justice in Belgium has been presented in 2010 by *Van Doosselaere* and *Vanfraechem* by way of national report in a compilation of overviews from nine European countries.[46] The

38 *Lauwaert* 2008.

39 *Bradt* 2009.

40 *De Mesmaecker* 2011; *De Mesmaecker* 2014.

41 *Bolivar* 2011; *Bolivar* 2012.

42 *Van Camp* 2011; *Van Camp*/*Wemmers* 2013.

43 *Dubois* 2011.

44 *Claes* 2012.

45 *Stamatakis* 2013.

46 *Van Doosselaere/Vanfraechem* 2010; *Vanfraechem/Aertsen/Willemsens* 2010.

authors distinguish between descriptive-inventory research, action-research and evaluative research.

Descriptive-inventory research has been done, for example, in a joint research project by the universities of Brussels, Gent and Leuven on behalf of the Flemish government on various restorative justice practices with juveniles in Flanders, including mediation, community service and educational projects. The 'restorative' character of these practices was looked at, as well as the type of cases and organisational models, against the background of a (developing) theoretical concept of restorative justice.[47]

Belgium has an interesting tradition of action-research in the field of restorative justice. *Van Doosselaere* and *Vanfraechem* (2010) present several projects, starting from the late 1980s onwards:

- an experimental project and an evaluative project on mediation with juveniles in the French Community assessing the possibility of entrusting community service organisations (usually working with offenders) with carrying out victim-offender mediation;[48]
- the action-research on mediation for redress in Flanders in the period 1993-1996, with the goal to develop a model of mediation for more serious crimes on the one hand, and to study its relationship with the criminal justice process on the other hand;[49]
- the action-research on implementing restorative justice in the prison (1998-2000), resulting in the appointment of restorative justice advisors in all Belgian prisons;[50]
- the action-research on conferencing in Flanders (2000-2003), where a model of family-group conferences was tried out in several judicial districts with a view of wider implementation afterwards.[51]

Because of its innovative character, a European action-research project on peacemaking circles (2011-2013), in which Belgium was involved, must be mentioned especially. In this project, coordinated by the University of Tuebingen (Germany), a model of peacemaking circles was developed that has to fit a European legal and cultural context. A limited number of peacemaking circles (30 in total) were realised in Belgium, Germany and Hungary. In Belgium, the action-research was done by the Leuven Institute of Criminology in cooperation with the NGO Suggnomè. The practice has shown that peace-

47 *Van Dijk/Van Grunderbeeck/Spiesschaert/Vanthuyne* 2002.

48 *Scieur/Van Duüren/Van Duüren* 1991; *Billen/Poulet* 1999.

49 *Aertsen* 1999; 2000; *Peters*/*Aertsen* 2005; *Van Garsse* 2001.

50 *Robert/Peters* 2003; *Aertsen* 2005; 2012.

51 *Vanfraechem* 2003; 2004b; 2005.

making circles can be used effectively, but important challenges relate to the development of a method on how to involve members of the wider community. The project resulted in an extensive report and a manual on the implementation of peacemaking circles.[52]

Evaluative research on restorative justice practices has been done on various topics and was often part of the aforementioned PhD and other projects. High satisfaction rates for victims and offenders have been found in various studies, together with high compliance rates after reaching an agreement. Victims' and offenders' experiences of the mediation process and their perception of the mediator's role have been included in several studies, but also - for example - perceptions of 'justice' and 'restoration' after a mediation experience. However, these research projects usually did not adopt an experimental design, and rather focused on the assessment of experiences, practices and programmes as they could be observed in their daily functioning. How restorative justice *programmes* have been evaluated, might be shown by the following three examples:

- An evaluative research on the Flemish compensation fund for juvenile offenders (see above *Sections 1.2.1* and *3.3*) entailed three elements: a study of the institutional position of the compensation fund; observation and description of the functioning of the fund; and an inquiry on the satisfaction and general experience of victims, offenders and relevant third persons, including their experience with the accompanying mediation process.[53] Interviews with those involved revealed positive attitudes towards the model of the compensation fund and high satisfaction rates with the process of mediation. Moreover, victims' and offenders' opinions were asked about the origins of the financial support for the fund, and the further (judicial) handling of the case after mediation.
- Mediation at the police level (see *Section 1.2.2*) has been evaluated aiming at: a clarification of the objectives, the institutional link and the organisational framework of this type of mediation and specifically its relation with 'penal mediation' at the prosecutor's level; an analysis of the mediation practices as developed by the respective projects at the police level; an exploratory study related to the satisfaction of the parties, the way mediation at the police level is perceived by the public and the follow-up of the offenders.[54]
- Evaluative research has been done on the (reasons for the) limited application of the conferencing model for juveniles, although this restorative justice practice together with mediation has been prioritised

52 *Ehret/Dhondt/Szegö* 2013; *Fellegi/Szegö* 2013.

53 *Stassart* 1999; *Van Dijk et al* 2002.

54 *Lemonne/Aertsen* 2003; *Aertsen* 2009.

by the new juvenile justice act of 2006. Figures for Flanders for example showed that in the period 2007-2010 only 335 juveniles had been referred to conferencing, of which 118 juveniles (35%) finally started a conferencing process.[55] In Wallonia in the same period of four years, only 145 cases were referred to conferencing. The evaluation in Flanders revealed, for example, the existence of considerable differences between the judicial districts in terms of number of cases referred to conferencing and the motivation and involvement of youth justice social services. Nevertheless, there seems to be a strong consensus in the work field on the added value of conferencing and the possible effects of the meeting with the victim. Obstacles for referring cases to conferencing related to the complex nature of the selection process, the time- and labour intensive nature of conferencing, and the simple fact that many cases had already been referred to mediation. Moreover, not all actors in the judicial field seem to be sufficiently informed about the applicability and characteristics of conferencing, and youth judges sometimes allocate different objectives to conferencing.[56] In Wallonia the same disparity in the limited application of conferencing between judicial districts was found. Moreover, until today youth judges in that part of Belgium show more resistance towards restorative justice approaches. They are more in favour of a protective model of youth justice and they are afraid of losing control over their files. The confidential nature of restorative justice processes worries them, and in several locations the cooperation with external restorative justice programmes (NGOs) hampers. In short, there seems to be a discrepancy between how restorative justice processes are conceived in the law and are given priority in theory on the one hand, and their practical application in reality on the other hand.[57]

Some of the above mentioned obstacles have also been found in a larger research project on the practice of victim-offender mediation for juveniles in Flanders and Brussels.[58] For the whole of Flanders and Brussels, 2.9 juvenile

55 The main reason for the non-starting of a conference was the lack of interest or willingness from the side of the victim (in 67% of the non-started conference cases). But, once a conference was started, 92% of the cases resulted in an agreement or 'intention declaration', and 64% of the intention declarations was complied with totally. In 17% of the conferences started, no victim was present, whereas in 92% of the cases a police officer attended the conference.

56 *Bradt* 2012.

57 *Dachy* 2013.

58 *Fekwerda/van Leiden* 2012.

offenders per 1,000 juvenile inhabitants (i.e. under age 18) are referred to victim-offender mediation on an annual basis. One out of five victims involved in mediation is a legal person (shop, institution, ...). On average, the period between the offence and the referral to mediation is six months. Direct (face-to-face) mediation is only applied in about 25% of all cases, for which both characteristics of the mediator (practical approach, experience, perseverance) and the parties (non-interested victims) seem to be responsible. Personal experiences of victims and offenders on various topics have been investigated in this research, as well as opinions and experiences of legal and social practitioners. At the organisational level it seems that, notwithstanding what is prescribed by law, mediation is not always considered by the judicial actors; here again important differences exist between judicial districts. The flow into mediation processes is, in practice, extremely vulnerable because of practical and administrative circumstances at court level, lack of staff, and personal opinions.

5. Summary and outlook

Belgium is one of the countries where restorative justice has found fertile soil. It 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. The landscape, however, is divided: there are (too) many different victim-offender mediation models, which does not contribute to transparency for the users of the programmes, and which prevents proper and efficient coordination of services, integrated policymaking at national level and continuous growth.

Because of the absence of an integrated national data recording system for all types of restorative justice programmes, we can only make a realistic estimation of the total number of cases dealt with annually: it concerns 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 is far under-used. We lack a reliable system on how to calculate the potential in a quantitative way, but observations in the field and various research reports reveal the presence of important obstacles to refer 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, and which, for adults, determine that all persons with a possible interest in mediation must be informed about the offer systematically.

In a more general way, we are confronted – to a certain degree – by a discrepancy between 'law in the books' and 'law in action'. In the field of restorative justice, there is a lot of intellectual work being done in the country, and a lot of theoretical and other research is available. Legislation, although spread over various frameworks, is well conceived, according to good practice and restorative justice standards internationally. All public prosecutors and all judges know about restorative justice, which is now also amongst them a generally accepted idea. Mediators and facilitators are well skilled and well trained, and they are well organised. However, in order to reach its full potential, restorative justice must become less dependent on its main referral source namely the criminal justice system. There are within the system important bottlenecks which are very difficult to deal with, and moreover as in most European countries the majority of crimes are not reported and not dealt with at all by the criminal justice system. This means that many citizens finally do not have access to restorative justice. One the one hand, it makes sense to further invest in collaboration, training and changing attitudes within the criminal justice system, but on the other hand, much more work should be done in order to build a broad societal support for restorative justice. In order to reach this, restorative justice programmes should focus much more on their affiliations with other social fields, including developing expertise with the media.

The years 2014 and following might entail a new perspective for restorative justice in Belgium, as an important new phase of the State reform process will take place. It is to be seen how the Communities and Regions will consider their new competences in the justice field, and whether a true community oriented system of restorative justice can play a role in this respect in order to adopt a wider application in practice.

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Bosnia and Herzegovina

Hajrija Sijerčić-Čolić

1. Overview of restorative justice elements and historical development in Bosnia and Herzegovina

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

The development of restorative justice in the context of the criminal law and the criminal justice system in Bosnia and Herzegovina is not always followed by planned legislative activities. Nor are the statutory forms of restorative justice applied seriously in practice. Past changes in the criminal legislation and criminal justice system have introduced the following forms and elements of restorative justice:

With regard to *adult offenders*, applying a wide definition, elements of restorative justice can be seen in the possibility for victims to file 'property claims' on the one hand and in 'community service' as an alternative to prison sentences on the other. Compensation for damages in the context of a property claim is awarded by the court if personal or property rights of the victim have been threatened or violated by the criminal offence. Importantly, victim offender mediation processes (VOM) can be applied in this context. In the case of community service, restorative elements can be seen in the delivery of work to the community and the reintegration of the offender into the community that this is said to bring with it. Due to the strict application of the principle of legality in adult criminal justice, the prosecutor may *not* suspend the prosecution of an adult offender or drop his/her criminal prosecution by referring the case to mediation, or do so on the ground of the offender having delivered reparation to the victim or the community.

By contrast, wider opportunities for the application of restorative justice have been introduced in the *juvenile justice system*. The most important legis-

lative accomplishments up to now include the principle of opportunity in juvenile criminal procedure, i. e. the right of the prosecutor to make *educational recommendations* as an alternative way of responding to juvenile offending, and to drop the case where such recommendations are successfully complied with by the offender. Similarly, at the court level, the juvenile judge can make a decision to postpone the beginning of the court procedure, on the condition that the offender fulfils an educational recommendation ordered by the court. Not all available educational recommendations can be said to have restorative elements, but they nonetheless include: the requirement for the delivery of a personal apology; the delivery of compensation/reparation to the victim; and working for a charitable or humanitarian organisation or the local community.

Staying at the court level, the courts have at their disposal a number of *educational measures* that serve as alternatives to traditional punishments. Among these measures, there is the educational measure of intensified supervision[1] that can be supplemented with so-called 'special obligations' where the court is of the opinion that such special obligations are necessary for the successful enforcement of the 'educational measure of intensified supervision'. Among these special obligations there is the requirement to deliver an apology to the victim, as well as the obligation to deliver reparation to the victim for the damage he/she has suffered (see *Section 2.2.2.2* below).

These more recent reforms in the juvenile justice system of Bosnia and Herzegovina were the first steps towards the development of an approach to responding to juvenile delinquency that is in accordance with international standards and recommendations, that are in turn based on what is regarded as best practice. In this regard, recently victim-offender mediation, too, has gained entry to the juvenile justice system at least at the theoretical level. In Bosnia and Herzegovina, the above mentioned educational recommendations that have a restorative character (delivery of a personal apology, compensating the damaged caused, and working for a humanitarian organisation or the local community) can be delivered through or involve a process of victim-offender mediation. The same also applies to the delivery of apologies and/or reparation/compensation to victims in the context of special obligations attached to educational measures of intensified supervision at the court level.

1 Educational measures of intensified supervision as specific sanctions imposed on a juvenile after finishing the criminal proceedings are: intensified supervision by the parents, adoptive parents or guardians, intensified supervision in a foster home, or intensified supervision by a competent social welfare body. Compared to normal supervision, 'intensified supervision' actually means broader and more intensive social intervention in the education of juveniles (f. ex. the juvenile's education, his/her employment, necessary medical treatment and the improvement of the conditions in which he/she lives, and everything else that might be of importance for a juvenile's rehabilitation and social reintegration).

In adult criminal justice, the above-mentioned property claims can involve VOM, however this is the only context in which VOM is linked to the adult criminal justice process. In fact, in adult criminal justice the institution of mediation between victim and offender can only be used to resolve issues that are the subject of civil rights, and not as a way to resolve the criminal case. The resolution of the property claim through VOM has no bearing on the sentence that the offender shall receive for the offence he/she has committed.

1.2 Reform history

"Bosnia and Herzegovina" consists of two Entities (the Federation of Bosnia and Herzegovina, and the Republic of Srpska) and one District (Brčko District of Bosnia and Herzegovina). They each have their own legal, political and administrative systems. This state of affairs is the result of the General Agreement for Peace of 1995.[2]

In adult criminal justice, the valid criminal legislation consists of four criminal codes and four criminal procedure codes passed in 2003, which have been revised in a number of amendments:

- the Criminal Code of Bosnia and Herzegovina and the Criminal Procedure Code of Bosnia and Herzegovina (applied in criminal proceedings before the Court of Bosnia and Herzegovina, the so-called the *state level*);[3]
- the Criminal Code of Brčko District of Bosnia and Herzegovina and the Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina (applied in criminal proceedings before the Basic Court and the Appellate Court of Brčko District of Bosnia and Herzegovina);[4]

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2 The General Framework Peace Accords for Bosnia and Herzegovina, which was initialled on 21 November 1995 in Dayton (USA) and signed on 14 December 1995 in Paris, set forth the basic principles of the legal and political system of Bosnia and Herzegovina as a State. An inherent part of the Agreement, included as Annex 4, is the Constitution of Bosnia and Herzegovina.

3 The Criminal Code of Bosnia and Herzegovina published in "Službeni glasnik BiH" (Official Gazette of Bosnia and Herzegovina), no. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10. The Criminal Procedure Code of Bosnia and Herzegovina published in "Službeni glasnik BiH" (Official Gazette of Bosnia and Herzegovina), no. 32/03, 36/03, 26/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13.

4 The Criminal Code of Brčko District of Bosnia and Herzegovina published in "Službeni glasnik Brčko distrikta BiH" (Official Gazette of the Brčko District of Bosnia and Herzegovina), no. 10/03, 45/04, 6/05, 21/10, 52/11. The Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina published in "Službeni glasnik Brčko distrikta BiH" (Official Gazette of the Brčko District of Bosnia and Herzegovina), no. 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08, 17/09 and 44/10.

- the Criminal Code of the Federation of Bosnia and Herzegovina and the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (applied in criminal proceedings before municipal and cantonal courts in the Federation of Bosnia and Herzegovina);[5]
- the Criminal Code of the Republic of Srpska and the Criminal Procedure Code of the Republic of Srpska (applied in criminal proceedings before basic and district courts in the Republic of Srpska).[6]

In juvenile justice, Bosnia and Herzegovina has "a parallel and *separate* system of provisions on juveniles": 'specific rules for juvenile delinquency' within substantive and procedural criminal law (the *state level* of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina)[7] and 'comprehensive juvenile justice legislation'[8] (the Republic of Srpska and the Brčko District of Bosnia and Herzegovina).

Namely, the current development of juvenile justice and juvenile delinquency legislation is moving in direction of 'comprehensive juvenile justice legislation'. In January 2010 the entity of the Republic of Srpska adopted *the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings.*[9] This new 'comprehensive' juvenile legislation came into effect on 1 January 2011. The same legislative activities have been carried out in Brčko District of Bosnia and Herzegovina and the *Law on Protection and*

5 The Criminal Code of the Federation of Bosnia and Herzegovina published in "Službene novine FBiH" (Official Gazette of the Federation of Bosnia and Herzegovina), no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11. The Criminal Procedure Code of the Federation of Bosnia and Herzegovina published in "Službene novine FBiH" (Official Gazette of the Federation of Bosnia and Herzegovina), no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13.

6 The Criminal Code of the Republic of Srpska published in "Službeni glasnik RS" (Official Gazette of the Republic of Srpska), no. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13. The Criminal Procedure Code of the Republic of Srpska (revised text) published in "Službeni glasnik RS" (Official Gazette of the Republic of Srpska), no. 53/12.

7 It means the following: in the applicable criminal (substantive and procedural) law and in the law on the execution of criminal sanctions there are legal provisions concerning juvenile offenders, which are different from the provisions concerning adult offenders.

8 The new comprehensive juvenile legislation (The *Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings*) contains chapters that systematically address issues of juvenile delinquency. The Law includes provisions on the application of substantive and procedural criminal law on juvenile delinquents, the organization of sections within courts, the execution of sanctions imposed on juvenile offenders, and also criminal offences committed against children and juveniles.

9 Published in "Službeni glasnik Republike Srpske" (Official Gazette of the Republic of Srpska), no. 13/2010.

Treatment of Children and Juveniles in Criminal Proceedings[10] was adopted in November of 2011. This new 'comprehensive juvenile legislation' came into effect at the end of November 2012. On the other hand, in the entity of the Federation of Bosnia and Herzegovina, the laws pertaining to juvenile justice and juvenile delinquency still can be found in the Criminal Code of the Federation of Bosnia and Herzegovina and the Criminal Procedure Code of the Federation of Bosnia and Herzegovina. In this entity, the new comprehensive law (or *Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings*) was adopted in January of 2014 and will become effective one year later (2015).[11] Finally, in proceedings before the Court of Bosnia and Herzegovina (or on the *state level*) the laws pertaining to juvenile delinquency can be found in the Criminal Code of Bosnia and Herzegovina and the Criminal Procedure Code of Bosnia and Herzegovina. At the time of writing this article, preparation of a new comprehensive law at the *state level* had not yet begun.[12]

The criminal justice system (for adult offenders) has been gradually and partially complemented with elements and forms of restorative justice. In that sense, for example, the possibility of filing a property claim by a victim has been available in the procedural law since its introduction in the Criminal Procedure Code of Yugoslavia in 1948. It has not been substantially changed until now, except by the introduction of the possibility of using VOM processes in the last 10 years.[13] This means that now property claims can be settled through a process of victim-offender mediation, that has however no bearing on the outcome on the criminal case. Community service as an alternative court sanction for prison sentences was first introduced in 2003. Victim-offender mediation is not possible, and thus the work to be fulfilled is not determined through a restorative process.

The relevant history of the introduction of restorative justice elements into juvenile justice legislation can be outlined as follows. First, educational recommendations as an alternative for treatment of juvenile having committed less serious crimes were introduced in the criminal legislation of the Federation of Bosnia and Herzegovina in 1998. The same alternatives were introduced in the criminal legislation of the Brčko District of Bosnia and Herzegovina in 2000. And, in 2003 the same alternative measures were introduced in the entity

10 Published in "Službeni glasnik Brčko distrikta BiH" (Official Gazette of the Brčko District of Bosnia and Herzegovina), no. 44/2011.

11 Published in "Službene novine FBiH" (Official Gazette of the Federation of Bosnia and Herzegovina), no. 07/14.

12 *Sijerčić-Čolić* 2012, pp. 229-249.

13 The Criminal Procedure Code of the Republic of Srpska provides victim-offender mediation from 2003. Other three Criminal Procedure Codes prescribing victim-offender mediation from 2009.

of Republic of Srpska and into proceedings before the Court of Bosnia and Herzegovina. So, during 2003 the juvenile justice legislation was harmonized throughout Bosnia and Herzegovina and educational recommendations as alternative forms of response to juvenile delinquency were extended throughout Bosnia and Herzegovina. Educational recommendations are alternatives to criminal prosecution and judicial procedure, and constitute the least formal way of dealing with juveniles who commit less serious offences. Educational recommendations: apologise to the injured party, compensation of damage to the injured party and working for a humanitarian organisation or the local community are the restorative ones.

New possibilities for diversion from criminal procedure into non-judicial models of treatment were introduced by comprehensive juvenile legislation in 2011. The comprehensive juvenile justice legislation provides wider options for the application of educational recommendations (which are applicable for *all* criminal offences and not only for less serious offences) and victim-offender mediation, and has facilitated that international standards on restorative justice and the protection of juveniles' rights and freedoms have been more adequeately implemented in Bosnia and Herzegovina.

1.3 Contextual factors and aims of the reforms

For a long period of time there has been constant and significant inactivity with regard to the introduction of forms of restorative justice in the criminal justice system, particularly in terms of adult perpetrators of criminal acts. This is a consequence of different factors. For example, primary objectives of the reform of criminal justice and criminal legislation in Bosnia and Herzegovina (since its admission to the United Nations in the spring of 1992) have been focused on: a) the efficiency of criminal proceedings and effectively combating crime, especially corruption and other forms of organized crime; b) the protection of basic rights and freedoms; c) reducing workloads in the criminal justice system by simplifying the criminal proceedings involving less serious offences (e. g. the procedure for issuing a warrant for pronouncement of the sentence); d) speeding up criminal proceedings through consensual forms such as guilty pleas and plea bargaining; e) the development of an efficient and independent criminal justice system.[14] So, the greatest attention in our criminal law and criminal justice system has been devoted to developing strategies to combat serious and organized crime. This development is not unexpected because, on the one hand, Bosnia and Herzegovina is going through a period of complex and fast changes in the political, economic, social and legal spheres and, on the other hand, there

14 For the process of reform in the criminal justice system and criminal legislation in Bosnia and Herzegovina, see *Sijerčić-Čolić* 2001, pp. 599-616; *Sijerčić-Čolić* 2003, pp. 181-208.

are new forms of serious crime as a result of global economic and IT development. Consequently, legislators and policymakers have concentrated on other pressing issues in recent years, despite the fact that restorative justice could well contribute to reaching some of these goals.

Movements for the protection of victims are poorly developed (if at all), and where they have emerged in recent years, it was due to war crime trials before courts in Bosnia and Herzegovina, rather than aiming to protect victim-witnesses before, during and after criminal proceedings and did not focus on various forms of restorative justice.

The main impetus for the above mentioned reforms that have led to the introduction (at least in theory) of forms of restorative justice at both the pre-court and the court level, primarily in the field of juvenile justice, have lain in a desire to develop a system of responding to juvenile offending that provides alternatives to traditional criminal justice responses to youth crime, and that is more in line with international consensus on what constitutes best practices in juvenile justice, as indicated through international standards, instruments and recommendations (see *Section 1.4* below). Introducing victim-offender mediation as an alternative approach to resolving conflicts between juveniles and victims, as well as doorways into the process through which VOM can be applied, can be regarded as a continuation of this trend.

1.4 Influence of international standards in the development of restorative justice in Bosnia and Herzegovina

Following the discussion above about forms and elements of restorative justice, when it comes to adult offenders, one can conclude that international instruments have not found their way into political and legislative circles. Weaknesses in the behaviour of responsible actors in Bosnia and Herzegovina, as well as the need to open the door to alternative measures in the criminal justice system for adults (in order to protect victims, eliminate the negative consequences of the application of criminal sanctions, especially regarding short-term sentences of deprivation of liberty, or, for example, in order to reduce the number of cases in courts) are pointed out in the conclusions of the Action Plan for the implementation of the 2009 Bosnia and Herzegovina Justice Sector Reform Strategy.[15]

The impact of international standards on national law is more visible in the area of juvenile justice, where there is a certain level of harmonization with international instruments of the UN and the Council of Europe (e. g. the Convention on the Rights of the Child, the Tokyo Rules, the European Convention respecting the realization of child rights, Council of Europe

15 *Sijerčić-Čolić* 2011, pp. 301-329.

recommendations on juvenile delinquency). Although Bosnia and Herzegovina is in the process of modernizing its juvenile justice legislation and aligning it with international standards, some shortcomings of existing practice should be noted. For example, the Committee on the Rights of the Child reviewed the compliance of our juvenile justice law with the Convention on the Rights of the Child. The Committee recommended the adoption of detailed regulations on alternative measures and the extrajudicial treatment of juvenile delinquents.[16] The impact of international standards to encourage national legislators to develop a broader alternative treatment (starting from measures before initiating criminal proceedings until after the verdict is rendered) has increased in recent years so that *comprehensive juvenile legislation* emphasizes a program of alternative measures and insists on the adoption of detailed regulations for its application.

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

2.1 Pre-court level

2.1.1 Adult criminal justice

The rules of criminal procedure in Bosnia and Herzegovina strictly follow the principle of legality regarding the prosecution of criminal cases. The prosecutor is obliged to initiate formal proceedings against adult suspects whenever there is evidence that a criminal offence has been committed. As a consequence there is no possibility for the prosecution of an adult offender to be conditionally suspended or dropped before going to court. The principle of opportunity cannot be applied, thus closing the door to any possibilities of closing cases on the basis of successful mediation between victim and offender or due to the delivery of reparation to the victim or the community at the pre-court level, i. e. before a case goes to trial. Therefore, there is no possibility of resolving any disputed relationship between the offender and the victim by removing the damage caused to their relationship, of giving the victims an active role in criminal proceedings and of redirecting the traditional attention from offender to victim. Thus, this option is not provided even for minor offences.

16 *Sijerčić-Čolić* 2009.

2.1.2 Juvenile justice

2.1.2.1 Specific rules for juvenile delinquency

At the pre-court level, manifestations of restorative justice can be found in the context of educational recommendations. According to current legislation,[17] the purpose of imposing and executing such educational recommendations lies in the avoidance of formal prosecution, and in achieving the goal of special prevention by deterring the juvenile from future criminal activity.

These educational recommendations are: 1) delivering a personal apology to the victim; 2) compensating the damage caused to the victim; 3) attending school regularly; 4) working for a humanitarian organisation or the local community; 5) taking up a profession suitable to the juvenile's skills and qualifications; 6) placement in another family, home or institution; 7) treatment in an appropriate health institution (e. g. in order to combat alcohol or drug abuse/addiction); 8) attending instructive, educational, psychological and other forms of counselling.

At the pre-court level, the following educational recommendations are available to the prosecutor: apologizing to the victim; delivering reparation/ compensation to the victim; regular school attendance and attending instructive and educational, psychological and other forms of counselling. Victim-offender mediation can be used in cases of delivering a personal apology to the victim, and where the educational recommendation implying the delivery of reparation/ compensation is made.[18] The remainder are available to the courts at the court level, as is highlighted below under *Section 2.2.2.2*.

The prosecutor can make educational recommendations if certain conditions are cumulatively fulfilled. Firstly, they are only applicable to criminal offences that are punishable by a fine or by imprisonment of up to three years. Secondly, the juvenile has to have made an admission to having committed the offence. Thirdly, regarding apology to the victim and the delivery of compensation for the damage caused to the victim, the juvenile has to have expressed his/her willingness to reconcile with the victim.

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17 Criminal Code of the Federation of Bosnia and Herzegovina (see *footnote 5*) and the *Decree on the Application of Educational Recommendations against Juveniles in the Federation of Bosnia and Herzegovina* ("Službene novine Federacije BiH" (Official Gazette of the Federation of Bosnia and Herzegovina) no. 6/09 , which came into effect in February 2009. This Decree provides for the method of application of educational recommendations against juveniles having committed less serious crimes, the types and conditions for the implementation, the goals to be achieved, deadlines for the application and enforcement and authorities taking part in the procedure.

18 *Sijerčić-Čolić et al*. 2005, p. 881.

If the juvenile fulfils the educational recommendations, the prosecutor shall not initiate preparatory proceedings, thus closing the criminal case. Should the juvenile fail to fulfil what is expected of him/her by the educational recommendations (breach), the prosecutor shall inform the judge of such failure, the ground for breach as stated by the juvenile, the victim and third parties (if the injured party is not directly involved in the execution of the educational recommendation) and file a request for the initiation of preparatory proceedings. This means that where a juvenile fails to deliver reparation, refuses to participate in VOM or where VOM is not completed successfully, the prosecutor always revokes the measure and asks for the judge to initiate preparatory proceedings (see *Section 2.2.2.2*).

An educational recommendation is selected and enforced in cooperation with the juvenile's parents or guardians and institutions of social care in addition to their advisory therapeutic work. In selecting a particular educational recommendation the overall interests of the juvenile and the victim have to be taken into consideration. Specific educational recommendations may not last longer than one year.

Based on a joint proposal by the juvenile and the victim, an educational recommendation that has been imposed may be replaced with another educational recommendation, if the execution of the first educational recommendation is too arduous for the juvenile. Interestingly, this provision applies to all forms of educational recommendations, not only those in which VOM can be applied. The authorized professional of the guardianship authority informs the prosecutor of this joint proposal, citing the difficulties that make replacing the original educational recommendation necessary. If the prosecutor accepts the proposal, the educational recommendation is replaced, as agreed by the juvenile and the victim. Also, replacement and revocation of educational recommendations can be made at the suggestion of juvenile's parents, adoptive parents or guardians.

2.1.2.2 Comprehensive juvenile justice legislation

Under comprehensive juvenile justice legislation,[19] educational recommendations may be imposed not only for offences punishable by fines or by imprisonment of up to five years (LPTCJCP RS) or up to three years (LPTCJCP BD), but also for more serious criminal offences if this is proportionate to the

19 The *Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Republic of Srpska* (hereinafter: LPTCJCP RS; see *footnote 9*). The *Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings* of Brčko District of Bosnia and Herzegovina (hereinafter: LPTCJCP BD; see *footnote 10*). See also the *Rulebook on the Application of Educational Recommendations to Juvenile Offenders*, published in "Službeni glasnik Republike Srpske" (Official Gazette of Republic of Srpska), no. 101/2010.

circumstances and gravity of the offence, the juvenile's overall living and life circumstances, and his/her personal characteristics. The conditions for applying educational recommendations are:

a) the juvenile has admitted to the offence;
b) the admission is given freely and voluntarily;
c) evidence is sufficient to prove that he/she has committed the criminal offence;
d) where an educational recommendation requires the delivery of an apology or of compensation/reparation to the victim, the juvenile has to have expressed his/her willingness to make amends to the injured party;
e) the juvenile gives in writing his/her consent to subject him/herself to an educational recommendation (for younger juveniles aged 14 to 16, such consent is given jointly with his/her parents or guardians).

Comprehensive juvenile justice legislation provides for six educational recommendations: 1) delivering a personal apology to the victim; 2) compensation/repairing the victim for the damages suffered; 3) regular school or workplace attendance; 4) volunteering for a humanitarian organization or local community or in welfare or environmental activities; 5) treatment in an appropriate health institution (as an in-patient or out-patient); 6) attending correctional, educational, psychological and other forms of counselling. Regarding the first two recommendations, a further requirement is that the victim has given his/her written consent to receive an apology, reparation or compensation. Accordingly, in the case of these two educational recommendations, VOM can be applied.

Before ordering the initiation of preparatory proceedings in the case of a juvenile offender, the prosecutor must consider making an educational recommendation where the above stated preconditions are met. The prosecutor informs the juvenile, his/her parents/guardians/adoptive parents about this option for resolving the case, the nature, content, duration and consequences of educational recommendations, as well as the consequences of refusing or failing without reasonable excuse to cooperate, execute and fulfil the requirements thereof.

Where the juvenile, in cooperation with and under supervision by the guardianship authority, fulfils the requirements of the educational recommendation, the prosecutor issues an order not to institute preparatory proceedings against the juvenile. If, on the basis of a report from the guardianship authority, it is determined that the juvenile has without reasonable excuse failed to fulfil the requirements of the recommendation entirely or in full, the prosecutor shall issue an order to initiate the preparatory proceedings.

The conditions for selecting and enforcing educational recommendations, their modification and revocation, the role of a juvenile's parents or guardians and the institutions of social care, and the role of victim are defined by the "Rulebook on the Application of Educational Recommendations to Juvenile

Offenders" in the Republic of Srpska.[20] Regarding said conditions, the same rules apply under comprehensive juvenile justice legislation as those set forth in *Section 2.1.2.1* above.

2.2 Court level

2.2.1 Adult criminal justice

2.2.1.1 Filing a claim for damages

At the court level, one first manifestation of restorative justice in a wider sense can be found in the possibility for the victim to file a claim for damages in the criminal proceedings, if his/her personal or property rights have been threatened or violated by the criminal offence. The court takes the property claim under consideration and decides on it in the criminal proceedings if: (i) it was caused by the offence, (ii) if the authorized person has stated the claim and (iii) if this would not considerably prolong the criminal proceedings. Damage claims may involve different matters such as compensation for (pecuniary and non-pecuniary) damage, the recovery of property or the cancellation of a certain legal transaction. Efforts to use this concept and remedy the crime, in whole or partially, are extended by the implementation of mediation between the injured party and the accused (see *Section 3.1.1* below). VOM in such cases requires consent from the offender and the victim before it can take place. However, where VOM is not applicable or appropriate, the offender's consent to pay the compensation to the victim is not required for the court to make such an order. Delivering compensation to the victim, either with or without VOM, can be legally enforced.

2.2.1.2 Community Service

According to the Criminal Codes, when the court assesses and imposes imprisonment for a term not exceeding one year, at the same time it may decide that such punishment, with the consent of the accused, be replaced with community service. The decision to replace imprisonment with community service shall be based upon the assessment that, considering all the circumstances determining the type and range of the sentence, the execution of imprisonment would not be necessary to realise the purpose of punishment, but at the same time a suspended sentence would not be sufficient to accomplish the general purpose of criminal sanctions. The substitution of imprisonment with community service may also

20 Published in "Službeni glasnik Republike Srpske" (Official Gazette of Republic of Srpska), no. 101/2010.

be applied where a fine has previsouly been substituted with a period of imprisonment due to non-payment.

The extent of the community service to be delivered shall be proportional to the imposed term of imprisonment, and shall be for between 10 and ninety working days. The time frame within which the work shall be performed shall be no shorter than one month and shall not exceed one year. In assessing the number of hours of community service, as well as the period in which these hours are to be delivered, the court shall take into consideration the imposed term of imprisonment that is being substituted, and the perpetrator's possibilities in terms of his/her personal circumstances and employment situation. The type of work to be performed, and place where it is performed are determined by the Ministry of Justice, taking into consideration the capacities and skills of the convicted person (for example, business of the employer should be humanitarian, environmental, utilities, service).

Should the offender fail to complete the full extent of community service within the set time frame without reasonable excuse, the court shall order that the offender serve a period of imprisonment that is proportionate to the number of days of community service that the offender has failed to fulfil.

Since community service can only be applied as a substitute for an otherwise retributive sanction (imprisonment, fines), the degree to which it can be regarded as a restorative practice can of course be questioned. However, in a very wide sense, community service can be regarded as a form of "reparation to the community" that aims to reintegrate offenders by avoiding the detrimental effects attributed to custodial sanctions and by fostering a sense of responsibility towards the community of which the offender is a part. However, no restorative process is involved in the determination of the work to be performed, and therefore community service in Bosnia and Herzegovina is at best at the absolute margins of restorative justice.

2.2.2 Juvenile justice

2.2.2.1 Filing a claim for damages

According to both the *specific rules for juvenile delinquency* and *comprehensive juvenile justice legislation*, the juvenile judge may also require a juvenile to make restitution of claims or compensation of damage to the injured party. For juveniles, however, this is only possible if he/she has been sentenced to a term of juvenile imprisonment. In such cases, the juvenile judge may propose mediation to the victim and the juvenile and the defence attorney if it concludes that such a process is suitable for settling the claim (see *Section 3.1.2* below).

2.2.2.2 Specific rules for juvenile delinquency

2.2.2.2.1 Court Diversion

As already stated under *Section 2.1.2.1* above, if a juvenile fails to fulfil what is expected of him/her by the educational recommendations that have been made by the prosecutor, the latter shall send the case to the juvenile judge requesting the initiation of the preparatory proceedings. The judge, however, can still decide against instituting proceedings, and instead issue other educational recommendations himself/herself as a form of court diversion. In this regard the judge can make one of the following educational recommendations: working for a humanitarian organisation or the local community; accepting a job suitable to the juvenile's skills and qualifications; placement in another family, home or institution; treatment in an appropriate health institution. Among these, working for a humanitarian organisation or the local community can be highlighted as being a form of intervention with restorative potential[21] and it can be delivered through (or be a component of an agreement resulting from) victim-offender mediation.

Where the guardianship authority reports to the juvenile judge that a juvenile offender has successfully fulfilled what is required of him/her by an educational recommendation, the judge shall decide not to initiate further proceedings, and the case is closed. The judge can make the same decision where a juvenile has only partially fulfilled the requirements of the educational recommendation, but the judge is of the opinion that further proceedings would not be purposeful given the nature of the offence and the circumstances in which it was committed, the juvenile's living circumstances, his or her personal characteristics and the reasons for failing to fulfil the obligations in full. If, based on a report from the competent guardianship authority, the court is of the opinion that a juvenile has without reasonable excuse failed to comply with an educational recommendation or has complied with it only partially, the juvenile judge shall begin preparatory proceedings.

2.2.2.2.2 Court Sanctioning

The specific rules for juvenile delinquency also provide for restorative justice to be used in the context of court sanctioning. The courts have at their disposal a number of educational measures (not to be confused with the aforementioned *educational recommendations*) that serve as alternatives to traditional punish-

21 Regarding working for a humanitarian organisation or the local community, the juvenile can work i. e. with the elderly, or in environmental protection projects.

ments.[22] Among these measures, there is the *educational measure of intensified supervision*[23] that can be supplemented with *special obligations*. Special obligations are not independent educational measures. Rather, they are used where the court is of the opinion that such special obligations are necessary for the successful enforcement of the educational measure of intensified supervision. The goal of attaching specific obligations to the educational measure of intensified supervision is to improve the juvenile's personal responsibility, his/her awareness of the need to respect social and legal norms, to help him/her develop a positive attitude towards the basic values of other individuals and communities, as well as to remove or mitigate factors that could contribute to recidivism. Therefore, in pronouncing some of the specific obligations, the court must appreciate the circumstances that relate to the personality of the juvenile and the offence.[24]

The court may order one or more special obligations, provided that such obligations cannot last longer than the educational measure of intensified supervision to which they are attached. The following special obligations are available to the juvenile court: delivering an apology to the victim; delivering reparation for the damage caused to the victim; going to school regularly; undergoing training for a job suitable for his/her capabilities and propensities; refraining from consuming alcohol and intoxicating drugs; visiting an appropriate health institution or counselling office; not associating with persons who exert a bad influence on him/her. The first two of these special obligations (delivering an apology, delivering reparation) can be achieved through victim-offender mediation, and are thus an important theoretical manifestation of restorative justice at the court level.

2.2.2.3 Comprehensive juvenile justice legislation

2.2.2.3.1 Court Diversion

The judge can impose educational recommendations with elements of restorative justice. The relevant legislation defines the list of educational recommendations, the conditions for application of educational recommendations and the purpose of the imposition and execution of educational recommendations, as already described in *Section 2.1.2.2* above.

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22 Educational measures are traditional court sanction for juveniles. Educational measures may be imposed to a juvenile perpetrator of a criminal offence, while in extreme cases, the punishment of juvenile imprisonment may be imposed on an older juvenile (16 to 18).

23 See *footnote 1*.

24 *Babić et al.* 2005, p. 323.

Before making a decision on the prosecutor's proposal, the juvenile judge shall consider feasibility and justification of the educational recommendation. The juvenile judge shall inform the juvenile and his/her parents/guardian/ adoptive parents about the particular way of disposing this case, the nature, content, duration and consequences of the implementation of educational recommendations and consequences of failing to cooperate, execute and fulfill them. If the judge finds that criminal proceedings and imposition of a educational measure or juvenile imprisonment would not be purposeful given the nature of the offence and the circumstances under which it was committed, the juvenile's previous life and his/her personal characteristics, he/she shall issue a decision imposing a educational recommendation when the juvenile consents to it. In the course serving the educational recommendation, the guardianship authority shall submit a report on its implementation to the judge. If the juvenile fulfills his/her obligations arising from the imposed educational recommendation, the judge shall issue a decision not to accept the prosecutor's proposal for a criminal sanction and shall inform the victim thereof, as required, and shall advise him/her to claim damages via civil action. If, based on a report of the guardianship authority, it is determined that the juvenile has refused to fulfill what is required of him/her under the educational recommendation or he/she has fulfilled it disorderly without just cause, the judge shall schedule a session or trial.

2.2.2.3.2 Court sanctioning

In comprehensive juvenile justice legislation, elements of restorative justice can be found in the context of *special obligations*. Special obligations can be defined as certain orders or prohibitions which can be imposed as independent sanction or as an ancillary one in addition to the educational measure of intensified supervision or conditional release from educational measure.[25] In selecting the special obligation the court takes into account the readiness of the juvenile to cooperate in the fulfilment of the obligation as well as if the obligations are properly adjusted to him/her and his/her living conditions. The following special obligations may be ordered: regular school attendance; regular attendance at work; undergoing training for a vocation suitable to his/her capabilities and propensities; working in favour of humanitarian, welfare, local and ecological organisations; abstaining from visiting certain places or events and certain companies and persons who can have a bad influence on the juvenile; undergoing treatment for and/or giving up the use of drugs and other addictive substances; integration into individual or group work of youth counselling;

25 According to specific rules for juvenile delinquency, *special obligations* can be imposed only in addition to educational measures of intensified supervision (see *Section 2.2.2.2* above).

performing certain sports or recreational activities; the prohibition of leaving the place of residence without the courts' permission.

Comprehensive juvenile justice legislation does not provide for the special obligations 'to deliver an apology' and to 'pay for the damages' that are provided for under specific rules for juvenile justice legislation as described in *Section 2.2.2.2* above. On the other hand, a meaningful element of restorative justice can be found in the provision which stipulates that when selecting special obligations, the court has to take the juvenile's will to cooperate into consideration. And, second, the restorative element lies in the possibility for the judge to impose special obligation to work for charitable or humanitarian organizations. However, this does not involve a restorative process or any active victim or community involvement in determining what kind of work should be performed. It can therefore be understood as restorative only in a rather wide sense.

The court may subsequently cancel or modify obligations it has ordered. In ordering the special obligations, the court shall alert the juvenile, his or her parents or guardians or adoptive parents about the consequences, for example: in the case that the special obligations are not fulfilled, the court may commit a juvenile to a disciplinary center, or if the juvenile has been conditionally released from an educational measure, the court can suspend that conditional release.

Suspended execution of juvenile imprisonment sentence[26] is, also, an important novelty: the court may impose the sentence of juvenile imprisonment and at the same time order that it will not be executed if it can be reasonably expected that the threat of execution of sentence may influence the juvenile to abstain from committing other criminal offences. In addition to suspending the sentence, the court may impose educational measures of intensified supervision combined with one or more special obligations where deemed necessary. If the juvenile commits a new offence in the probation period established by the court or refuses to comply with the ordered educational measure of intensified supervision or fails to fulfil specific obligations, the court may subsequently order that juvenile imprisonment be enforced. After the lapse of at least one year of probation, the court may make its final cancellation of sentence after obtaining a report from the guardianship authority, if new facts give reasons to believe that the juvenile will not commit new crimes. The restorative elements lie in the opportunities for the judge to impose special obligation to work for charitable or humanitarian organisations.

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26 According by both specific rules for juvenile delinquency and comprehensive juvenile justice legislation, only a senior juvenile may be punished if he/she has perpetrated a criminal offence for which a punishment of imprisonment for a term exceeding five years has been prescribed, if it would not be justifiable to apply an educational measure because of the grave consequences of the offence perpetrated and the degree of guilt.

2.3 Restorative Justice elements while serving sentences

2.3.1 Adult criminal justice

In Bosnia and Herzegovina, legislation governing the execution of sentences makes no provision for the use of restorative practices while serving sentence. Criminal legislation provides only for conditional early release of offenders, however restorative justice is not officially foreseen as a condition of such early release. In general, the legislative framework governing the execution of sanctions provides very little room for potential local restorative justice initiatives to manoever in.

2.3.2 Juvenile justice

Comprehensive juvenile justice legislation also makes provision for the conditional early release of juvenile offenders who have received an institutional educational measure. Conditional early release can be revoked if the juvenile re-offends during the early release period, if he/she fails to subject himself/herself properly to intensified supervision, and if he/she fails without reasonable excuse to fulfil any special obligations on which the early release was conditioned.

In addition to conditional release, intensified supervision may be imposed or one or more special obligations. The juvenile judge of first instance who originally imposed imprisonment decides on conditions for conditional release upon a motion submitted by the juvenile.

The restorative elements lie in the opportunities for the judge to impose special obligation to work for charitable or humanitarian organisations. Today, the comprehensive juvenile justice legislation makes limitations in terms of which conditions are eligible for restorative justice elements while serving sentences, but the context of serving custodial sentences is one that bears great future potential for the use of restorative justice in future.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

3.1.1 Victim-offender mediation for adults

The Criminal Procedure Codes provide for the possibility of resolving the issue of property claims through mediation processes, if it is more purposeful in relation to its resolution in criminal or civil proceedings. Thus, in adult law, the

institute of mediation in Bosnia and Herzegovina applies only to resolve issues that are the subject of civil rights, and not as a way to resolve the criminal case.

The court may propose mediation to the victim and the accused or the defence attorney in accordance with the law if it concludes that the claim under property law may be settled through mediation. A proposal for mediation can also instead be initiated before the completion of the main trial by both the injured party and the accused or the defence attorney. The court shall consult the opposite party as to its interest in participating in VOM before it makes any decision to turn the proposal down. This opens the door to alternative ways of resolving damage claims, which can significantly contribute to reducing the workload of courts and a simpler realization of the rights and interests of victims of crime (see *Section 2.2.1.1* above).

The process of victim-offender mediation for adult offenders is regulated by the Law on Mediation Procedure and the Law on Transfer of Mediation to the Association of Mediators[27] (for juvenile offenders and the respective mediation process, see *Section 3.1.2* below). According to the Law on Mediation Procedure, mediation is a process in which an independent person (the mediator) assists the parties in an effort to reach a mutually acceptable resolution of a dispute in the form of an agreement. The Association of Mediators of Bosnia and Herzegovina[28] is responsible for carrying out mediation. The Association of Mediators is the central mediation service and its members are mediators who are registered as members of the Association of Mediators of Bosnia and Herzegovina in accordance with the *Rules on the Register of Mediators*.[29] A member becomes authorized to carry out mediation as of the date of registration. In order to be eligible to become a mediator, a person must fulfil the following requirements: a) he/she must have a university degree (bachelor degree), b) he/she must have completed training according to the program of the Association or other training program recognized by the Association,[30] c) he/she must

27 The Law on Mediation Procedure, "Službeni glasnik BiH" (Official Gazette of the Bosnia and Herzegovina), no. 37/04. The Law on Transfer of Mediation to the Association of Mediators, "Službeni glasnik BiH" (Official Gazette of the Bosnia and Herzegovina), no. 52/05.

28 The Association of Mediators of Bosnia and Herzegovina is a public body. It has existed since November 2002. The formation of the Association of Mediators in Bosnia and Herzegovina was of crucial importance for the introduction of mediation in Bosnia and Herzegovina. The association was the carrier of ideas and activities to create a legal framework and the promotion of mediation as an alternative means of dispute resolution.

29 The Rules on the Register of mediators, "Službeni Glasnik BiH" (Official Gazette of the Bosnia and Herzegovina), no. 21/06. The Association of Mediators issues these rules.

30 The mediator is bound in a calendar year to attend at least two days of professional training, organized by the Association. The professional training focusses on the role of

be registered in the Register of Mediators kept by the Association, d) he/she must attain a satisfactory score in the context of a standardized interview in which the potential mediator's knowledge and understanding of the legal basis and procedure for mediation and the Association of Mediators are examined.

Fees and costs incurred by mediators, in the amount prescribed in the Rules of the Association, as well as other costs necessary for the implementation of the mediation process, shall be borne by the parties in equal shares unless the mediation agreement provides otherwise. The mediator shall conduct the mediation without delays, however the law does not foresee any fixed or strict time limits in this regard.

3.1.2 Victim-offender mediation for juveniles

As has already been described in the course of *Section 2* above, both specific rules for juvenile delinquency and comprehensive juvenile justice legislation make provision for VOM in certain circumstances. Specific rules for juvenile delinquency provide that mediation is possible during the procedure of imposition and execution of certain educational recommendations (personal apology, compensation to the injured party, working for a humanitarian organisation or the local community) and special obligations (personal apology, compensation to the injured party) (see *Section 2.1.2.1* and *Section 2.2.2.2*). In accordance with the comprehensive juvenile justice legislation, mediation is possible only during the procedure of imposition and execution of educational recommendations: personal apology of a juvenile and compensation to the injured party (see *Section 2.1.2.2* and *Section 2.2.2.3*).

According to "comprehensive juvenile justice legislation", in case of imposition of personal apology of a juvenile and of compensation to the injured party, besides the juvenile, the victim also must give written consent. According to the "specific rules for juvenile delinquency", written statements of consent by the juvenile and injured party are not required for the mediation process, and oral consent is sufficient instead.

Victim-offender mediation is conducted by an authorised person from the social welfare centre trained to perform, convey and report on the mediation process. According to specific rules for juvenile delinquency, the competent guardianship authority shall complete the mediation process as soon as possible, and no later than 90 days of receipt of a case from the prosecutor or judge. In accordance with the "comprehensive juvenile justice legislation", after having

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the mediator. According to the relevant laws, the role of the mediator is to remove barriers to communication, encourage the establishment of interest, removal and examination of possible options that could respond to the needs of persons involved in conflict. Such training is free of charge.

received a case from the prosecutor or judge, the competent guardianship authority shall complete the mediation process with due urgency.

The method of application of educational recommendations against juvenile offenders, the types and conditions for their implementation, the goals to be achieved, deadlines for the application and enforcement and authorities taking part in the procedure are defined by the *Decree on the Application of Educational Recommendations against Juveniles* in the Federation of Bosnia and Herzegovina,[31] and by the *Rulebook on the Application of Educational Recommendations to Juvenile Offenders* in the Republic of Srpska.[32]

According to both the "Decree on the Application of Educational Recommendations against Juveniles" and the "Rulebook on the Application of Educational Recommendations to Juvenile Offenders", when the juvenile prosecutor or judge determines that the requirements are met, and that there is a possibility and justification for the application of educational recommendations, he/she refers the case to the guardianship authority to implement the mediation process, to monitor its progress and subsequently report on the outcome. The head of the competent guardianship authority appoints an expert to conduct a mediation process. If the competent guardianship authority does not have a qualified person, the prosecutor or judge may order for the mediation process between the juvenile and the victim to be carried out by an organization authorized to conduct mediation (the Association of Mediators of Bosnia and Herzegovina; see *Section 3.1.1*). In this case, an official of the guardianship authority monitors the process of mediation and informs the prosecutor or judge about an agreement reached and its execution.

Mediation is a process that is defined in a very similar, almost identical manner, in both sets of rules. For reaching a settlement between the juvenile and the victim, if it is ordered as an educational recommendation, the guardianship authority takes the following activities.

The guardianship authority schedules an interview with the juvenile first and then with the injured party. After receiving the consent of both parties, it schedules a joint meeting. A leaflet on the application of the educational recommendation is enclosed with a summons for a joint meeting sent to the juvenile and the injured party. The meeting with a minor on the competent guardianship authority's premises is attended by his/her parents, adoptive parents or guardians and counsel. The guardianship authority will explain the purpose of applying the recommendation: not to initiate preparatory proceedings, that at any time the juvenile may waive the application of the educational recommendation, that it is his/her free will and he/she does not have to consent to it, but that, if he/she consents to the educational recommendation, he/she must show willingness to

31 See *footnote 17*.

32 See *footnote 19*.

take responsibility for his/her actions. At the same time, the juvenile is warned that a waiver or failure to fulfill obligations will result in preparatory proceedings. Also the injured party is informed about the purpose of applying the recommendations, that he/she is not obliged to consent to the application of the recommendation, that he/she can give it up during the proceedings, that he/she should clearly express his/her interests and claims. The juvenile, his/her parents, adoptive parents or guardians, the defense counsel, the injured party and his/her counsel are summoned to a new hearing. This meeting is conducted by a representative of the guardianship authority (mediator). After an agreement on the implementation of the recommendation is reached by the juvenile and the injured party, the guardianship authority shall transmit the file to the prosecutor or judge who will make a decision not to institute criminal proceedings. In the course of these face to face meetings, the victim and the offender discuss how and what amount of reparation/compensation shall be delivered to the victim, and the offender is given the chance to apologize to the victim.

3.2 Reparation as a condition for dropping the case

The criminal justice system for adult offenders does not recognize compensation to the victim as an independent measure provided for in the Criminal Code. The juvenile justice system recognizes reparation as a condition for dropping the case (see *Section 3.1.1* and *Section 3.1.2*).

3.3 Others elements of restorative justice in the juvenile justice system

3.3.1 Specific rules for juvenile delinquency and 'special obligations'

The court may determine special obligations it deems necessary for the successful enforcement of the educational measure of intensified supervision (see *Section 2.2.2.2*). It is not in contradiction with the principle of legality, because specific obligations are not criminal sanctions. The obligations explicitly set forth in the law can be divided into three groups. The first group consists of the obligation of personal apology to the injured party and compensation for damage within the scope of juvenile's means, both of which can be achieved through VOM (see *Section 3.1.2*). They aim at raising responsibility of juveniles for their own actions and at providing opportunities to juveniles to demonstrate it by clearly expressing their attitude towards the offence. In this way, a juvenile actively contributes to his/her social reintegration. The second group consists of commitments to regularly attend school and undergo vocational training that corresponds to the abilities and interests of juveniles. Their purpose is to enable a juvenile to assume a constructive role in society and develop his awareness of

the need to behave in accordance with social and legal norms. The third group consists of commitments aimed at preventing recidivism: to refrain from using liquor and intoxicating drugs; to visit an appropriate health institution or counselling office; not to associate with persons who have bad influence.

A court may order one or more specific obligations, taking into account that a juvenile can objectively fulfil them. The obligations ordered by the court may be subsequently cancelled or modified by the court. The court terminates an order for certain obligations when it finds that the goal for which they were ordered in the first place has been achieved, or when it finds that the minor cannot fulfil them for objective reasons. An obligation ordered when an educational measure was imposed may be subsequently modified by the court by replacing the obligation by another obligation deemed more appropriate for achieving the purpose of ordering specific obligations. In case of failure to fulfil a specific obligation, the court may substitute the imposed measure of intensified supervision with some other educational measure. The law obliges the court to warn a juvenile while imposing a specific obligation that, in case of non-compliance with certain obligations, the court may replace the educational measure of intensified supervision with some other measure. The court also has to give such a warning to the parents, adoptive parents, guardians or future foster family that will be responsible for enforcing the order of intensified supervision. The court is obliged to monitor the fulfilment of certain obligations.[33]

3.3.2 Comprehensive juvenile justice legislation and 'special obligations'

The court may impose one or more specific obligations if it finds that appropriate orders or prohibitions are needed to influence the juvenile and his/her behaviour (see *Section 2.2.2.3*). The obligations may not exceed one year. When fulfilling an obligation to participate in activities of humanitarian organizations or social welfare, local or environmental activities, a juvenile may work a maximum of 120 hours in a period of six months, which is the maximum period of this specific obligation, in a way not interfering with his education or employment and not harmful to his health. The court supervises the fulfilment of specific obligations and may request a report and opinion from the guardianship authority. During fulfilment, the court may subsequently modify or discontinue the obligation. Generally, when ordering this measure, the court specifically points out to the juvenile's parents, adoptive parents or guardians that, should one or more specific obligations not be implementable in practice, they can be replaced by other obligations, and should the juvenile fail to perform specific obligations without reasonable excuse, he may be sent to an educational centre.

33 *Babić et al*. 2005, pp. 379-381.

4. Data, research, evaluation and experiences with Restorative Justice

Currently, no official data are collected that could give an indication of the extent to which restorative justice is used in practice, and thus to the role that it plays in Bosnia and Herzegovina.[34] This problem is further exacerbated by the fact that only few research reports and evaluations provide any insights into the quantitative role of restorative justice. The only research that has been conducted to date has focussed on educational recommendations in the context of juvenile justice. These research studies have been conducted continuously since 2001 up to today.[35] Overall, the results have shown that educational recommendations in general are used only very rarely, and thus do not assume a substantial role in juvenile justice practice.

Certain research on the use of restorative justice, the position of criminal justice practitioners and on public opinion has been conducted over the last 10 years. Regarding the stance of practitioners towards restorative justice, it clearly follows from the findings that the majority of them have analyzed the educational recommedations quite reasonably and they are relatively well-acquainted with the alternative ways of responding to juvenile offenders. Still, they need specialization in this area.[36] According to the presented study, public perceptions on the needs and responsibilities of juvenile offenders and elements of restorative justice show that the public is aware that countering juvenile delinquency is not an activity that needs to be left only to the institutions of society, but that all members of society need to become involved. Furthermore, alternative measures for treating the victim and the juvenile offender, such as the care for the needs of the victim and confrontation of the juvenile with the significance and consequences of the offence, are modes that the public would strongly support.[37]

To date, there have been no studies or evaluations in Bosnia and Herzegovina that sought to investigate the effects of participation in restorative practices on desistence or recidivism. Likewise, research into the perceptions, views and levels of satisfaction among participants of restorative processes has yet to be conducted in Bosnia and Herzegovina.

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34 Various institutions, such as law enforcement agencies, prosecutor's offices, courts or offices of statistics, collect information on both juvenile and adult offenders, but use various methodologies.

35 *Young People in Conflict with the Law* 2002, pp. 22-25; *Vranj* 2008, pp. 731-734; *OSCE Mission to Bosnia and Herzegovina* 2009, pp. 3-5; *Enforcement of alternative measures for juveniles* 2010, pp. 75 ff.; *Muratbegović* 2011.

36 *Muratbegović* 2011, p. 51.

37 See *Enforcement of alternative measures for juveniles* 2010, p. 32.

5. Summary and outlook

In accordance with the discussion above we can conclude that Bosnia and Herzegovina has gradually accepted restorative justice procedures and interventions in theory. At the same time, it is also clear that restorative processes and interventions have not been fully implemented in the treatment of juvenile offenders in practice. Reasons for it that are cited (or were cited) are multifold, e. g.:

- the law drafters did not determine in detail the procedure for the implementation of educational recommendations as an alternative method of addressing juvenile delinquency;[38]
- educational recommendations cannot be imposed for more serious offences;[39]
- educational recommendations are not applied more frequently because juveniles do not appear to show a willingness to reconcile with the victim;[40]
- from the point of view of setting the work quotas of prosecutors and judges, decisions taken in the diversionary proceedings are not considered as equal to other decisions;[41]
- the lack of specialization and training of those working in juvenile justice;
- the lack of financial and human resources.

Where are the further potentials and possibilities for expanding restorative justice in the context of criminal justice in Bosnia and Herzegovina?There is a need to promote restorative justice procedures and interventions in all social spheres of knowledge, and to train and specialize participants in the juvenile courts (social workers, police officers, prosecutors and judges). Human and material resources need to be strengthened, and the coordination of activities of relevant institutions and their officials in the implementation of restorative justice procedures and interventions needs to be improved. Legislation needs to be developed that strengthens restorative justice more explicitly and raises confidence in restorative options among practioners and decision-makers.

38 We should note that results of recent activities are the *Decree on application of educational recommendations against juveniles* in the Federation of Bosnia and Herzegovina (2009), or the *Rulebook on the implementation of educational recommendations to juvenile offenders* (2010). See *Section 3.1.2*.

39 That is why the comprehensive juvenile justice legislation provides that educational recommendations may be imposed for all criminal offences.

40 Enforcement of alternative measures for juveniles 2010, p. 61.

41 *Muratbegović* 2011, p. 53.

Thought should be devoted to expanding the kinds of restorative processes and practices available, and to developing strategies that seek to encourage citizens to support these types of response to delinquent behaviour of youth. An analysis that was conducted for this report shows that comprehensive juvenile justice legislation enables the successful implementation of restorative justice procedures and interventions, at least theoretically. In this sense, comprehensive juvenile justice legislation provides police cautioning and conditional early release as potential gateways through which restorative processes could gain increased weight in practice.

With regard to adult perpetrators of criminal acts there are no activities to promote restorative justice and its introduction into the legal system. We believe that the diversion programme and the principle of opportunity can and must be implemented in our criminal law and criminal justice more than it is now. This is also confirmed by conclusions of the Action Plan for implementation of the Justice Sector Reform Strategy in Bosnia and Herzegovina, which were affirmed in the 2009 Annual Report on the Justice Sector Reform Strategy Implementation in Bosnia and Herzegovina, which re-considers the needs and possibilities of introducing new measures in prosecution in order to reduce the backlog of court cases.[42]

Although changes in the legal framework have been registered only in the last 15-odd years, and for juveniles solely and not for adult offenders at all, one cannot talk about strengthening the idea of more "equitable" punishment of offenders in Bosnia and Herzegovina. Therefore, a lack of restorative justice procedures and interventions in the criminal justice system in Bosnia and Herzegovina is not a reflection of stricter criminal and penal policy in Bosnia and Herzegovina. The lack of restorative justice procedures and interventions is a consequence of the strict application of the principle of legality of criminal prosecution and insisting on formal criminal proceedings and court verdicts. Also, it is a consequence of an indolent attitude towards the application of restorative justice already available, and towards introducing new restorative procedures like conferencing for instance, which has been shown to be a very promising practice in other European countries (for instance Northern Ireland, Ireland and Belgium).

The future of restorative justice in Bosnia and Herzegovina depends on certain factors: changing the procedural framework in terms of prescribing restorative justice procedures and interventions, particularly in adult criminal justice; improving the legal framework for restorative justice procedures and interventions in juvenile justice; promotion of alternative forms of response to crime and delinquent behaviour; resolution of other issues indicated in the concluding remarks. In fact, restorative justice in juvenile justice has a chance to

42 For more information see *Sijerčić-Čolić* 2011.

take hold in practice. This may be the impetus for the introduction of restorative justice in criminal justice for adults.

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Bulgaria

Dobrinka Chankova

1. Origins, aims and theoretical background of restorative justice

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

The collapse of the socialist regimes in the Eastern Block, including Bulgaria, influenced the country in numerous different ways. Among the most important challenges encountered were the requirements to guarantee compatibility of domestic law with international standards and to respond adequately to societal challenges. Searching for ways to answer these urgent needs, the possibilities for introducing restorative justice were considered.

Restorative justice, one of the most attractive modern policies in criminal justice worldwide, is considered to be a new and more humane paradigm of criminal justice. It is based on the idea of the recovery of the victim and offender, repairing damage and relationships, and restoring balance in society.

In view of some political difficulties and considerable resistance on the part of relevant actors, the idea of restorative justice (RJ) and its application in the field of penal law and penal proceedings has gained prominence in the Bulgarian legal system in recent years.

The introduction of this new idea was, firstly, both a direct consequence of the influence of pro-American and pro-European tendencies, and an expression of the struggle for reform of the Bulgarian legal system in accordance with more advanced models. In the early years of Bulgaria's transition to democracy, many American and European agencies and non-governmental organizations (NGOs) settled in the country to support its efforts towards establishing the rule of law and strengthening civil society. Among many other innovations, they introduced the idea of mediation. This was attractive, secondly, because it could success-

fully fill a niche in Bulgaria's social consciousness, which had been stultified by the deficiencies of the criminal justice system, a system which had not and has not yet got a sound legitimate alternative. For some legal theoreticians and practitioners, victim-offender-mediation as a main and universal restorative justice model offered a powerful alternative vision of criminal justice, and Bulgaria's future.[1]

But this vision was not universally shared. Others within the legal community were critical of the idea, often openly hostile to the suggestion that it might become a part of Bulgaria's justice system.[2] At a time of adaptation to social and political changes, scepticism about the value of new ideas was common. In addition, doubts about victim-offender-mediation were unfairly exacerbated by the deficiencies of earlier structures such as the Comrades' Courts.

However, as time went by victim-offender-mediation (VOM) came to be accepted as a legitimate alternative to the earlier confidence in the State and its institutions. This confidence, which had become hypertrophied, gave way to increasing trust in non-formal organizations and mechanisms. Good examples from other countries and successful Bulgarian experiments paved the way for a number of new ideas, some of which have become legally institutionalized. Nowadays, thanks to the numerous grass-root initiatives and the efforts of some far-seeing practitioners, though still in the "shadow of the law", step by step the restorative ideal has become a fact of the juridical reality in Bulgaria. More precisely, VOM has begun to be implemented, albeit on a limited scale, as have interventions with restorative elements in the context of juvenile delinquency and in prison settings.

Before becoming an accepted part of the traditional criminal justice system, restorative approaches have already been established in other areas, for example in schools. In the capital Sofia as well as in other cities throughout the country like Plovdiv, Pazardzhik, Rousse, etc., a number of pilot projects, again at non-governmental level, have been successfully implemented to experiment restorative justice practices in the school environment. Restorative practices are more frequently applied in prisons and in cases of disputes among neighbours.

1.2 Reform history

Although in the last decades restorative justice and in particular mediation in all fields (civil, labour, penal matters etc.) had numerous adherents in academic circles and NGOs, and won recognition in wider society, it was only recently that it began to attract attention and gain support of policy makers and members of Parliament, and that was not without a push from outside. At the same time,

1 *Chankova* 1996, p. 155; 2002, p. 65; *Trendafilova* 2001, p. 77; 2005, p. 7.

2 *Sulov* 1996, p. 127; *Tatarchev* 1996, p. 259.

generally recognised was the fact that the existing criminal justice system in Bulgaria was far from efficient, did not function in a satisfactory way, and was in need of change.

During the year 2000 several sociological studies were conducted and showed a positive attitude and readiness among society at large and the law-enforcement authorities to apply VOM as the most universal RJ instrument in Bulgaria.[3] This RJ model, although uncharacteristic for the continental law system and the general Bulgarian mentality, was known and trusted by the general public and legal professionals. In the beginning, the idea of VOM indeed met some resistance on the part of the lawyers' association in particular, and that was understandable. The latter was not interested in having more cases diverted from traditional legal practices, as this jeopardised its historically acknowledged monopoly on conflict resolution. This period can safely be assumed to be more or less over, as more and more legal practitioners admit the advantages of mediation for the parties to the conflict and their own daily practice.

While both the Parliament and the cabinet are being convinced that introducing restorative justice is only a matter of when, not of if, a number of NGOs have started and successfully implemented training for mediators, judges, prosecutors and other professionals in the field. The Institute of Conflict Resolution, the Union of Bulgarian Jurists and others have worked intensively in this area. The total number of training organisations licensed by the Ministry of Justice amounts to 21.[4] Twenty four mediation centres have been created throughout the country.[5] A National Association of Mediators (NAM) was established in 2005 as an umbrella organization to coordinate the activities of mediators and their associations.

The academics, on their part, have also contributed to this process: special courses on alternative dispute resolution, restorative justice and mediation in criminal matters have been introduced in the New Bulgarian University and the South-West University, as well as in the Institute for Postgraduate Studies with the University of National and World Economy. The main tools for promoting the adoption of restorative justice practices in Bulgaria are books[6], articles, booklets, DVDs, conferences, workshops, TV and radio broadcasts, information campaigns etc. All these finally led to the adoption of the Mediation Act 2004, albeit a rather general one (to be discussed in *Section 2*).

In 2006, the Bulgarian Government adopted the National Strategy for the Support and Compensation of Crime Victims. Section 13 of the Strategy's guiding principles affirms that victims may use mediation in relation to criminal

3 *Chankova* 2002, pp. 170-196.

4 Http://www.justice.government.bg/MPPublicWeb/default.aspx?id=3.

5 Http://www.lex.bg/bg/centrovemediacia/page.

6 *Stefanova* 2002; *Chankova* 2002; 2011.

proceedings. Section 2 of the immediate objectives of the Strategy refers to possible legislative amendments to "ensure the possibility that victims take part in mediation in the course of criminal proceedings", which constitutes a clear government policy in this area. These, however, have yet to be accomplished. Hopefully, the adoption of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime will accelerate the process. In December 2007 a National Round Table discussion on Perspectives of Victim-Offender Mediation was organized by the National Association of Mediators. A Concept for detailed legal regulation of VOM was adopted. A Working Group was established to develop the proposals for amendments to the Penal Code and Penal Procedure Code, later submitted to the Minister of Justice. These drafts were discussed and received wholehearted support during the Bulgarian-German conference on mediation held in May 2008, with the involvement of representatives of the Government, the judiciary and the academic circles. What remains to be done now is to take the decisive step of adopting those drafts and delivering on commitments already made.

Mediation in penal matters has been explicitly mentioned as one of the highest priorities in the Strategy to Continue the Judicial Reform in the Conditions of full EU Membership 2010, approved by the Council of Ministers. A new National Concept of Penal Policy of the Republic of Bulgaria for the period 2010 – 2014 has also been adopted. Having in mind the basic postulates of the Treaty of Lisbon and the Stockholm Program for an Open and Secure Europe Serving and Protecting Citizens, the concept offers far-seeing perspective in compliance with the common European penal policy. Here one more step towards restorative justice has been made.

Even in the latest Concept of State Policy on Juvenile Justice 2011 it is envisaged that the restorative measures should take precedence over punishment.

1.3 Contextual factors and aims of the reforms

There are rich traditions in Bulgarian customary law that may be seen to be the predecessors of alternatives to punishment and of modern notions of out-of-court methods for conflict resolution. These traditions are based on the classic understanding that the worst agreement should be preferred to the best court decision. Reconciliation between the disputing parties was a common feature of customary law, designed to avoid the referral of the dispute to the local court, with its unavoidable and considerable expenses. Although most of these customs concern family, labour, commercial and other private disputes, such traditions can also be found in Bulgarian customary penal law. An illustrative example of this is the compensation for a crime that had been proved against an offender.

In the chronological development of Bulgarian customary penal law, financial or property compensation gradually replaced the vendetta as a means of settling the score between the victim and the offender. Historically this

development was intended both to prevent future bloodshed and to compensate for the harm done. In addition to its instrumental purpose, the payment of compensation was intended to achieve reconciliation between the notional 'enemies', restoring the peace that had been broken by the offender's 'mischief'. As Bulgarian customary law does not distinguish between civil and criminal offences, this 'mischief' covered both *delicts* (torts) and crimes. Their common characteristic is the illegal result – the harm, which has to be repaired and compensated so that the prior social balance between the conflicting parties is restored. Indeed, the Bulgarian customary law went further than this. It has traditionally included rules for calculating due compensation. These rules took account of the seriousness of the mischief, the offender's characteristics, and the financial circumstances of the victim and the offender. In general reconciliation was applicable in cases which today we would treat as negligently committed wrongs, or wrongs committed while the offender was affected by a medical condition that might excuse his behaviour; but it was not available for intentionally committed crimes.

Towards the close of the 19th century these custom-based wrongs were codified as positive laws, the breach of which constituted an offence. But in their written form they continued to reflect social mores, myths and customs; even today some minority groups (such as the Roma) continue to apply customary law alongside official law. This could be interpreted as a signal of the need to integrate such non-formal mechanisms into formal law and thus rationalise the official conflict resolution system in general.

As a rule the Bulgarian legislature is rather conservative and cautious about the enactment of new alternatives to the imposition of criminal responsibility and to the maintenance of conventional criminal proceedings in cases where other European countries have adopted a range of initiatives. It unquestionably plays a major role in the continued scepticism voiced by politicians and some criminal justice theorists.

In addition the State, which still holds the monopoly in administering justice, remains rather reluctant to yield its monopolistic prerogatives. Such reform to the judicial system as does occur inevitably encounters the strong opposition of the vested interests of judges, prosecutors and lawyers. For this reason the implementation of Article 6 of the European Convention on Human Rights in Bulgaria was a major achievement, won with difficulty and requiring many legislative changes. The access to a fair trial that is guaranteed by Article 6 is of course powerfully defended as a fundamental value for the individual, the society, the State and the international institutions.

Despite its increasing prominence, some still consider VOM and restorative justice in general to be a denial of justice precisely because these alternatives by-pass the justice system. These sceptics doubt that citizens would voluntarily skip the justice system, being a public good to which, as citizens, they are entitled, regardless of the price. This is the underlying view of those who insist

that people will not readily embrace what they see as a voluntary, although partial, denial of the 'services of the justice system'.

It is also important to recognise that Bulgaria is an exception to the general tendency to humanize and reduce the salience of criminal repression: to the contrary, there are many indicators that Bulgaria is becoming more repressive. For a number of recently criminalised offences severe penalties are envisaged such as long periods of custody. As crime rates increase, sanctions for traditional crimes also increase. Although the legislation provides for alternatives to punishment, in reality punishment remains the preferred instrument.

These circumstances are regularly stressed by the opponents of restorative justice and victim-offender mediation: the continuing high crime rate demands a strong response, and criminal justice should not be a matter of negotiation with offenders. They also argue that the social conditions of the continuing transition which Bulgaria experiences will compromise or even destroy the idea, and that Bulgarian society is not yet ready to accept it. Of course, the proponents of restorative justice and victim-offender mediation have publicly expressed their contra-arguments. These may be summarised as follows.

The introduction of victim-offender mediation and other restorative justice practices reflects the established tendency towards enrichment and development of out-of-court methods and instruments for crime reduction. As already proven, punishment is not the most effective instrument for the control and prevention of crime; it is more important to react to every criminal act. Restorative justice practices will enrich the range of tools available to penal justice and penal procedure, and will offer more freedom of choice in the selection of the most effective method with respect to the specific case. Victim-offender mediation is something new and different from all known similar penal justice and penal procedure responses which should exist independently within the Bulgarian legal culture.

Rarely has any restorative practice been accepted without reservation and even resistance; initial scepticism has often prevailed, especially amongst the juridical community. However, in none of the countries in which RJ has been introduced, has it later been abrogated. On the contrary, its application continues to broaden. It will not completely replace classical criminal justice but may reasonably complement it. The penal justice system needs RJ to reduce its workload and work more efficiently in the interests of the victim, offender and society as a whole.[7]

7 For more details see *Chankova/Staninska* 2012.

1.4 Influence of international standards

The process of introducing RJ in Bulgaria has had some external catalysts. Firstly, it was the Council of Europe Recommendation on Mediation in Penal Matters No R (99)19. Bulgaria had its representative in the Expert Committee that drafted the Recommendation. The Bulgarian policy-makers were familiarised with another soft-law act of the Council of Europe: Guidelines for a better implementation of the existing Recommendation concerning penal mediation 2007.

Secondly, Bulgaria has been a full member to the EU since 01 January 2007. Bulgarian politicians were alert to the imperatives of the EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. As a binding act, it obliged Bulgaria to adapt the national legislation so as to afford victims of crime a minimum level of protection, including participation in mediation in criminal cases for appropriate offences. Harmonization of the Bulgarian legislation with the *acquis communautaire* and compliance with the standards of the European Convention on Human Rights were also of ultimate importance. The role of the regular progress reports of the European Commission on judicial reform (leading up to Bulgarian accession to the EU) and currently the Cooperation and Verification Mechanism monitoring reports should also be recognised. Bulgaria also supported the new European Commission's draft Victim Package, paying attention to RJ.

Thirdly, the UN Resolution on Basic Principles of the Use of Restorative Justice Programs in Criminal Matters 2002 and the previous similar resolutions also enjoyed the official Bulgarian support. The UN Handbook on Restorative Justice Programmes 2006 was widely spread.

Important support was received from some international NGOs – the European Forum for Restorative Justice, American Bar Association, Central and Eastern Europe Legal Initiative, America for Bulgaria Foundation, some German Foundations etc.

All these developments contributed to reformulating the Bulgarian criminal justice policy lately and putting it on the right track to achieve, hopefully sooner than later, compliance with the most advanced European and world models in the field of RJ.

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

It should be immediately stated that the issue of the legislative basis for RJ in Bulgaria is a *sui generis* case as will be explained below.

At the end of 2004 the Bulgarian Parliament finally adopted the long-awaited Mediation Act. This was the natural completion of the NGOs' work on

promoting and applying mediation as a conflict resolution method. The introduction of mediation was also inevitable in the context of the harmonization of Bulgaria's national legislation with the EU law, the need to follow the Recommendations of the Council of Europe's Committee of Ministers encouraging the application of mediation in civil, family, administrative and penal matters, as well as in juvenile justice, and the UN resolutions on restorative justice. According to Article 3, paragraph 1 of the Mediation Act, mediation may be used in civil, commercial, labour, family and administrative disputes; disputes related to consumer rights and other disputes involving natural and/or legal persons. Paragraph 2 of Article 3 stipulates that mediation shall also be available in cases under the Penal Procedure Code. However, the last Penal Procedure Code 2005 did not include any provision to this effect, though it is expected to be included in the next amendment to it.

Since the Mediation Act is itself relatively short, a number of soft law texts have been developed in order to create all the necessary prerequisites for the implementation of mediation in practice. In 2005 the Minister of Justice, who is responsible for the implementation of the law, issued Training Standards for Mediators; Procedural and Ethical Rules of Conduct for Mediators; and Rules Pertaining to the Unified Register of Mediators. These three texts regulate the implementation of the Mediation Act and, at a technical level, define the context in which mediation is to be applied. The regulations concern mediation in general, in all legal branches, including penal law. It is widely acknowledged that the specific conditions required for the use of victim-offender mediation will be met by additional soft law acts. However, amendments and supplements to the Mediation Act were introduced at the end of 2006. Those changes enhance the eligibility requirements for mediators concerning training and registration in the Unified Register of Mediators. It is envisaged that the Minister of Justice will approve the mediator training organizations with a ministerial order. These new rules have been detailed in Ordinance No 2 of 15 March 2007 on the Conditions and Procedure for Approval of Organizations Providing Training for Mediators; on the Training Requirements for Mediators; on the Procedure for Entry, Removal and Striking off Mediators from the Unified Register of Mediators; and on the Procedural and Ethical Rules of Conduct for Mediators, issued by the Ministry of Justice.

The Mediation Act contains few provisions concerning the organizational framework for mediation. It stipulates only that the Minister of Justice shall establish and maintain a Unified Register of Mediators (Article 8a), and that mediators may form associations for the purpose of organising their practice (Article 4). This legislative vacuum leaves substantial scope for grass-root initiatives and the involvement of NGOs. Despite the absence of any engagement on the part of State institutions and its inadequate initial funding, there has been considerable progress in the development of the basic infrastructure for the use of mediation in specific cases. The Unified Register has been set up and has

commenced its work. It lists only those mediators who hold a certificate of training according to the training requirements for mediators, currently numbering around 950 persons. This training, which presently is provided by a number of universities and NGOs, lasts for a minimum of 60 academic hours and includes both theory and practice. The National Association of Mediators plays the key coordinating, networking and stimulating role. Mediators in Bulgaria are volunteers – mediation is not a profession yet.

Except in the above mentioned enabling Mediation Act and soft-law acts, relevant provisions relating to RJ may be found in other legislative acts. These provisions however are rather fragmental, of permissive nature and not very detailed. The Bulgarian legal system has traditionally used some alternative dispute resolution methods, different elements of which are integrated in the system's jurisprudence. They are primarily applied in the resolution of civil, family and labour disputes, most frequently in arbitration and out-of-court settlement.[8] Opportunities for the application of alternative dispute resolution measures and elements of restorative justice have always existed, although with a limited scope, both in Bulgarian penal law and penal procedure law.[9] The last Penal Procedure Code 2005 reinforces these opportunities.[10]

2.1 Pre-court level

2.1.1 Adult criminal justice

Currently no explicit legal provisions allowing the application of RJ measures towards adults exist at the pre-trial level. It is widely accepted that this should be stipulated in the new Penal Code (which is currently being elaborated) and in the amendments to the Penal Procedure Code 2005. Relevant *proposals de lege ferenda* have already been developed and submitted to the Ministry of Justice. They are based on a sociological survey conducted in 2005 by a team of scholars and legal practitioners amongst the criminal justice authorities regarding the applicability of VOM in the Bulgarian criminal justice legislation and practice[11]. Three research institutions were involved: the South-West University, the New Bulgarian University and the Institute of Conflict Resolution. The survey covered a total of 100 criminal justice officials: judges, prosecutors, investigating magistrates, and lawyers from the cities of Sofia, Blagoevgrad, Plovdiv and Varna and the respective court districts. Several relevant questions were asked.

8 *Chankova* 2000, p. 253; *Stefanova* 2002, p. 197; *Manev* 2004, p. 11.

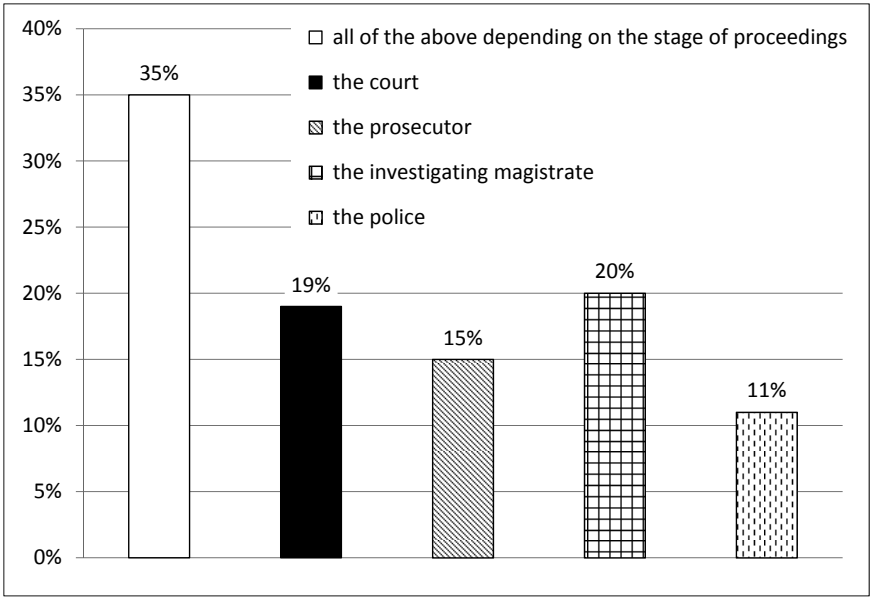
9 *Miers/Willemsens* 2004, p. 140.

10 *Chankova/Staninska* 2012.

11 *Chankova* 2006, pp. 43-59.

The first question was as to who should have the authority to decide whether a given case is appropriate for victim-offender mediation. The gate keeping function is, of course, a key element in the implementation and likely success of victim-offender mediation and restorative justice interventions. The analysis shows that there is a powerful tendency for each professional group to defend its own status and influence over the process (see *Figure 1*). For example, most police investigators maintained that the police should have this authority (11%) and investigating magistrates felt that this authority should be their prerogative (20%). Respectively, 15% of the respondents felt that the prosecutor should exercise the gate keeping function, while 19% stated that it should be a prerogative of the court. It is also consistent with such a position that each group would prefer that all should have the authority to decide whether a given case is appropriate for victim-offender mediation depending on the stage of proceedings, rather than being definitively excluded at some point (35%).

Figure 1: Who should have the authority to decide whether a given case is appropriate for victim-offender mediation?

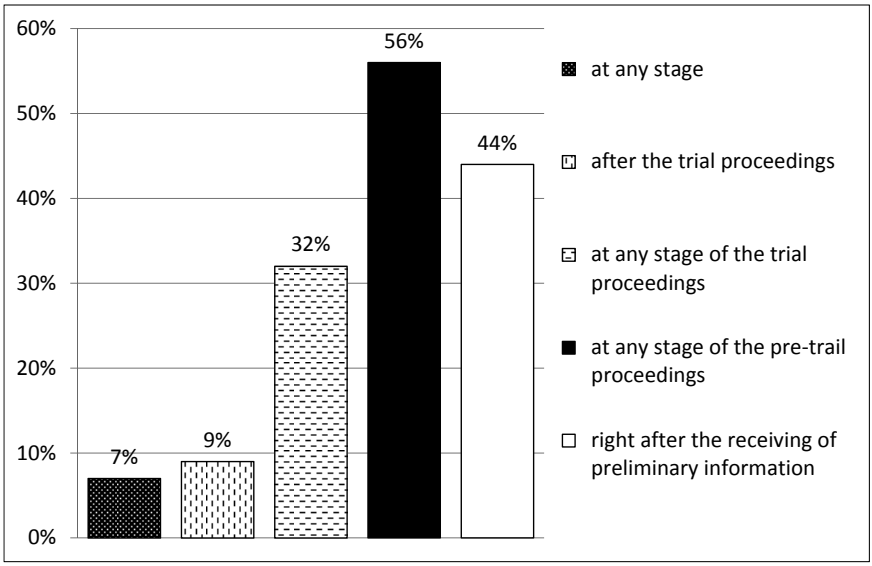


Source: *Chankova* 2006, p. 48.

Regarding the question as to the stage of the procedure at which a referral to mediation should be possible (Figure 2), the responses practically covered all stages of the criminal proceedings. It has to be noted that the total of the

percentages exceed 100 because the respondents were able to give more than one answer. Victim-offender mediation has its supporters at every stage, but these decrease as the proceedings near their conclusion. While 32% considered that any stage of the trial proceedings would be appropriate, 9% thought the best moment to be after the trial proceedings, and only 7% that at any stage a given case could be referred to victim-offender mediation. The predominant conclusion, however, is that victim-offender mediation is preferred at an earlier stage when the effects of its application would be stronger. Of those surveyed, 44% thought that the case could be referred to victim-offender mediation right after receiving the preliminary information, and 56% that it could be done at any stage of the pre-trial proceedings. As noted, mediation after the verdict has been delivered is not widely accepted (9%). This is understandable as this kind of mediation that aims at restoring relationships as practised in Belgium[12] and Northern Ireland[13] for example is not a very realistic option in Bulgaria.

Figure 2: At what point in time should a case be referred to mediation?



Source: *Chankova* 2006, p. 47.

12 *Aertsen* 2000, pp. 153-192.

13 *McEvoy/Mika* 2002, pp. 534-562.

2.1.2 Juvenile justice

The situation with regard to juvenile justice is far from being fully in line with the requirements of Council of Europe Recommendation (2003) 20 "New ways of dealing with juvenile delinquency and the role of juvenile justice". Current Bulgarian substantive penal law indeed envisages a number of alternative measures as it seeks to minimize the use of penal repression, especially in cases of juveniles. The legislature has traditionally taken the position that in cases where minor crimes are committed by negligence, it is neither necessary nor desirable to impose criminal responsibility. Its imposition demands time as well as financial and human resources; less repressive measures should usually be sufficient to correct and educate the offender, and to exert both general and individual deterrence.

Moreover, Article 1, paragraph 2 of the Penal Code 1968 explicitly states that the Code determines which publicly dangerous acts are crimes and what punishment shall be imposed for them. It also establishes the cases where, instead of punishment, social measures such as education and correctional orders may be imposed. Different measures have been introduced in the Penal Code over time. Some were transitory in effect and of varying substance but they were all aimed at the offender's complete or partial release from criminal responsibility while at the same time preserving the punishment's preventive and educational impact.

Now primary attention is paid to the release of juvenile offenders from criminal responsibility by imposing instead appropriate corrective (educational) measures (measures of public influence), as provided for in Article 78 in connection with Article 61 of the Penal Code. These are cases in which the offender has committed a crime that is not very harmful to society. Some of the measures, which are provided for in detail in the Juvenile Delinquency Act 1958 (adopted in the socialist era, albeit for different purposes), have some restorative character. These include: an apology to the victim; attending educational programmes and consultation for rehabilitative purposes; repairing the inflicted damage through work, where possible; and community service (Article 13, paragraph 1, items 2, 3, 9 and 10). However, while such outcomes can be deemed restorative, the procedure applied to achieve them cannot be said to be fully restorative. They are not a result of VOM but are imposed at the discretion of the implementation agencies – the Local Commissions for Combating Juvenile Delinquency. The apologies are delivered in person to the victims immediately. The panel shall determine the term and procedure for enrolment in counselling, training sessions and educational programmes. The intervention measure repairing the inflicted damage through work shall be enacted within a month of the effective date of the decision thereof. The Secretary of the Local Commission or a Commission member authorised by him shall monitor damage restitution. Where community service is imposed, the duration of the specific

job shall be defined, where it shall not exceed 40 hours. To ensure enforcement of the measure the Mayor of the Municipality of the current domicile of the under-aged person shall assign a job that must be performed, the method and procedure, taking into account the age, education and health condition of the under-aged and other circumstances of relevance to measure enforcement.

The Local Commissions for Combating Juvenile Delinquency are under the guidance of the Central Commission for Combating Juvenile Delinquency. The Central Commission comprises representatives of different ministries, agencies and judiciary. The local commissions, established at the municipal level, consist of representatives of municipal administrations, police, specialised local agencies and experts. However, the Juvenile Delinquency Act is quite old. It does not correspond in the best way to the contemporary situation and it is a matter of time before it is abolished and replaced by more adequate legislative regulations. However, at this time it is still in force.

According to Article 61 of the Penal Code, where a juvenile (aged 14-17 years) commits, due to aberration or frivolity, a crime which does not represent a great social danger, the prosecutor may decide not to initiate or to discontinue the initiated pre-trial proceedings if corrective measures pursuant to the Juvenile Delinquency Act can successfully be applied. If the prosecutor decides not to constitute or to discontinue pre-trial proceedings, he shall send the file to the commission for the imposition of corrective measures. Such measures may be imposed also to minors (aged 8-14 years) and juveniles who have committed anti-social acts where the commission has been notified. The commission institutes a correctional case and sets a date for its hearing, immediately notifying in writing the minor or juvenile, his parents or guardians, and the respective local Social Assistance Directorate. The case shall be scheduled for hearing within one month as from the date it has been instituted. In hearing the correctional case the presence of the minor or juvenile, as well as of his parent or guardian shall be obligatory. The rights and legal interests of the minor or juvenile shall be defended by his confidential representative or by an attorney, and if no such person is present, by a representative of the respective Social Assistance Directorate. The correctional case shall be heard *in camera.* Where he deems that it is in the interest of the minor or juvenile, the commission chairperson may also invite other specialists – a pedagogue, a psychologist, a psychiatrist, a class teacher, a pedagogical counsellor, a school psychologist, a public supervisor and others, as well as the person affected by the anti-social act.

The commission chairperson shall invite the minor or juvenile, if he/she so wishes, to give explanations. He/she may not be compelled to give explanations and plead guilty.The minor or juvenile shall be heard in the absence of his/her parents or guardians if the commission deems that it is in his/her interest.

After hearing the correctional case and taking into account the specific characteristics of the offender, his age, state of health, physical and psychic development, family environment, education and training, the nature and seve-

rity of the act, the motives and circumstances in which it was committed, whether an attempt has been made to remove the inflicted damages, the subsequent conduct of the offender, previous records and imposed measures and punishments, as well as other circumstances of importance in the concrete case, the local commission shall can impose the above mentioned measures of restorative character, or terminate the correctional case where it is established that no anti-social act has been committed or it has not been committed by the minor or juvenile, or the committed act is obviously negligible. The commission could also undertake some other actions, but they are not related to the application of restorative measures.

The juvenile, his parents, the parents of the minor or his guardians, or the persons defending his rights and legal interests may, within 14 days, appeal before the regional court any decision which imposes educational and corrective measures under Article 13, paragraph 1, item 3, 9 and 10 of the Juvenile Delinquency Act. The regional court shall schedule the hearing to be held within 14 days. The court shall hear the case unilaterally *in camera*. The minor or juvenile, his parents or guardians, the persons defending his rights and legal interests, and the chairperson of the commission imposing the corrective measure, shall attend the hearing. The court shall within three days come to a reasoned decision in the form of a ruling which: upholds the decision of the local commission; revokes the decision and imposes another educational measure; revokes the decision and sends the case to the prosecutor where the act constitutes a crime; revokes the decision and terminates the case where it establishes that no anti-social act has been committed or it has not been committed by the minor or juvenile, or the committed act is obviously negligible. The decision shall be final and a copy of it shall be sent to the relevant persons for execution.

2.2 Court level

2.2.1 Adult criminal justice

In some cases the Bulgarian law gives adult victims the discretion to decide whether the offender should be prosecuted or not by lodging a complaint in court. This is why such cases are colloquially called ‘complainant’s crimes’ or privately actionable cases. Under Article 24, paragraph 4 of the Penal Procedure Code 2005 penal proceedings shall not be officially instituted in cases of privately actionable crimes; also, the instituted proceedings shall be discontinued if the victim and the offender have reached reconciliation except where the offender has, without good reason, failed to meet the reconciliation conditions. The Bulgarian penal process allows for such reconciliations to be reached at every stage of the proceedings, even after the verdict has been pronounced. In such cases, pursuant to Article 84, paragraph 3 of the Penal Code of

1968 punishment shall not be enforced if the complainant requested so prior to its commencement. Although the legislation does not specifically refer to victim-offender mediation or any other out-of-court methods for settlement between the victim and the offender, it nonetheless allows for the application of these methods in such cases, so VOM is indeed used in cases of 'complainant's crimes'.

(Potentially) restorative elements can be found in the relatively new sanction of probation, a form of punishment that has been available in Bulgaria since 2005. Pursuant to Article 42a of the Penal Code probation is a totality of measures for control and impact without imprisonment which can be imposed either separately or in combination with each other. The probation measures shall be: obligatory registration at the present address; obligatory periodical meetings with a probation officer; restrictions of free movement; attending courses for professional qualification or programmes for social impact (lecturing, moralising, etc.) correctional labour; gratuitous work to the benefit of society. Although most of these measures have a purely punitive nature, some of them indeed bear restorative potential that could be further developed.

2.2.2 Juvenile justice

According to Article 60 of the Penal Code, punishments for juveniles shall be imposed with the priority objective of their reformation and preparation for socially useful labour. In cases pursuant to Article 61 of the Penal Code, which are already described in *Section 2.1.2*, where a juvenile commits, due to aberration or frivolity, a crime which does not represent a great social danger, the court may also decide not to commit an offender to trial or not to convict the offender if corrective measures can be successfully applied under the Juvenile Delinquency Act. In these cases the court itself can impose a corrective measure and notify the local commission for juvenile delinquency thereof, or send the case file to the commission for the imposition of such a measure. The procedure has already been described in *Section 2.1.2*. Unfortunately, VOM is not used as a tool in this regard. Again, the court can apply a measure with a restorative character on appeal. Under Article 62 the following punishments can be imposed on juveniles: imprisonment; probation; public reprobation and deprivation of the right to practice a particular profession or activity.

2.3 Restorative Justice elements while serving prison sentences

2.3.1 Adult criminal justice

Regrettably, the relatively new Execution of Punishments and Detention in Custody Act 2009 and the regulation for its implementation do not provide a

legislative basis for the use of restorative interventions while serving prison sentences and after an offender has been released on parole. However, in the legislative vacuum some far-seeing prison staff and specialised NGOs have put in place pilot projects on victim-offender mediation, conflict resolution in prisons and restorative measures as conditions for early release. Probation officers also use restorative methods for enhancing convicted persons' reintegration into society, like facilitated dialogue with their relatives, colleagues, neighbours and friends.[14] At the theoretical level[15] numerous proposals for amendments to the Execution of Punishments and Detention in Custody Act, that seek to introduce mediation, family (group) conferences, restorative conferencing etc. have already been made, but they still await government and legislative action.

2.3.2 Juvenile justice

Juveniles, until coming of age, serve sentences to imprisonment in ‚corrective homes'. Upon reaching majority they are generally moved to a prison or to a prison hostel. They can, however, remain in corrective homes until their 20th birthday in order to finish their education or qualifications, so long as the pedagogical council makes a respective proposal and the prosecutor agrees to it. No legal regulations about possible restorative interventions for young offenders are currently in place at the time of writing. Nevertheless, well educated and motivated staff[16] have been able to accomplish quite a lot in this regard, e. g. different conflict resolution training programs, using art for reducing stress, anger and sense of guilt, stimulation of remorse and repentance etc. But this on its own is definitely not enough. Promisingly, the latest Concept of State Policy on Juvenile Justice 2011 envisages that restorative measures should take precedence over punishment. This thesis is underpinned by theory.[17] One can only wait and see what will happen in practice in the near future.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

As has already been emphasized, the only genuine restorative justice practice that is currently applied in Bulgaria, albeit in the framework of pilot projects and

14 *Madjarov* 2007, pp. 3-32.

15 *Chankova* 2011, pp. 259-260.

16 Http://www.gdin.bg.

17 *Chankova* 2011, pp. 254-259.

in the "shadow of the law", is VOM. The best example in this regard is the European Project 2009-2010 "Victim-Offender Mediation at the Post-Sentence Stage", coordinated by the French Federation "Citoyens et Justice", with the support of the Ministry of Justice and project partners: the Bulgarian National Association of Mediators, with the active participation of magistrates from Sofia and Varna judicial districts and academics, the Italian Ministry of Justice, the Directorate General of Justice of the Government of La Rioja, Spain, and the District Courts of Nantes, Marseille and Pau and three associations working respectively with the said courts. It was remarkable that the project went beyond its original objectives and stimulated the implementation of Victim-Offender Mediation at all stages of the procedure. It was sponsored by the European Commission, Directorate General "Justice, Freedom and Security."

In the framework of this project, VOM could be applied or offered at different stages of the procedure, namely: before scheduling the case; during the hearing; after sentence has been passed. The relevant procedural documentation has been developed by Varna District Court. The usual practice has been as follows: before sending the case to trial, the judge informs the parties of the opportunity to reach an agreement through extrajudicial means, e. g. through victim-offender mediation. If an agreement is reached, the case is terminated. If there is no agreement, during the hearing the presiding judge again informs them of the opportunity to resolve the conflict through VOM at that stage of the proceedings. If such agreement can be reached, the case is terminated. When reconciliation is reached after the sentence has been passed, the punishment shall not be carried out if the complainant requested prior to its commencement that it should not be.

Case study from the case law of Varna Regional Court

It concerned one of the so called "complainant's crimes". In the particular occasion the crime was against honour and dignity and the victim and the offender were siblings. There is no pre-trial procedure in such cases and the parties refer directly to the first instance criminal court.

During the ongoing hearing the presiding judge found out that reconciliation was possible and gave detailed information about mediation together with instructions to the parties to look for a mediator. He suspended the proceedings and gave opportunity to the conflicting relatives to find a mediator to enable the communication. The registered mediator B. Z. was contacted. The mediation session took place on the very same day. After some deliberations an out of court mediation agreement was reached. It was submitted to the court and according to the will expressed by the parties, the court proceedings were terminated.

Moreover, the mediation agreement that was achieved played an extra role - it was taken into account in other court proceedings between the same parties which were also terminated.

As a result the relationship between the relatives was improved and the court workload was reduced. Time and expenses for both the parties and the court were saved.

The main sources of financing for the VOMs currently applied in Bulgaria are EU and charities' funds. That is why extra costs have not been required so far from the parties involved (the victim and the offender). As a rule VOM's costs are lower than the ones for the traditional criminal justice services. As far as time necessary for completing the proceedings is concerned, VOM is shorter than the traditional proceedings.

To the extent to which we can say that restorative justice provisions, except VOM, exist in the Bulgarian legal system, they are primarily offender-focused and less victim-oriented. Restorative practices are applied to petty crimes (without specification) and to crimes prosecuted at the instigation of a complaint by the victim; to both juvenile and adult offenders, at pre-trial level, trial level and while serving sentences. Restorative practices are available at all stages of criminal proceedings, although they are primarily used at an early stage. At present they are mainly part of the criminal proceedings and only in exceptional cases comprise an alternative to it. The Public Prosecutor's Office and the courts exercise the gate keeping function. Again, it must be emphasized that most of these interventions only include restorative elements rather than fully fledged restorative procedures, and they are not used to their full potential.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

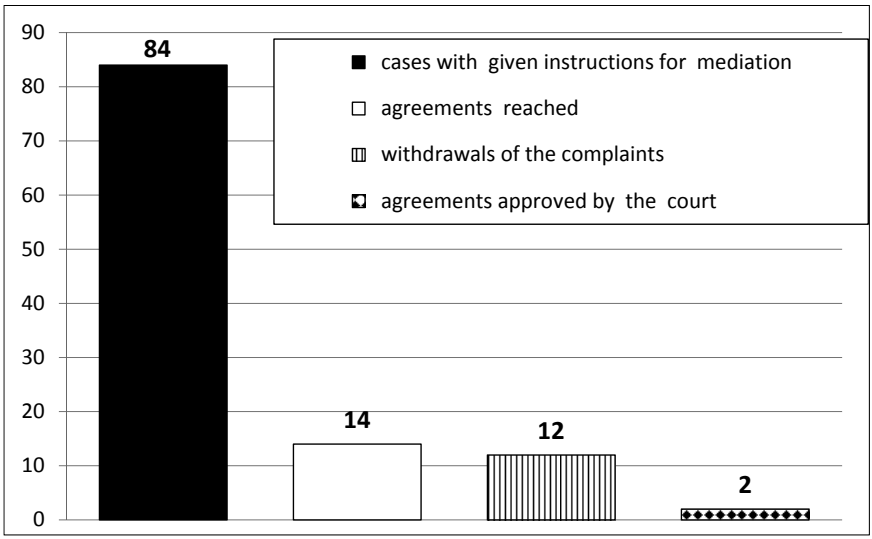
4.1.1 Victim-Offender-Mediation

As has already been stated, there are no genuine nationwide restorative justice programmes, initiatives and services in Bulgaria. There are only some pilot projects and restorative elements in classical criminal justice and juvenile justice. Consequently, there are no reliable statistics at the national level. To the best of my knowledge, the only statistical data available are on the limited number of cases that were settled through a restorative justice measure in the framework of the European Project 2009-2010 "Victim-Offender Mediation at the Post-Sentence Stage".[18] No further evaluative research has been carried out so far.

18 *Citoyens et Justice* 2011, pp. 46-47.

In Sofia Regional Court, the biggest regional court in the country, for the period ranging from January to October 2010, 46 panels considered 255 cases of privately actionable crimes. In approximately half of the cases reconciliation was reached, mainly through VOM or direct negotiations, and in the other half the complaints were withdrawn.

Figure 3: Varna Regional Court achievements



Source: *Citoyens et Justice* 2011, p. 46.

Varna Regional court achievements are as follows: of 84 cases with given instructions for mediation, agreements have been reached in 14 cases; 12 complaints have been withdrawn and 2 agreements have been approved by the court. According to further statistics, of the 14 agreements that were reached, 8 involved crimes against dignity and honour, and six were in cases of assault.[19] Although not fully representative, the statistics are nonetheless indicative of the restrictive use of VOM in practice, and of the kinds of cases in which VOM agreements are most frequently reached.

19 *Citoyens et Justice* 2011, p. 46.

4.1.2 The use of restorative justice measures in the practice of the Juvenile Commissions and the courts' sentencing practice

As stated in *Section 2.1.2* above, some of the measures provided for in the Juvenile Delinquency Act 1958 can be viewed as being of a restorative nature, while the others entail stigmatising or retributive elements. *Table 1* provides some statistical data from the database of the *National Statistics Institute* on the application of these measures over the last five years.[20] As can be seen, educational measures with a restorative orientation played only a peripheral role throughout the period from 2006 to 2010.

Table 1: Issuance of select educational measures by the Juvenile Commissions from 2006 to 2010

Year	Total number	Apology to the victim	Attending educational programmes and consultation with rehabilitative purpose	Repairing the inflicted damage by his own work, where possible	Community service
2006	1.724	38	184	3	17
2007	1.795	17	249	1	27
2008	1.502	21	187	1	26
2009	1.507	25	173	11	26
2010	1.681	33	208	32	21

Source: National Statistics Institute, *www.nsi.bg*.

Recently, the use of probation as a form of sanction has increased in Bulgaria. However, since the requirements attached to probation are not limited to such with a restorative element, and since the data do not discern between sentences to probation with or without restorative elements, the statistics would provide no insight whatsoever into the extent to which restoration is incorporated into court sentencing. Overall, there are sadly no reliable statistics on other restorative interventions at the post-sentence stage.

4.2 Findings from implementation research and evaluation

Several national and transnational RJ research and promotion projects have been launched and implemented recently in Bulgaria. In the following section, two European projects – "Meeting the Challenges of Introducing Victim-Offender

20 Http://www.nsi.bg.

Mediation in Central and Eastern Europe" 2004-2005, in the frameworks of the AGIS Programme, and COST Action A21 "Restorative Justice Developments in Europe" 2002-2006, with an active Bulgarian involvement, shall be presented more closely. They have paved the way to RJ application in Bulgaria.

4.2.1 "Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern Europe" 2004-2005

The project was co-ordinated by the European Forum for Restorative Justice.[21] Representatives from 28 countries from Central, Eastern and Western Europe, two countries outside Europe, the EU, the Council of Europe and the UN were directly involved.The general objective of the project was to effectively support the development of restorative justice in Central and Eastern European countries. The specific objectives of the project were:

- to study, at the conceptual and practical level, the possibilities for implementing restorative justice in Central and Eastern European countries given their specific political, economical, cultural and legal background;
- to discuss the ways in which the experience in Western European countries can inform and support the development of restorative justice in Central and Eastern European countries;
- to prepare strategies for promoting the development of an integrated policy concerning restorative justice in Central and Eastern European countries;
- to actively work towards creating dynamics for exchange and co-operation (networking) between Central and Eastern European countries in this field;
- to discuss what Western European countries can learn from the developments in criminal justice in Central and Eastern European countries;
- to study what can be learned from the previous points in terms of policy development concerning restorative justice at the level of the European Union.

During the project 2 expert meetings and 2 seminars for restorative justice practitioners, policy makers, legal practitioners and researchers from different Western, Central and Eastern European countries were organised. At the end of the two years a final publication was written which brings together and analyses the information collected during the entire project.

21 At that time European Forum for Victim-Offender Mediation and Restorative Justice: *www.euforumrj.org*.

The exchange between the East and the West of Europe was beneficial for both parties. The accompanying networking activities were beneficial to the EU too since the project had aimed to define more detailed policy recommendations which could be considered in further policy development work on restorative justice at the level of the European Union.

4.2.2 COST Action A21 "Restorative Justice Developments in Europe" 2002-2006

COST Action A21 "Restorative Justice Developments in Europe" concerned a European network of researchers from 21 countries, which was started late 2002 and which was run until the end of 2006. The main objective of Action A21 was to enhance and to deepen knowledge on theoretical and practical aspects of restorative justice in Europe, with a view to supporting implementation strategies in a scientifically sound way. In order to reach this general objective, a network of researchers has been created to: exchange and discuss research needs, methods and results; co-ordinate research projects in the respective countries as far as possible and desirable; stimulate or support further (common) research projects.

Four working groups were established: on evaluative research, policy oriented research, theoretical research and restorative justice, violent conflicts and mass victimization. The Working Groups met twice or three times a year in order to exchange and analyse the information collected, to discuss methodologies and to develop or set up further (theoretical) research.

The main scientific benefits of the project could be pointed out as being the development of an analysis of RJ practices, research, legislation and policy; enhancing the knowledge on what restorative justice is (not), how it can be evaluated and what the possible benefits and disadvantages are. Getting an overview of different policies with regard to restorative justice in the various countries have led to a better understanding for policy makers on what the possibilities are and what works best. EU policy makers have been informed about lacunas and how to accommodate these. Scrutinizing the best practices has guided practitioners in developing their own practice. There were also numerous benefits regarding specific training on the European level. The project ended with several publications.

5. Summary and outlook

Presently, as already stated, Restorative Justice is not used to its full potential in the criminal justice system in Bulgaria yet. Surprisingly, this innovative approach has for a long time remained at the periphery of the attention of criminal justice policy-makers, despite the European Union imperatives and the tendencies that can be recognized worldwide. The usual arguments are as follows: still a high

crime rate; society is not ready yet; restorative justice is an unknown option etc. The latest positive signals from the government cannot be denied but the declared intentions and objectives need commitment. Otherwise restorative justice will remain only on the academic and NGOs agenda.

Having in mind all the available information, the following **conclusions** about the recent developments of RJ in Bulgaria can be drawn:

- Ancient traditions for reconciliation and reparation still exist; Restorative justice in the modern sense of the word is a new idea.
- The retributive approach still prevails over the restorative elements in the legislation and practice.
- There is a tendency towards enrichment and development of non-penal methods and instruments for combating crime. Nevertheless, RJ practices are at an early stage of development and represent a tiny segment of criminal justice reality.
- There is already an active NGO sector, launching information campaigns, various projects, pilot schemes, lobbying, training, networking.
- Academics are one of the main proponents of RJ. Training and university education in RJ principles and practices are rapidly developing.
- Policy makers are lagging behind.
- Legislation is still underdeveloped and hampers the spreading of RJ practices (important as Bulgaria belongs to the continental law system).

Definitely there are some *obstacles hampering progress* of Restorative Justice implementation in Bulgaria. Analyzing the latest developments, the following hindrances for RJ wide spreading could be summarized:

- still rather low level of civil activism – people are mainly busy with their own survival during the very long transitional period and current financial crisis;
- prevailing state monopoly in the criminal justice system;
- still existing "vested interests" of judiciary and their reluctance to new development; RJ practices are believed to affect directly the sovereignty of the state and to threaten lawyers' preserved interests;
- insufficient training of professionals on RJ principles and practices;
- poor economic conditions;
- difficulties related to the transitional period (high crime rate, feeling of insecurity, despair, disappointment, frustration; as a result of which new ideas are not easily adopted), etc.

To overcome these it is necessary:

- To allocate the necessary funds. RJ services assume not only NGOs' and volunteers' involvement but also some state's support, especially in relation to the crime victims.

- To continue with further training of mediators, judges, prosecutors, lawyers, police officers, probation and prison staff.
- To raise awareness among the general public, to disseminate widely information. In this aspect "success stories" are of ultimate importance.

It could be summarised that nowadays initial awareness, understanding and support for victim-offender mediation and the other instruments of restorative justice exist among policy-makers, specialists and the broader social circles in Bulgaria. This shows that restorative justice has a future in Bulgaria. There are people ready to work for this goal, and their number is increasing every day. As a member of the UN, the EU and of the Council of Europe, Bulgaria has to provide better services to both crime victims and offenders. Introducing measures enabling diverting cases from the criminal justice process, including restorative practices, is a relevant approach to that problem. A continuing exchange of ideas, knowledge and expertise with foreign scientists and practitioners will stimulate the Bulgarian researchers and policy-makers and will accelerate the ongoing processes in Bulgaria. Of course, still a lot should be done for the full implementation of the international RJ standards. Nevertheless, it is an exciting time for RJ developments in Bulgaria.

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Croatia

Igor Bojanić

1. Origins, aims and theoretical background of restorative justice

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

There are three main sources in the Republic of Croatia that contain elements of restorative justice in terms of process and outcomes: the Criminal Procedure Act of 2008 (CPA, mmost recently amended in 2013), the Criminal Code of 2011 (CC, implemented on 1 January 2013) and Juveniles Courts Act 2011 (JCA). Within the framework of provisions on pre-trial procedure, the CPA regulates in more detail conditions for the application of the principle of opportunity. Regarding restorative justice, it is worth pointing out the provision governing "conditional opportunity" (Art. 522 of the CPA) which prescribes that the State Attorney, for a criminal offence punishable by imprisonment of no longer than five years, after obtaining the consent of the victim or injured person, can dismiss the criminal report or desist from criminal prosecution, even though there exists a reasonable suspicion that the offence has been committed, if the suspect agrees to fulfill certain obligations (e. g. to repair or compensate the damage caused by the offence). The application of conditional opportunity is also possible according to provisions of the JCA. The State Attorney for juveniles can condition his decision to not institute criminal proceedings based upon the readiness of the juvenile or young adult to fulfill special obligations (Art. 72 of JCA). Provisions of the JCA on special obligations (as a type of educational measure) and opportunity of criminal prosecution are of the most practical value from a restorative justice point of view, because they have made possible a number of victim-offender mediations in the context of the proceedings of so called "out-of-court settlements" in the last ten years.

As far as restorative justice in the wider term is concerned, one should point out the provision of the CC regarding the substitution of imprisonment (Art. 55 of the CC) according to which the court can replace a fine of 360 daily amounts or imprisonment of up to one year with community services. When the punishment of imprisonment up to six months is pronounced, the court will replace it with community service unless the purpose of punishment cannot be achieved by doing so (Art. 55 § 1). The court can impose such community service together with one or more special obligations from Art. 62 of the CC. Those obligations include, among others, the obligation to repair the damage caused by the criminal offence, or the obligation to pay a particular sum to the benefit of a public humanitarian institution, for instance into the fund for compensating damage to the victims of criminal offences, and shall only be ordered if they are deemed suitable in relation to the committed offence or to the personality of the offender (Art. 55 § 3 of the CC). Community service will be executed only with the consent of the convicted felon (Art. 55 § 4 of the CC).

Community service is not an independent criminal sanction, but contentwise it represents an adequate alternative for short-term imprisonment. Also important are the provisions of the CC on sentencing and conditions of application of suspended sentences, which – as an important criterion – emphasize the behaviour of the perpetrator after having committed the criminal offence, particularly regarding his behavior towards the victim/injured person and/or whether or not he has compensated the damage caused by the offence.

1.2 Reform history

In the historical development of restorative justice in the Republic of Croatia, the current application of the out-of-court settlement in the pre-trial procedure against the juvenile and younger adults is of the greatest relevance. Even though the possibility of victim-offender mediation has not been explicitly prescribed by the law, the basis for its application in practice can be found in the provisions of the JCA 1997 governing special obligations and conditional opportunity of the criminal prosecution. Since 2000, such mediation has been promoted by the project "Alternative Interventions for Juvenile Offenders – Out-of-court Settlement" formulated by the Ministry of Health and Social Care, the State Attorney Office and the Faculty of Education and Rehabilitation Sciences of the University of Zagreb. The project started with the education of professionals conducted by Austrian mediators and educators from the association "Neustart Graz" and included various theoretical approaches to mediation and supervision practice. First out-of-court settlements began in mid-2001 in the offices for out-of-court settlement of the three Croatian cities of Osijek, Zagreb and Split.[1] Encouraging

1 *Cvjetko* 2003, p. 59.

results stemming from the implementation of the project influenced the legislator, and the new JCA 2011 emphasizes – within the assumptions of conditional opportunity – the readiness of juveniles to become involved in the out-of-court settlement procedure.[2]

1.3 Contextual factors and aims of the reforms

The gradual affirmation of the idea of restorative justice in the Republic of Croatia has to be viewed in the context of the continuous modernization of the criminal justice system and solving problems that burden it. Restorative justice appears to be a useful model in multiple ways: as an alternative/addition to the classical approaches such as retributive justice and re-socializing justice; as a model which strengthens the role of the victim in the criminal procedure; it represents an adequate response to the problems that the contemporary criminal justice system faces, being burdened by large case-loads, long procedures, decreased efficiency and often negative public perception. Some Croatian scholars view the emergence of restorative justice as a new concept primarily in the context of improving the position of the victim, whereby the main issue in the criminal procedure is to determine damage caused by the criminal offence and possibilities for its compensation. This makes the interpretation of restorative justice quite narrow and it is defined as the fair compensation of suffered damage, while also focusing on the reestablishment of relations between the victim and offender that existed prior to the commission of the criminal offence (restitution and reconcilement of the offender – victim relationship). The guiding idea is that the victim of less serious offending is less interested in punishing the offender and more interested in being compensated for the damage caused by the offender. The criminal offence is regarded as causing damage to the victim or the community which results in a deterioration of the relation between the offender on one side and the victim and community on the other. Compensation of incurred damages is the solution not only in the best interest of the victim and offender, but rather of the society as a whole: in addition to being satisfied with the compensation of the damage, the victim's sense of dignity and safety can be restored; the offender assumes responsibility for his/her behaviour, is spared punishment and receives the opportunity to be reintegrated in the community; the reconcilement of parties leads to easier and faster resolutions of social conflicts than can be achieved by punishing offenders, and thus the feeling of justice is satisfied.[3] Others view restorative justice as a replacement for retributive justice in cases of less serious criminality, particularly when it comes to interpersonal conflicts. It approaches criminal

2 *Božičević-Grbić/Roksandić-Vidlička* 2011, p. 710.

3 *Carić* 2000, p. 280.

offences in a special way – as a theory of criminal justice that focuses on crime as an act against another individual or community rather than the state.[4] Still, the articles on restorative justice in the field of juvenile criminality dominate in the Croatian literature. Only some authors systematically present possible forms of restorative justice and results of their efficacy at the global level,[5] while others are focused on experiences and results of the application of the out-of-court settlement in the field of juvenile criminality, favoring an expansion of the application of this form of restorative justice to adult offenders.[6]

1.4 Influence of international standards

The increased focus on restorative justice in Croatia and the introduction of restorative ideas into the legislation are the result of an aspiration to increased harmonization with international standards and recommendations. Out of numerous international documents one should point out those that are related to the victims, mediation, restorative justice in penal matters, the simplification of the criminal justice system, and juvenile justice. In particular, the literature makes repeated reference to ECOSOC Resolution 2002/12 on basic principles on the use of restorative justice programmes in criminal matters, yet implicitly the 1999 recommendation on mediation in penal matters will also have played a role.

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

The possibility to resort to measures of restorative justice should be ensured in all phases of the criminal procedure. Thus, one should point out the general provision of the CPA, according to which the state attorney and the court, prior and during the procedure, as well as in each phase of procedure, are obliged to examine whether there is a possibilityfor a suspect to mend the damage caused to the injured person by the criminal offence (Art. 47 § 2 of the CPA). It is considered that this provision has its basis in restorative justice.[7] However, there are no detailed provisions on how exactly it should be implemented in practice. At the pre-trial level, the application of the principle of opportunity it is of great importance in the Croatian law. The assumptions for its application are different depending on whether an offender is a juvenile or an adult. Differences between adults and juveniles also exist at the court level in terms of the criminal

4 *Pavišić* 2011, p. 20.

5 *Mirosavljević* 2010.

6 *Žižak* 2010, p. 176.

7 *Pavišić* 2011, p. 116.

sanctions with restorative elements that can be applied. Restorative contents are the least expressed at the level of sanction execution and in the treatment of convicted persons after the sanction has been executed.

2.1 Pre-court level

Decisions of the State Attorney according to the principal of conditional opportunity are practically the most important element of restorative justice in the pre-trial phase. The assumptions for its application are determined by the CPA for adult offenders and by the JCA for juveniles and young adults.

2.1.1 Adult criminal justice

The State Attorney can, after obtaining the consent of the victim or injured person, dismiss the charge or desist from criminal prosecution, even when there is a reasonable suspicion that a criminal offence has been committed for which the law foresees a fine or imprisonment of up to five years, if the suspect undergoes one of the following obligations: 1) to perform an action with the purpose of amending or compensating the damage caused by the offence; 2) to pay a certain amount for the benefit of a public institution for humanitarian or charitable purposes or into a fund for the compensation of damage for victims of criminal offences; 3) to fulfill an obligation to provide legal maintenance; 4) to perform community service work; 5) to be submitted for treatment against drug abuse or other addictions pursuant to special rules; 6) to be submitted to psycho-social therapy with the objective of combatting violent behaviour provided that the suspect gives his consent to leave his family for the duration of the therapy (Art. 522 § 1 of the CPA).

In his decision, the State Attorney determines the period, not exceeding one year, within which the offender must fulfill his obligations (Art. 522 § 2 of the CPA). The State Attorney must deliver his decision to dismiss the charge or to desist from criminal prosecution to the suspect, the injured person and the person who filed the criminal report. In doing so, the State Attorney must instruct the injured person that he can assert a claim for indemnification in a civil action. The ruling of the State Attorney cannot be appealed (Art. 522 § 3 of the CPA). Until the CPA 2008 came into force, the principle of opportunity could only be applied for criminal offences for which the law prescribed imprisonment of up to three years.[8]

8 *Carić* 2009, pp. 608-611.

2.1.2 Juvenile justice

In Croatian juvenile criminal law, the principle of opportunity is an important means for providing a rational and humane policy of social reactions to juvenile offenders, who can be provided assistance, care and protection through out-of-court measures within the framework of social care. The application of the principle of opportunity is most evident in the conduct of the State Attorney who decides whether or not offenders should be charged.[9]

In cases of criminal offences for which the law foresees imprisonment for up to five years or a fine, the State Attorney can decide not to request the initiation of the criminal proceedings – even though there is a reasonable suspicion that a juvenile has committed the criminal offence – if he/she assumes that it would not be purposeful to conduct proceedings against the juvenile considering the nature of the criminal offence and the circumstances in which the offence was committed, the earlier life of the juvenile as well as his/her personal traits. In order to determine those circumstances, the State Attorney can request information from the parents, i. e. the juvenile's guardian, other persons and institutions, or ask an associate in the State Attorney's Office to provide him/her with such data. When necessary, the State Attorney can invite those persons and a juvenile to the State Attorney's Office in order to obtain direct information (Art. 71 § 1 of the JCA). When a juvenile is reported for multiple criminal offences, but it is purposeful to impose a juvenile sanction for only one offence – because initiation of proceedings for the other criminal offences would not significantly impact the selection of juvenile sanction – the State Attorney can decide that he does not have a basis for conducting the criminal proceedings for those other offences. The State Attorney can make this decision only in cases of criminal offences for which a fine or imprisonment of up to 5 years is prescribed (Art. 71 § 2 of the JCA). This decision will be forwarded by the State Attorney to the centre for social care and to the injured person, stating the reason for such a decision, as well as the instruction that the injured person can realize his/her property-rights claims through a civil lawsuit; if the police authorities filed the report, they would be notified about this decision as well (Art. 71 § 3 of the JCA). The stated provision is related to so-called "unconditional opportunity" and it is not directly related to the elements of restorative justice. Still, one should not exclude the possibility that the State Attorney, while deciding on its application, takes into consideration the behaviour of juvenile after committing the offence, e.g. the fact that the juvenile offender has apologized to the victim or compensated the damage done.

Elements of restorative justice are clearly stated in the provisions on the principle of conditional opportunity. The State Attorney can condition his decision not to institute criminal proceedings on the readiness of a juvenile to

9 *Carić/Kustura* 2010, pp. 614-615.

fulfill particular obligations (Art. 72 of the JCA) and thus some informal sanctions appear in the Croatian juvenile criminal law (as a measure of diversion). The State Attorney can condition a decision not to persecute on the readiness of a juvenile to:

a) apologize to the injured person,
b) correct or compensate, in accordance with one's own possibilities, the harm caused by the offence;
c) be involved in the mediation process of "out-of-court settlement",
d) be involved in the work of humanitarian organizations or provide services that are of communal or ecological significance;
e) participate in a rehabilitation program against drug and other addictions, with the consent of the juvenile's legal representative,
f) get involved in individual or group psycho-social treatment in the youth counseling center,
g) be referred to the competent institution for the examination of driver's knowledge related to traffic regulations, and
h) fulfill other obligations that are appropriate for the criminal offence committed as well as for the personal and family circumstances of the juvenile (Art. 72 § 1 of the JCA).

After the juvenile has fulfilled his/her obligations in cooperation with and under the supervision of the Centre for Social Care, the State Attorney makes a final decision not to initiate the criminal procedure against the juvenile (Art. 72 § 2 of the JCA). The State Attorney will inform the Centre for Social Care in the local county as well as the injured person of the decision not to institute criminal proceedings, together with the instruction that the injured person can realize his/her property-rights claims through a civil lawsuit; if the police authorities filed a report, they would be notified about this decision as well (Art. 72 § 3 of the JCA). The Principal State Attorney of the Republic of Croatia provides more detailed instructions on the application of the provisions of conditional opportunity (Art. 72 § 4 of the JCA). The above-stated obligations correspond to the special obligations which are (as types of educational measures) prescribed in Article 10 of the JCA (a total of 16 special obligations), except for the obligation to take part in the mediation process through the out-of-court settlement. Contrary to the legal provisions for adult offenders, the decision of the State Attorney to apply the principle of conditional opportunity in the proceedings against juvenile offenders is not dependent on the prior consent of the victim or injured person. This implies that offenders cannot appeal such diversionary decisions and thus are not entitled as such to a full criminal trial in which their guilt must be tested.

2.2 Court level

2.2.1 Adult criminal justice

As mentioned in *Section 1.1* above, the court can replace a fine of 360 day-units or imprisonment of up to one year with community service. When a prison sentence of up to six months is pronounced, the court *shall* replace it with community service unless the purpose of punishment cannot be achieved by doing so (Art. 55 § 1). Community service can be supplemented with one or more of the "special obligations" that are stated in Art. 62 of the CC, which also include obligations of a reparative nature, for instance reparing the damage caused by the offence or paying a particular amount of money to a humanitarian institution, i.e. into the fund for compensating damages to the victims of crime. Such obligations shall only be attached if they are suitable to the committed offence or to the personality of offender (Art. 55 § 3 of the CC). Community service requires the consent of the convicted person (Art. 55 § 4 of the CC).

Thus, in the Croatian "tariff" community service as an alternative sanction has been systematically placed between short-term imprisonment (too harsh for the case) and the suspended sentence (too lenient for the case). At this point it needs to be pointed out that community service is a substitute for short-term imprisonment, and as such a modification of a custodial sentence, and not a particular type of independent sanction.[10] The execution of community service is determined in more details by the Law of Probation. In practice, the work should reflect or be linked to the offence, for example planting trees where the offender had previously damged or destroyed them. Furthermore, community service should be performed in a non-stigmatizing fashion.

The restorative elements at the court level become obvious in numerous provisions of the CC which are related to damage compensation.[11] Within the general rules on the selection of type and range of punishment, the legislator particularly emphasized the perpetrator's relation towards the injured person and his efforts to compensate for the damage caused by the criminal offence (Art. 56 § 2 of the CC). The court can evaluate the perpetrator's behaviour towards the injured persons after committing a criminal offence as a particularly mitigating factor, and in view of the existence of such circumstance, the court can mitigate the punishment if it holds that the purpose of punishment shall still be fulfilled (Art. 57 § 2 of the CC).

One should point out that, in cases in which an offender commits a crime through negligence, the court may remit the perpetrator of the punishment if, immediately upon perpetration, he makes efforts to eliminate or reduce the

10 *Novoselec* 2009, pp. 401-405

11 *Carić* 2000, pp. 283-285.

consequences of the offence and if he completely or substantially compensates for the damage caused by the offence (Art. 59 of the CC). An important criterion (condition) for the application of admonition (Art. 66 § 1 of the CC) and suspended sentences (Art. 67 § 2 of the CC) is the perpetrator's relation towards the injured person and the compensation of caused damages. Together with imposing a suspended sentence, the court may order that the perpetrator of a criminal offence compensate the damage he has caused (Art. 68 § 1 of the CC).

2.2.2 Juvenile justice

At trial, the Juvenile Council of the court can terminate the proceedings regardless of the gravity of the criminal offence if it determines that neither the imposition of an educational measure nor of juvenile imprisonment would be purposeful (Art. 88 § 2 of the JCA). The law in this case does not determine in more detail the circumstances relevant for such an evaluation. However, the behaviour of a juvenile perpetrator towards the victim/injured person after committing a criminal offence, including the delivery of an apology, working in the interest of the victim/injured person, conciliation with the victim/injured person, and the like, should be considered as circumstances that are relevant for the application of said provision.

When selecting an educational measure, the court must take into consideration the behaviour of the juvenile after the offence, particularly in terms of whether he has tried to repair damage caused, and his behaviour towards the victim/injured person (Art. 8 of the JCA). When it comes to the application of special obligations (Art. 10 of the JCA) as a type of educational measure, restorative justice is directly related to the possibilities of imposing an obligation on a juvenile to apologize to the injured person, to repair the damage caused by the criminal offence according to his own possibilities and an obligation to be involved in the work of humanitarian organizations or in the work of community or ecological services.

When selecting a particular obligation, the court will take into account the perceived readiness of the juvenile to cooperate in meeting the obligations, while having regard to the suitability of the obligations for the offender and the circumstances in which he lives. Obligations that are unreasonable or impossible must not be imposed on a juvenile. When selecting the obligation of repairing the damage caused by the criminal offence, the court will determine the scope, form and the nature in which the damage is to be alleviated. At the same time, the amount of time that a juvenile can be required to work shall not exceed 60 hours within a three month period, and must be organized in a fashion that is not disruptive to the juvenile's schooling or employment. At this point, it must be noted that special obligations do not require a prior admission of guilt from the offender.

2.3 Restorative elements while serving sentences

In Croatia, elements of restorative justice are the least pronounced in the process of enforcing criminal sanctions. The Imprisonment Execution Act (first passed in 1999, most recently amended in 2013) contains a general provision according to which a prisoner should be supported in compensating the damage caused by the criminal offence as well as in conciliating with the victim (Art. 12 § 2). Such a general idea should be exercised in shaping individual sentence plans for prisoners. Restorative measures are neither mentioned among assumptions for early release nor among contents of post-release care. This is the area in which the realization of restorative justice has to date been neglected.[12]

Taking into consideration positive experiences in the application of the out-of-court settlement in the pre-trial procedure against juvenile perpetrators of criminal offences, one supports the application of the restorative approach at the level of the enforcement of educational measures with the purpose of promoting the responsibility of juvenile perpetrators for their own behaviour, development of their competences and protecting of the community.[13] The Probation Act of 2009 provides particular possibilities for incorporating and realizing a restorative approach. Probation is defined as the conditional and supervised freedom of the offender during which procedures are taken to minimize a perpetrator's risk of repeating the criminal offence (Art. 2). The Act prescribes in detail the tasks of the Probation Service, which *inter alia* include supervision of fulfilling the obligations set out in cases when the State Attorney makes a decision according to the principle of conditional opportunity, reporting the circumstances to the court important for sentencing or executing the sanctions as well as participation in organizing support and help to the victim, his/her family or to the family of the offender.

3. Organizational structure, restorative procedure and delivery

Restorative justice, in terms of the process in which the victim and offender together with the help of a facilitator actively participate in resolving the problems that stem from an offence, is realized in the Republic of Croatia within the framework of the out-of-court settlement in the procedure against the juvenile offender. Provisions of the JCA on conditional opportunity of criminal prosecution and the special obligation of mending or compensating damage caused by the criminal offence represent the legal basis for the application of the Croatian model of the out-of-court settlement. The basic idea of such a settlement

12 *Šeparović* 2003, p. 200; *Carić* 2000, p. 287.

13 *Žižak* 2006, p. 803.

is that the conflict that has arisen from the criminal offence is "returned" to the parties and solved with the help of professional mediators. The goal is to accomplish a successful agreement which is acceptable for both parties, which is a sound basis for a peaceful life together in the future as well as for the prevention of recidivism.[14]

In the out-of-court settlement, the role of the State Attorney is tremendously significant, since he decides which cases should be referred, and whether or not a case shall be dismissed after the out-of-court settlement procedure has been completed. As already mentioned above, the project of introducing the out-of-court settlement resulted in the establishment of the Services for the Out-of-Court Settlement in Zagreb, Osijek and Split.[15] In all three of these cities, the Services work in the premises of the Center of Social Care. Mediators are paid by the Ministry of Health and Social Care. Mediators are employees of the Ministry who receive mediator training that is based on international practices and positive experiences, particularly from *Germany* and *Austria.* Thus, the staff members who assume the role of mediator are from professional fields that fit the line of work of the Ministry of Health and Social Care, for example social workers, lawyers, psychologists and social pedagogues.

It is worth pointing out that in 2001 the State Attorney's Office of the Republic of Croatia published the Guidelines on implementation of the experimental project of out-of-court settlement. The directives point to criteria and assumptions for the application of the principle of opportunity and special obligations of the out-of-court settlement: that the injured persons should be (as a rule) physical persons; that there is a high degree of certainty that the juvenile or young adult committed the criminal offence; that juveniles and young adults voluntarily participate in the out-of-court settlement; that the criminal offence is one for which the law foresees a prison sentence of up to five years or a fine; that the gravity of the offence in question is not of minor significance (*bagatelle delict*); that being a recidivist is on its own not a ground to exclude a juvenile or young adult from out-of-court settlement. According to the criteria emphasized in the Guidelines, the out-of-court settlement should not be applied in cases in which: the offender has harmed more than one person; when the offence was planned in advance or was a demonstration of brutality and coldness on behalf of the perpetrator; criminal proceedings for other criminal offences are ongoing at the same time; when offenders are concerned who, prior to committing the criminal offence, demonstrated severe behavioural problems for which the Social Care Service has undertaken specific measures of help and protection.

Considering the previously mentioned criteria, the principle of conditional opportunity and fulfillment of special obligations within the out-of-court

14 *Koller-Trbović/Gmaz-Luški* 2006, p. 936.

15 See in more details *Koller-Trbović/Cvjetko/Koren-Mrazović/Žižak* 2003.

settlement in the Republic of Croatia are applied in the following manner. After receiving a criminal report in the municipal State Attorney's office and if the basic conditions for a potential application of the opportunity principle are fulfilled, the State Attorney passes the case to the associate (e. g. social pedagogues, social workers and psychologists). The associate in turn consults the files, examines earlier records of the Social Care Services and, if he/she estimates that the necessary criteria are met, forwards the motion for mediation to the Services for Out-of-Court Settlement, stating the three month deadline for implementation of the obligation. At the same time, when the criminal report is filed against juvenile perpetrators, the Center for Social Care is notified in order for family-law measures to be applied if deemed necessary. Upon receipt of the case from the associate, the Service first invites the offender to a conversation. Should he/she accept responsibility and express a readiness to continue with the process of mediation, the injured person is then consulted.

Together with the invitation to the actual meeting, both the victim and the offender are given a leaflet that describes the process of out-of-court settlement in detail. If the victim also agrees to such a form of mediation, a joint conversation is set up with the aim of reaching a mutual agreement. Besides victim, offender and mediator, it is envisaged that the young offender's parents or other close family members be present as well. Specially educated professionals support them through the non-material, i. e. emotional part, as well as in coming to an agreement regarding the demands of the injured person for the harm done. Afterwards, they follow up the fulfillment of the agreement, check if the injured person is satisfied with the degree and nature to which it has been fulfilled, and send a respective report to the State Attorney. Based upon this report, the State Attorney decides whether he will initiate criminal proceedings or not.[16]

Solving the conflict between the defendant and injured person through the out-of-court settlement can have multiple advantages for all – victims, defendants, and the community. The victim does not have to appear as the witness, but only as a person who has suffered harm or loss through the criminal offence; he/she has an opportunity to speak freely about the consequences that the criminal offence has brought upon his/her life, his/her fears, emotional condition; the victim can freely express his/her interests; he/she is introduced to his/her rights, and can receive assistance in working through the emotional and not only the material consequences of the criminal offence; also, the problem is relatively quickly resolved (through the correction or compensation for the harm done) compared to generally long-term criminal proceedings.

The offender (defendant) learns to accept responsibility for his past behaviour and future behaviour (development of character); he/she obtains better insight into the consequences of his/her behaviour based upon the statement made by the injured person; he/she develops the creativity in finding a way to

16 *Žižak* 2010, p. 175.

correct the harm done; he/she does not go through the criminal proceedings and remains unpunished as such (without stigmatization).

Advantages for the community are evident through the efficient prevention of criminality, avoidance of expensive and long court proceedings, as well as through the promotion and development of social peace and peaceful community life in the future.

Since the beginning of the project, the long-term plan has been to spread the model and services for out-of-court settlement in the criminal proceedings against juveniles and young adults throughout the whole Republic of Croatia. Despite the good results, this has not yet been put into practice, primarily due to the economic costs that setting up the respective infrastructures, training mediators etc. would entail.

4. Research, evaluation and experiences with restorative justice

4.1 Statistical data on the use of Restorative Justice in practice

The data situation in Croatia is rather bleak, but the few sources that are available indicate that, while the use of restorative justice has been on the increase, it still plays a more minor than a central role in the practices of the criminal justice system. While 35-45% of all cases of juvenile offenders are resolved via the institution of conditional opportunity (non-prosecution subject to the fulfillment of certain conditions or obligations), out-of-court settlement has never accounted for more than 10% of the special obligations that prosecutors have ordered in that context. From 2004 to 2011, a total of 1,111 cases were referred for out-of-court settlements, which is a rather modest number considering the time frame. However, it is likewise not entirely surprising considering the fact that services for implementing mediation of this type are only in place in three regions of the country. What is promising though is that use of such settlements (in absolute numbers) has been on the increase. This upward trend can also be reported regarding the use of community service as an alternative to imprisonment. However, precise statistics relating to community service are not available as it is not a stand-alone intervention and is thus not recorded adequately.

4.2 Research, evaluation and experiences with restorative justice

Considering the implementation of victim-offender mediation through the procedure of out-of-court settlement in the Republic of Croatia, two evaluations of

achieved results have been conducted so far. Both of these evaluations analyzed the results of the work of the Service for Out-of-Court Settlement in Zagreb.

The first piece of research was conducted for the period 2001-2006, covering a sample of 175 cases (suspects). The research focused in particular on evaluating the fulfillment of the basic criteria for referring to the procedure of out-of-court settlement, successfulness of the process, and satisfaction of the parties to the procedure.

The criterion of voluntary participation (the consent of both parties) has been respected, and a high degree of willingness to participate could be measured: only 4% of suspects and 6% of injured persons did not agree to participate in the out-of-court settlement. Considering the type of criminal offences referred to the Service, property offences (60%) and offences against life and limb (25%) accounted for the majority of cases. None of the cases included an insignificant offence. The injured persons were physical persons in 95% of cases. Perpetrators were mostly first-time offenders (94%) and mostly male (95%). The State Attorney made a decision not to institute the criminal proceedings in 86% of the cases. The period of time between referral from the associate of the State Attorney to the Service and completion of the out-of-court settlement procedure was within one month in 49% of the cases. In 32% of the cases this period lasted between one and three months, and three to six months for 14% of cases referred. In cases in which there was consent to the out-of-court settlement, agreements could be reached in 88% of cases, and the agreement was successfully fulfilled in 92% of cases in which an agreement was reached.

In terms of the contents or requirements of the reached agreements, the most common means of repairing or compensating the damage took the form of an apology followed by material compensation (58%), only an apology (26%) and only material compensation (6%), while other forms were represented with lesser frequency – it was always an apology connected with the return of property, work, a symbolic gift, treatment in the centre against drug abuse or other addictions, humanitarian work, etc.

As far as recidivism is concerned, out of 175 suspects who were referred to the Service for the out-of-court settlement (regardless of whether or not they participated in that process), only 9.7% reoffended within a three year follow-up period (mostly for criminal offences relating to drug abuse), which is a fine result considering that the average rate of recidivism among juveniles is somewhat higher than 30%.

The analysis also showed that both categories of participants (victims and offenders) were highly satisfied – 94% of suspects and 95% of injured persons.[17]

The second evaluation was conducted for the period 2006 – 2009 and covered a sample of 209 suspects. A comparison with the first evaluation yields

17 See for more details *Koller-Trbović/Gmaz-Luški* 2006.

no substantial differences. One should point out that, of the total number of cases in which – after the voluntary consent of the victim and offender – the out-of-court settlement procedure was initiated, agreement was reached in 90% of the cases, and in 86% of the cases the agreement is successfully fulfilled. However, despite such promising results, it is rightly emphasized in the literature that there is a need for more comprehensive evaluation with more adequate (multi-variate) methodology that encompasses out-of-court settlements throughout all of Croatia.[18]

5. Summary and outlook

Restorative justice in the Republic of Croatia has been primarily put into practice in the pre-trial procedure where the State Attorney decides whether or not to prosecute based upon the principle of conditional opportunity. Such a form of reaction to the committed criminal offence, in terms of adequate participation of offender and victim in the resolution of problems arising from criminal offences, is only consistently applied in the mediation procedure (the out-of-court settlement) when it comes to juveniles and young adults, based upon the assumptions determined by the JCA. Achieved results in the last ten years, according to evaluations so far, can be considered encouraging but not sufficient since services for Out-of-Court Settlement operate only in three Croatian cities. Hence, one should expect in the future an expansion of the restorative justice model throughout the whole of Croatia, as well as finding the most adequate way of adjusting it to be adequately used with adult offenders. A significant barrier for such aspirations can be financial means which are necessary not only for establishing mediation services, but also for necessary education of new mediators, as well as State Attorneys who at the end decide on the criminal prosecution. The possibilities of developing the concept of restorative justice within the application of the principle of opportunity in the criminal prosecution are determined by the seriousness of the criminal offence committed for which imprisonment of up to five years must be prescribed. This means that restorative justice can serve as a substitute or alternative for retributive justice only in the case of less serious criminality. Elements of restorative justice are less expressed at the court level, where there are in general limited to the problems of selecting types and measures of sanctions by taking into consideration, when sentencing, the relation of an offender towards the injured person and whether or not compensation has been delivered for damage caused by the criminal offence (sentence mitigation). Forms of restorative justice are the least considered at the level of enforcement of sanctions. This is the field that has the most space for future reforms which should treat the

18 *Mirosavljević/Koller-Trbović/Lalić-Lukač* 2010, p. 89.

relation of offender, victim and community as an integral part of individual sentence plans, assumptions for earlier release and post-release offender care. Finally, it must (sadly) be stated that there are currently no legislative or policy reforms underway that seek to address these problems.

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Czech Republic

Petr Škvain

1. Origins, aims and theoretical background of restorative justice

After the fall of the totalitarian regime in former Czechoslovakia at the end of 1989, fundamental social, political and economic changes occurred that subsequently influenced not only the structure of criminality, but also helped to foster new approaches within the system of criminal justice. Until this time there had been very limited space for non-punitive approaches and there had only been limited standards for victims in the former criminal justice system. The emergence of elements of restorative justice in the Czech Republic can be traced back to the early 1990s as an essential part of the reform that diverted from the traditional punitive approach associated with the communist regime. It needs to be mentioned that the reform of the former legal system was not only about changing laws or adopting new codifications, but also about establishing new institutions, such as the Probation and Mediation Service, and training specialist personnel.

The concept of restorative justice in the Czech Republic has been developed in the last two decades within the traditional (retributive) criminal justice system. From this point of view the Czech Republic nowadays belongs to the European countries that reflect some elements of restorative justice.

This chapter provides a basic overview of the origins of restorative justice in the Czech Republic as well as its adoption and integration into Czech law. Due to the fact that restorative justice is to be understood in this project in a broader sense that also includes approaches that can go beyond the definition of restorative processes as provided by Art. 2 of ECOSOC Resolution 2002/12, community service and court-ordered reparation orders have also been included.

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

The Czech Republic belongs to the European countries which have incorporated some forms of restorative justice into the national legislation. Basically, these elements were established in major criminal laws, such as the Criminal Code, the Code of Criminal Procedure etc. There are also two pieces of legislation that have mainstreamed restorative justice in the last decade, namely the Probation and Mediation Act (act no. 257/2000 Coll.) and the Juvenile Justice Act (act no. 218/2003 Coll.). With special regard to mediation in criminal matters, it is obvious that the development of mediation measures was closely related to the establishment of the Probation and Mediation Service as of 01 January 2001.[1] While talking about restorative justice, the new Victims of Crime Act (act no. 45/2013 Sb.), which came into force on 01 August 2013, has to be mentioned as well. Of course, there are specific participatory elements for victims in the Czech criminal procedural law with a certain restorative dimension, e. g. a right of a victim to assert civil legal claims stemming from the criminal offence. However, these elements do not primarily aim at restoration in the meaning of restorative justice, and therefore shall not be further examined in this report.

In terms of the Czech criminal justice process, restorative forms might be seen in the following legal institutions:

- in the context of forms of diversion (conciliation, conditional discontinuance of prosecution),
- victim-offender mediation,
- community service,
- reparation orders,
- special approaches in juvenile cases.

Other interventions such as restorative group conferencing, restorative police cautioning, community reparation boards or sentencing circles have not yet been given legal recognition. However, in some pilot areas forms of victim counselling have been introduced that are mainly provided by the Probation and Mediation Service and NGOs.[2]

1 *Rozum* 2009, p. 12.

2 The long-term goal of the project "Restorative Justice – Victim Support and Counseling" is to gradually develop a functional network of services for victims. The project is implemented by the Probation and Mediation Service of the Czech Republic (PMS) in partnership with the Association of Citizen Advice Centres (AOP). For more detailed information, see https://www.pmscr.cz/en/news/how-to-integrate-restorative-justice-and -victim-support-in-probation-practice.

1.2 Reform history

Soon after the transition in the early 1990s, there was a desire to change the punitive approach of the former Czechoslovak criminal justice system through new legislation. The reform process followed a number of international documents related to the fundamental doctrines of democratic criminal justice systems, as well as some elements of Anglo-American legal culture, such as alternative sanctions and measures. This was a revolutionary step in the Czech context. While dealing with the relevant history that led to the introduction of some elements of restorative justice in the Czech Republic in particular, the typical 'top-down' approach through the legislation seems to be apparent. On the other hand, a viable impetus for such an approach had lain in the activities of one NGO in particular – the Association for the Development of Social Work in Criminal Justice (SPJ). This NGO is strongly connected with *Helena Válková* and her lectures called 'Social Work and Criminal Policy' at the Charles University in Prague in 1993. In 1994, students and lecturers of this course officially established SPJ in order to promote the development of a system of alternative sanctions and methods for resolving criminal disputes that address the special needs and interests of victims on the one hand and the position of offenders on the other hand. SPJ promoted such an idea of restorative approaches and alternative sanctions through many projects and focused not only on academics, but also judges, public prosecutors and other officials. The most significant projects focussed on the evaluation of out-of-court mediation (1994) or on the concept of probation and mediation. Such activities helped the introduction of restorative elements into the Czech criminal justice system and are considered from a historical point of view as the typical example for how localized pilots may help foster a nationwide implementation through the law.

The first legislation that introduced elements of restorative justice into the Czech criminal law was adopted shortly after the breakup of Czechoslovakia in 1993. The Act no. 292/1993 Coll. that amended the Code of Criminal Procedure established the legal basis for a possible conditional discontinuance of criminal prosecution for less serious crimes (up to five years of imprisonment) with consent of the accused if certain other conditions are met. Two years later another amendment of the Code of Criminal Procedure (Act no. 152/1995 Coll.) set up a new institution of conciliation that already involved active participation of victims, and that was not only limited to the reparation of civil claims. This legal institution, too, applies for less serious crimes (up to five years of imprisonment), with the consent of the accused and the victim if other conditions are met.

While taking into consideration that, in the context of this project, restorative justice is to be understood in a broader sense, community service, as an alternative criminal sanction, falls within the scope of our attention as well. The criminal sanction of community service was firstly introduced into the Czech Criminal Code in 1995 (Act no. 152/1995 Coll.). This revolutionary step in the

Czech context was a major breakthrough within the traditional (punitively oriented) system of criminal sanctions.[3]

Other significant legislative steps followed in 2000, when the Probation and Mediation Service Act (no. 257/2000 Coll.) was adopted and finally regulated the position of probation officers and mediators in Czech criminal proceedings. One of the most significant pieces of legislation that considerably affected restorative justice procedures within the Czech criminal justice system was the reform of the juvenile criminal law that resulted in the successful adoption of the Juvenile Justice Act (no. 218/2003 Coll.) in June 2003. Naturally, the reform developments in the field of Czech substantial criminal law shall be mentioned as well. In 2009 the new Criminal Code (no. 40/2009 Coll.) was introduced and came into force on 01 January 2010. The last significant legislative step, the Victims of Crime Act (no. 45/2013 Sb.), which came into force on 01 August 2013, implicated some new victim-oriented developments for the Czech criminal justice system and brought the Czech Republic within the group of countries with a more victim-oriented approach to responding to crime.

1.3 Contextual factors and aims of the reforms

It has already been mentioned that the introduction of some elements of restorative justice within the Czech criminal justice system may be considered as the typical 'top-down' approach through legislation. On the other hand, such activities might not be attributed to the presence of a political will itself, because the most important initiatives had come mainly from the activities of academics and NGOs. From this point of view the typical 'top-down' approach was employed through the 'bottom up' activities promoting offender-oriented strategies for developing alternative sanctions and a victims' rights movement. The aims that were being followed by introducing some elements of restorative justice into the Czech criminal justice system were mainly the reduction of prison populations and of the workload of the formal justice system, in light of the failing of the traditional (purely retributive) criminal law system in meeting the needs of stakeholders.

1.4 Influence of international standards

It is obvious that the influence of international instruments such as the Council of Europe's recommendation on Mediation in Penal Matters (Rec (1999)19) and Rec (2006)8 on Assistance to Crime Victims, Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) as well as the United Nations Handbook of Restorative justice Programmes undoubtedly had a

3 *Válková* 2006, p. 382.

significant impact on the adoption of elements of restorative justice within the Czech criminal justice system.[4] From this point of view restorative justice measures were also introduced in order to harmonise domestic law to international standards, especially because of the strong intentions toward European Union membership.[5]

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

Within the Czech criminal justice system, the making of material or immaterial reparation to victims or the community (for instance through conciliation, victim-offender mediation, performing community service) primarily plays a role at the pre-court level (in the context of diversion) and court level (special measures/sanctions, sentence mitigation, court diversion). Furthermore, Victim Offender Mediation can also be applied at the post-sentencing stage (for instance while serving sentence).

2.1 Pre-court level

At the police level, Czech law does not provide a legal basis for the police to order or implement restorative justice measures, neither for adults nor for juveniles. This is because of the leading principle of legality that guides Czech criminal proceedings.[6] Contrary to this principle, there are of course some exceptions that have evolved from the principle of opportunity, but the final decision not to prosecute (e. g. to apply some type of diversion) is always made by the prosecution authorities and the courts.[7] One exception to this rule is victim offender mediation, where the police play a key gatekeeping role. In "suitable" cases, the police may assign a duty to the Probation and Mediation Service to start mediation.[8]

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4 *Karabec* 2003, p. 70.

5 *Clamp* 2012, p. 114.

6 Art. 2 para. 3 Code of Criminal Procedure (Act. no. 141/1961 Coll.).

7 *Šámal* 2013, p. 26.

8 The Probation and Mediation Services carry out, within the scope of their activities, tasks upon assignment from the bodies involved in criminal procedures, and in suitable cases in the realm of mediation also without such an assignment, and instead upon request from the offender and the victim. In such cases they immediately notify the respective body involved in a criminal proceeding, which can then decide that the matter should not be mediated and mediation will not be pursued further, Art. 4 para. 7 Probation and Mediation Act (no. 257/2000 Coll.).

2.1.1 Adult criminal justice

As is to be expected, based on the overall RJ landscape in Europe today, in the Czech Republic restorative justice comes into play (or consideration) in the context of different forms or pathways of pre-court diversion. In this regard, "conditional discontinuance of criminal prosecution" (*podmíněné zastavení trestního stíhání*) plays the key role in practice, although another type of diversion – "conciliation" (*narovnání*) – more closely resembles the traditional elements and notions of restorative justice.[9]

The central provision on "conditional discontinuance of criminal prosecution" (Art. 307 para. 1 Code of Criminal Procedure) states that, at the pre-court level, the public prosecutor may decide, with the consent of the accused, to conditionally discontinue criminal prosecution in cases of misdemeanours,[10] if the other legal conditions are met (see *Section 3.3*) and the (personal) characteristics of an accused, with regard to his/her previous life, the circumstances of the case, might be deemed suitable for such a decision. This measure is an example for the principle of opportunity, so the public prosecutor decides purely on a discretionary basis. It has to be noted that, under the same conditions, the public prosecutor may also decide in so-called simplified proceedings (*zkrácené přípravné řízení*) and, instead of filing a motion for punishment (which is the simplified form of indictment), the criminal proceedings can be conditionally suspended.[11] Both of these instruments can be regarded as reflecting key notions of restorative justice, because making monetary or non-monetary reparation to victims is among the preconditions for their applicability (see *Section 3.3*).

Another form of diversion with restorative elements at the pre-court stage is conciliation (*narovnání*). The central provision on this measure (Art. 309 para. 1 Code of Criminal Procedure) states that the public prosecutor may, with the consent of the accused and the victim, propose reconciliation (*narovnání*) in misdemeanour proceedings,[12] if certain other preconditions are met (see *Section 3.2*) and such a method of resolution of the case is sufficient with respect to the nature and seriousness of the committed act, to the degree to which the offence affected public interest and to (personal) characteristics of an accused, his/her

9 See definition of restorative justice brought by *Marshall* 1999, p. 5, and *Section 4.1*.

10 According to the new Criminal Code 2009, criminal offences are divided into two divisions – felonies and misdemeanours. The central provision on the definition of a criminal offence, Art. 14 para. 2, states that misdeameanours are "all negligent criminal offences and such intentional criminal offences for which the criminal law sets out a prison sentence with an upper penalty limit of up to five years."

11 Article 179g Code of Criminal Procedure.

12 *Ibidem* 9 10.

personal and financial circumstances. The public prosecutor decides on this measure purely on a discretionary basis as well.

Victim-offender mediation is also applicable at the pre-court level, but only with the consent of the police or the public prosecutor. On the other hand, requests for mediation may be also lodged by the offender or the victim as well. In such cases, the mediator shall immediately notify the police or public prosecutor, who may in turn decide that the case should not be mediated and mediation should not further be pursued.[13] In practice, the latter approach might be expected in cases in which the offender has a history of violence in his/her criminal record.[14] This intervention may be used as a separate one or mainly as a means of diversion from criminal proceedings.

Where measures with restorative elements fail, such failure does not have direct negative effects on the procedure and sentencing. Where conciliation or VOM fail, in that no monetary or non-monetary reparation is made to victims, the criminal proceedings are not diverted and continue as though conciliation (*narovnání*) had not been ordered by the public prosecutor or the court.[15] On the other hand, one can expect that the court might examine during sentencing the reason why the making of reparation was unsuccessful.

In terms of due process safeguards, namely the right of the parties to be heard by an independent body (usually a court), the applicability of the above mentioned measures is undisputable – conditional discontinuance of criminal prosecution and conciliation form part of the criminal procedure and are thus regulated by the law, and the consent of the accused for such measures is given purely on a voluntary basis. As for legal remedies, the parties (the accused and the victim) can submit a complaint.

2.1.2 Juvenile justice

Within the Czech juvenile justice system, applicable to offenders between 15 and 18 years of age (Art. 1 Juvenile Justice Act), the public prosecutor is responsible for ordering or conducting restorative justice measures at the pre-court level. Similar to adult criminal justice at the pre-court level (see *Section 2.1.1)*, conditional discontinuance of criminal prosecution (*podmíněné zastavení trestního stíhání*) and conciliation (*narovnání*) may be applicable.

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13 Art. 4 para. 7 Probation and Mediation Act (no. 257/2000 Coll.).

14 I am personally aware of a case in which the public prosecutor decided that mediation was not appropriate at the pre-court level, even though the investigating police officer had recommended it, because the offender had a previous conviction for a serious violent crime.

15 E. g. Art. 314 Code of Criminal Procedure.

Regarding procedural specialties in juvenile criminal law, Art. 69 para. 1 lit. c Juvenile Justice Act provides for a special form of diversion – "abandonment of criminal prosecution" (*odstoupení od trestního stíhání*). The central provision on "abandonment of criminal prosecution" (Art. 70 para. 1 Juvenile Justice Act) states that in proceedings concerning petty offences (*provinění*),[16] offences for which the Criminal Code provides a term of imprisonment not exceeding three years, the public prosecutor may discontinue proceedings on the ground of a lack of public interest in further prosecution, when other requirements are met (see *Section 3.4*) and criminal prosecution is inappropriate and punishment is not necessary to prevent a juvenile from committing further offences. This measure is only applicable for juveniles, and the public prosecutor may decide on a discretionary basis, although the legislator provides examples of suitable cases (e. g. successful completion of probation programme, restoration etc.).[17]

In the context of other measures with restorative elements within the juvenile criminal system at the early pre-court level, educational measures (*výchovná opatření*) may be ordered by the public prosecutor with the consent of the juvenile offender. Such an obligation with restorative elements is not limited to financial reparation only, but may also include reparation in a broader sense, i. e. writing a letter of apology, repairing criminal damage for which the juvenile is responsible, or meeting the victim in person to apologize under the supervision of a mediator, and so on. The Juvenile Justice Act does not provide an exhaustive list of obligations or activities that may be ordered by the public prosecutor at the pre-court level.[18] This measure is also applicable on a discretionary basis. As a consequence of successful reparation in a broader sense, the public prosecutor may decide to drop criminal prosecution, resulting in the discontinuation of criminal proceedings.[19]

2.2 Court level

The Czech criminal law states that some of the restorative measures that are available at the pre-court level are also available at the pre-sentencing stage at the court level. When the preconditions are met, the court may decide to conditionally discontinue criminal prosecution (*podmíněné zastavení trestního stíhání*), order conciliation (*narovnání*) or (in cases of juveniles) abandon criminal prosecution (*odstoupení od trestního stíhání*) (see *Section 2.1*).

16 A criminal act committed by a juvenile is called a petty offence (provinění), Art. 2 para. 2 lit. a Juvenile Justice Act.

17 Art. 70 para. 3 Juvenile Justice Act; see *Section 3.4*.

18 Art. 18 para. 1 Juvenile Justice Act.

19 For details, see *Section 3.4*.

The Czech criminal law does not provide a situation in which successful reparation (potentially achieved through mediation) automatically means that the court *shall* refrain from punishment. Rather, where other preconditions are met, the court *may* decide to refrain from punishment (Art. 46 para. 1 Criminal Code). Overall, mediation should be regarded as an exceptional measure in practice, because the other forms of non-punitive diversion are more likely to be applied as they are likely to be more expedient.[20]

Regarding victim-offender mediation, there are no legislative restrictions to mediate a case at the court level, but the court may decide that a case should not be mediated for various reasons. At this level, this measure is used mainly as a means of diversion from criminal proceedings – conciliation (narovnání).[21]

2.2.1 Adult criminal justice

As a general principle of sentencing in the Czech criminal law, an offender's effort to deliver reparation might have mitigating effects in sentencing (Art. 39 para. 1 Criminal Code). On the other hand, this mitigating circumstance may be outweighed by other factors that need to be taken into account when sentencing (e. g. aggravating circumstances, nature of an offence, personal character of an offender, personal and financial circumstances etc.).[22]

The court may also impose reparation in the form of a "conduct order" (*přiměřené povinnosti*), but purely as an ancillary sanction. Conduct orders are essentially to be regarded as a set of additional duties and restrictions to which the offender must adhere in addition to his main sentence. Such an order may be imposed when the court decides to refrain from punishment and makes the offender subject to a probationary period (Art. 48 para. 1, 3, 4 Criminal Code). Conduct orders are predominantly used in connection with alternative sanctions, e. g. when the court suspends the execution of a sentence or simultaneously makes the offender subject to a probationary period (Art. 82 and 84 Criminal Code). Also in these situations a conduct order may relate to reparation that is not limited to financial reparation only, but may also include reparation in a broader sense (e. g. the court may order the offender to make a personal or public apology to the victim). A conduct order shall not substitute the main sentence (for instance, an offender cannot be ordered to perform work of a type or in a fashion that resembles what would be required of an offender sentenced to community service), but rather is to be regarded as a tool for securing its successful enforcement.[23]

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20 *Šámal* 2013, p. 638.

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

22 The central provison on sentencing is provided in Art. 39 para. 1 Criminal Code.

23 *Šámal* 2012, p. 666.

Regarding community service (*obecně prospěšné práce*), the central legal provision (Art. 62 Criminal Code) states that the court may impose such a criminal sanction only while sentencing misdemeanours, with respect to the nature and seriousness of the committed act, (personal) characteristics of an offender, and as a separate sanction where there is no ground to impose other (alternative) sanctions. The court shall not impose community service if an offender has previously – within the last three years – failed to comply with community service and that non-compliance resulted in imprisonment (Art. 62 para. 2 Criminal Code). Community service shall be performed for the benefit of welfare institutions. The sanction can require the performance of 50 to 300 hours of work within no more than two years. The court may also impose reparation in the form of a conduct order as an ancillary sanction. While sentencing, the court shall take into consideration the position of the offender and his/ her state of health. Community service shall not be imposed while an offender is incapacitated for such work (Art. 64 Criminal Code). Where an offender fails to comply with the requirements of a community service order, the court shall convert the sanction into a period of house arrest, a monetary penalty or imprisonment (Art. 65 para. 2 Criminal Code). In terms of due process safeguards, parties have a legal remedy against all types of court decisions at this level.

2.2.2 Juvenile justice

The successful delivery of reparation, also through VOM, can have a mitigating effect on the sentencing of *juvenile offenders*. In addition to the measures mentioned above in the context of adults (see *Section 2.2.1*), educational and protective measures shall have priority, followed by alternatives to imprisonment, and finally imprisonment as *ultima ratio* (last resort). This special sentencing structure was established by the Juvenile Justice Act in 2003.[24] In comparison to adult justice at the court level, successful reparation is one of the leading criteria within the third pillar of sentencing (criminal measures) and might have a strong influence on the granting of suspended sentences or other alternatives to imprisonment. Like in adult justice, the juvenile court may impose a conduct order as and ancillary court-ordered measure, which also includes elements of reparation (Art. 33 para. 1 Juvenile Justice Act).[25]

Regarding community service, some differences in comparison to adult criminal justice can be highlighted. Firstly, the number of hours of community service that a young offender can be ordered to perform is limited to between 50

24 *Válková* 2006, p. 386.

25 Such a conduct order is imposed within scope of so-called educational measures (Art. 15 Juvenile Justice Act).

and 150 hours. Furthermore, the imposition of community service must not "endanger the morals" of a juvenile. As is also the case in adult justice, a juvenile, too, cannot be ordered to perform work to the benefit of the direct victim.

2.3 Restorative Justice elements while serving sentences

At this point it needs to be mentioned that successful reparation is one of the mandatory conditions for early release from imprisonment (Art. 88 para. 3 Criminal Code) and the law *per se* does not exclude the situation that the case might be mediated (parole-related mediation). Such a process might be also initiated by the offender and most usually in the situations when the offender is planning to file an application for early release from imprisonment. In this situation the offender may contact the Probation and Mediation Service and request specialized assistance which may also cover mediation before or after his/her early release.[26]

3. Organizational structures, restorative procedures and delivery

3.1 Victim-offender mediation

Victim-offender mediation (VOM) is defined as an out-of-court intervention the purpose of which is to resolve conflict between the offender and the victim in criminal proceedings (Art. 2 para. 2 Probation and Mediation Act). This intervention may be used as a standalone measure or (as is mainly the case in practice) in the context of diversion from criminal proceedings.[27] VOM as an intervention is provided on a voluntary basis only. As in most European countries which have witnessed developments in VOM,[28] in such a process a neutral third party (mediator) facilitates a dialogue between the victim and the offender about how the crime affected them by expressing their feelings, needs and expectations. VOM as a process may also result in a mutually satisfactory written restitution agreement that is legally enforceable.[29] VOM has been developed partially parallel to prosecution on the one hand and as a diversionary model on the other hand. To make this statement more clear, the central provision on the duties of the Probation and Mediation Service, Art. 4 para. 7 Probation and Mediation Act (no. 257/2000 Coll.), states that "the Probation and Mediation Services carry out within the scope of their activities tasks upon assignment from the bodies involved in criminal procedures, and in suitable cases in the realm of mediation also without such assignment but upon request

26 For more detailed information see: https://www.pmscr.cz/images/clanky/PMS_letak_PAROLE_en.pdf.

of the offender and the victim. In such cases they immediately notify the respective body involved in a criminal proceeding, which can decide that the matter should not be mediated and mediation will not be pursued further."[30]

All services provided by the Probation and Mediation Service are free of charge.

Who are the official gatekeepers? With regard to the above mentioned Art. 4 para. 7 of the Probation and Mediation Act, the official gatekeepers comprise the full range of criminal justice stakeholders: the police, public prosecutors, Probation and Mediation Service, offenders and victims as well. In practice, the police and the public prosecutor at the pre-court level and the court play the key role, while the other stakeholders may have an influence on or be involved in prosecutors' or courts' diversionary decisions.

In the Czech Republic, the Probation and Mediation Service is the central agency in terms of restorative justice and VOM, but for probation services as well. The Probation and Mediation Service, as a government agency within the Ministry of Justice, consists of national HQ, eight manager's offices and 78 independent probation and mediation centers in all judicial districts. The present staff consists of the director, *Pavel Štern*, appointed by the Ministry of Justice, 405 probation officers and probation assistants and twenty six employees of national HQ.[31]

The Probation and Mediation Service may be characterized as a government organization providing professional services with a high standard regarding the qualifications of mediators.[32] The law also provides a legal obligation for further education for probation officers and probation assistants as well. The required qualification for probation officers covers twelve months of basic training with a concluding final examination, and an obligation to undergo further education;

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

28 *Aertsen* 2004, p. 18.

29 *McCold* 2006, p. 24.

30 Official English translation of the Probation and Mediation Act is available online at https://www.pmscr.cz/en/primary-documents.

31 Compared to 2003, where the staff consisted of 157 officers, sixty one assistants and twelve HQ staff.

32 Art. 6 para. 2 Probation and Mediation Act states, that "an officer working with the Probation and Mediation Service shall be unimpeachable and have capacity for legal action and shall hold a university degree in the field of social sciences obtained by graduating from a master's degree program and a professional exam which the office lets him/her sit for after passing an elementary qualification training for the officers of the Probation and Mediation Service; An unimpeachable natural person aged over 21 who has a capacity to take legal action and who completed a secondary school education in the field of social sciences may become an assistant of the Probation and Mediation Service" (Art. 6 para. 3 Probation and Mediation Act).

for probation assistants six months of basic training ending with a final examination and the same obligation of further education.[33]

3.2 Conciliation (narovnání)

The conciliation hearing is the procedure led by the public prosecutor at the pre-court level or by the court in the Czech criminal proceedings. Consequently, no impartial third party, in the form of a facilitator or mediator, is involved, thus watering down the true restorative value of the process. However, it nonetheless implies an encounter between the key stakeholders to the offence.

Its main objective is not only to reach an agreement on material reparation, but also to facilitate direct or indirect dialogue between the victim and the offender.[34] From this point of view, this procedure may include VOM as the means of diversion from criminal proceedings. On the other hand, we need to take the main procedural aim into consideration – to divert a case from criminal proceedings. At this point, one can say that conciliation is more about offender-victim mediation (the word order is deliberate), even though the rights of the victim are properly assured, because to focal point is what happens to the offender. Closing these general remarks, it needs to be underlined that the conciliation procedure (*narování*) may better fit the general definition of restorative justice than any other type of diversion within the Czech criminal justice system.[35]

The central provision on this measure, Art. 309 para. 1 Code of Criminal Procedure, states that the public prosecutor or the court may decide, with the consent of the accused and the victim, to offer reconciliation (*narovnání*) in the proceedings concerning a misdemeanour,[36] if the offender has made a "believable" confession; reparation had been made (even by various means); an adequate amount has been deposited into the crime victims fund in accordance with the Victims of Crime Act (act no. 45/2013 Sb.), and; such a method of resolution of the case is sufficient with respect to the nature and seriousness of committed act, to the degree to which the offence affected the public interest, and to (personal) characteristics of an accused, his/her personal and financial circumstances.

The public prosecutor (pre-court level) and the court decide on this measure on a discretionary basis. As to the legal consequences, such a decision is final and leads to criminal prosecution being dropped.

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33 Art. 7-8 Statute of the Probation and Mediation Service.

34 *Šámal* 2013, p. 3, 513.

35 E. g. *Marshall* 1999, p. 5.

36 *Ibidem* 9.

3.3 Conditional discontinuance of criminal prosecution (*podmíněné* zastavení *trestního stíhání*)

The central provision on conditional discontinuance of criminal prosecution, Art. 307 para. 1 Code of Criminal Procedure, states that the public prosecutor (at the pre-court level) and the court may decide, with the consent of accused, to conditionally discontinue criminal prosecution (*podmíněné zastavení trestního stíhání*) in cases involving misdemeanours,[37] if the offender has admitted guilt, reparation had been made (even by various means) and (personal) characteristics of an accused, with regard to his/her previous life, the circumstances of the case, might be deemed suitable for such a decision.

This type of diversion has undergone significant changes as a result of the reform of the Code of Criminal Procedure in 2012 (Act no. 193/2012 Coll.), which provided other preconditions (Art. 307 para. 2 Code of Criminal Procedure). Regarding this special sub-type of diversion, the general (above mentioned) conditions have to be fulfilled, and there must be reasonable grounds in favour of such an approach with respect to the nature and seriousness of committed act and if the offender refrains from particular activity (e. g. driving a car) and at the same time an appropriate sum has been paid into the crime victims fund in accordance with the Victims of Crime Act (Act no. 45/2013 Sb.).

With all respect to the original will of the Czech legislator to widen the scope of diversion to incorporate more serious misdemeanours (e. g. dangerous driving), such a measure (refraining from a particular activity) might be deemed controversial and regarded as lacking any restorative elements.

The public prosecutor (pre-court level) and the court decide on this measure on a discretionary basis. As to the legal consequences, such a decision is not final and a probationary period of minimum six months up to two years (Art. 307 para. 1 Code of Criminal Procedure) shall be ordered, or in cases of the special sub-type of diversion, for up five years (Art. 307 para. 2 Code of Criminal Procedure).

While this type of diversion plays a key role within the Czech criminal justice system, in practice, aspects of material reparation and civil claims prevail over VOM, where the active participation of parties is an intrinsic element (see *Section 4.1* and *5*).

3.4 Abandonment of criminal prosecution (*odstoupení od trestního stíhání*)

Regarding some procedural specialties with restorative elements in juvenile criminal law, Art. 69 para. 1 lit. c Juvenile Justice Act provides for a special

37 *Ibidem* 9.

type of diversion – abandonment of criminal prosecution (*odstoupení od trestního stíhání*). The central provision on abandonment of criminal prosecution, Art. 70 para. 1 Juvenile Justice Act, states that, in proceedings involving petty offences (*provinění*) for which the Criminal Code provides a term of imprisonment not exceeding three years, the public prosecutor at the pre-court level or the court may discontinue proceedings due to there being a lack of public interest in further prosecution, taking into consideration the nature and seriousness of committed act and (personal) characteristics of the juvenile, if the criminal prosecution would be inappropriate and punishment is not necessary to prevent the juvenile from committing further offences. While the public prosecutor (at pre-court level) and the juvenile court decide on a discretionary basis, the law provides examples for suitable cases, such as for instance the completion of probationary programmes, having made restoration, or other educational measures even at the pre-court level (see *Section 2.1.2* above). As to the legal consequences, such a decision is final and lead to the criminal prosecution being dropped.

3.5 Reparation order

Reparation, as a conduct order, is imposed by the court as an ancillary measure. In fact, there are no special procedural requirements, when in practice encounters between the parties are not intended (see *Section 2.2.1* above).

3.6 Community service

Regarding community service (*obecně prospěšné práce*) and its basic conditions, see *Section 2.2.1* above. Community service shall be performed for the benefit of welfare institutions. The Criminal Code does not provide an option that community service may be ordered as a means for offenders to personally work for the benefit of the direct victim. From this point of view, the restorative element is missing, while the work is not delivered on a voluntary basis and not directly connected to the offending behaviour in most cases. Therefore, this form of community service might not be termed restorative.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

Statistical data on the use of restorative justice measures in the Czech criminal justice system are provided by the Probation and Mediation Service and the

Ministry of Justice. Statistical data on mediation (VOM) have been available since 2005.[38]

As recent data from the Probation and Mediation Service for 2012 show, victim-offender mediation (VOM) was conducted in 1,200 cases, as were a further 5,308 cases of what is termed "indirect mediation" (other activities that might be considered to be of a restorative nature, e. g.: victim counselling, creating conditions for imposition of alternative sanctions etc.). More precise statistical data about VOM can be retrieved from the research study "Role of Mediation within the Criminal Justice System" (*Uplatnění mediace v systému trestní justice I., II.*) provided by the Institute of Criminology and Social Prevention in Prague. From 2005 to 2007, a total of 1,878 cases of mediation were registered, of which 1,608 involved male (85.6%) and 270 involved female offenders (14.4%). The largest number of mediation cases was recorded in 2005 – 950; in 2006 and 2007 there were only 489 and 439 cases respectively. Thus, the absolute number has been in decline. The average age of offenders in mediation was 30.3 years. The most strongly represented age group were offenders aged between 22 and 29 years inclusively (420 cases, i. e. 22.4%) and between 15 and 18 years inclusively (408 cases, i. e. 21.7%). Other age groups were represented as follows: aged 30-39 years (330 cases, i. e. 17.6 %); aged 19-21 years (284 cases, i. e. 15.1%); aged 50 and above (232 cases, i. e. 12.4%) and aged 40-49 years (201 cases, i. e. 10.7%).[39] The desired outcome of mediation – an agreement on reparation – was reached in 1,498 cases out of the total of 1,878 cases in the years of 2005 to 2007 (79.8%). In 361 cases mediation was not successful, while in 19 cases there were no available data about the outcome of mediation.[40] Regarding the nature of offences that were mediated in 2007-2009, the most common (82.7% of all cases) were offences against life and human health such as bodily harm, mostly of a negligible nature (road traffic offences) and crimes against property (mostly theft). The statistical data retrieved from the above mentioned research study enable us to draw a clearer picture of the (procedural) consequences of successful mediation, even though in 396 cases (i. e. 21%) the Probation and Mediation Service failed to receive the relevant data from the Public Prosecutor´s Offices and the courts. The majority of cases that were mediated (979 of 1,482 known cases, i. e. 66.1%) were diverted in the context of "conditional discontinuation of criminal proceedings" (see *Sections 2.1.1* and *3.3*). On the other hand comparing the data of this type of diversion (in the year of 2005 – 9,347 cases, in the year of 2006 – 9,666 cases and in the year of 2007 – 9,322 cases), it became clear that the

38 *Rozum* 2009, p. 13.

39 *Rozum* 2009, p. 13.

40 *Rozum* 2009, p. 14.

percentage of all cases being mediated within this most commonly applied form of diversion is very low (app. 3.5% – 979 cases).[41]

Other statistical data provided by the Ministry of Justice show that "conciliation" (*narovnání*), as a form of diversion that comprises some traditional elements of restorative justice, is underrepresented in practice. In comparison with "conditional discontinuation of criminal proceedings", conciliation as well as the special type of diversion for juveniles – abandonment of criminal prosecution (see *Sections 2.1.2* and *3.4*) – are applied very rarely. In the literature we can also find notions as to why it is so: the most frequently mentioned reason is that "it is simply much easier to divert a case as conditional discontinuation of criminal proceedings" than to apply the procedure of conciliation which shall include VOM.[42]

This practice at the pre-court level can be illustrated by the following statistical data. In 2005, conciliation was applied only in 53 cases, compared to 6,892 cases in which criminal proceedings were conditionally discontinued; in 2006 there were 38 cases of conciliation, while conditional discontinuation occurred in 7,387 cases. In the year 2011, conciliation was applied in 143 cases, compared to 3,692 cases of conditional discontinuation of criminal proceedings.

Sadly, the statistical data available do not allow us to determine the share that restorative practices and measures make up among all criminal cases that are diverted or sentenced, a major shortcoming that makes it difficult to accurately demonstrate the true numerical role that restorative justice plays in criminal justice practice in the Czech Republic.

4.2 Findings from implementation research and evaluation

In terms of relevant research and evaluation within the Czech Republic, the research project of the Institute of Criminology and Social Prevention in Prague called "The Role of Mediation within the Criminal Justice System" (*Uplatnění mediace v systému trestní justice I., II.*) shall be highlighted.[43] The study was assigned by the Council of Probation and Mediation and was implemented in the years 2008 and 2010. It focused on providing an evaluation of mediation (VOM); stakeholders' perceptions of the process; public awareness of mediation; and recidivism analyses. While the first part of the study dealt with public awareness concerning the process of mediation (2008), the second part primarily presented empirical findings (2010).

41 *Rozum* 2009, p. 17.

42 *Hulmáková/Rozum* 2012.

43 *Rozum* 2009; 2010.

Regarding empirical findings, a questionnaire survey was distributed among 94 victims and 93 offenders, of which a total of 89 responded in a statistically usable fashion – 50 from victims (53.2%) and 39 from offenders (41.9%).

Among all questioned offenders, the predominant motivations for participating in the VOM process were to reach an agreement on the making of reparation to the victim, to speed up the criminal process as a whole and to receive a more lenient punishment. While a strong desire to apologize in person was registered in a majority cases, the motivation of the offender to explain an offence was registered as a relatively rare answer. On the other hand, 71% of offenders reported that they had the impression that their victims only participated in VOM in order to receive financial compensation. 40% stated that they were met with arrogance from their victims. Such sentiments were voiced more frequently by recidivists than by first-time offenders.

Roughly two thirds of surveyed victims had the impression that the offender sincerely regretted his/her actions. At the same time though, 59% of all victims saw the offenders' true motivation for participating in the VOM process in formal factors, i. e. a mitigation of sentence and thus a more lenient criminal justice response than would have been incurred had they not participated in VOM. Nevertheless, the position of victims was understandably influenced by their prior feelings, experiences and attitudes: those victims with a great deal of prior anger and similarly victims of violent crime were in fact less likely to believe that the offender sincerely wanted to apologize.

The vast majority of both victims (96%) and offenders (97%) assessed the mediator's work as either very good or quite good.[44] Such high levels of satisfaction were also measured for more specific issues, for instance whether the mediator was able to create a "safe harbour " for mediation and whether both parties had an opportunity to express their feelings, needs, positions etc. On the other hand, almost one fifth of all victims and one third of offenders had the impression that the mediator had attempted to exercise too much pressure on how the case should be resolved, but overall most of the respondents welcomed the overall initiative of the mediator. Nine out of ten victims and offenders stated that they were satisfied with the results of VOM, with a further positive finding being that 84% of victims and 95% of offenders would agree to undergo such a procedure again. The vast majority of offenders (90%) stated that they would also agree to mediate the case if they were in the victim's place. The same fraction of victims answered "yes" to the question as to whether they would recommend mediation to other victims. Only one offender stated that he had committed another offence after participating in VOM. Regarding the overall impression and assessment of mediation, less than one tenth of the victims regretted their participation. Eight out of ten victims felt better after the

44 On a gravity scale of 1 to 4, with 1 and 2 representing "very good" or "quite good".

intervention.[45] Roughly three quarters of the victims stated that it was very important for them to meet and talk with the offender about the case. The vast majority of the offenders were satisfied with their experience of participating in mediation, while only one tenth reported that mediation had been an unpleasant experience. In this sense, the results of the survey thus basically corresponded with the results of comparable foreign studies or surveys.

The study also set out to investigate recidivism rates using data retrieved from the Criminal Register. The analysis covered 311 persons (276 men, i. e. 88.7% and 35 women, i. e. 11.3%) who participated in mediation in 2005 and provided information on the nature of the offence, whether or not the offender was a first-time offender and on the offender's age. In terms of offence types, the largest proportion of cases concerned theft and bodily harm. The average age of charged individuals in the mediation process was 26.3 years at the time of mediation. The average age of first-time offenders was 23.6 years. First-time offenders (with no prior conviction at the time of mediation) represented the majority of the sample (247 persons, i. e. 79.4%, and average age: 24.2 years). 24 persons (7.7%; 22.4 years) had one prior conviction, while 40 (12.9%) persons had committed multiple offences prior to mediation. Of these repeat offenders, 24 had two or three prior convictions (7.7%), 12 persons had between four and six prior convictions (3.9%) and four persons had seven or more prior convictions (1.3%). In the sample, the agreement had been successfully reached in 75.5%. Almost in two thirds of cases (189 persons) within the sample, the case was diverted according to the provisions governing "conditional discontinuation of criminal proceedings" (see *Section 2.1.1 and 3.3*) either at the pre-court or the court level. Such an approach was most widely applied (81.5%) in cases involving young offenders (65 cases, age 15-30 years). Regarding re-offending within the sample, 79 persons (25.4%) re-offended in the following four years after the mediation, of whom 75% had already re-offended after two years of mediation.

The conclusion of the study also provides information on problems mediation has to face in terms of practical delivery. The most frrequntly highlighted answer from mediators was "the motivation of both parties" in terms of there being unwillingness and disinterest in meeting face to face (especially among victims); maximum financial compensation of civil claims; and "better position in criminal proceedings" in case of offenders. The overall level of cooperation with the courts and public prosecutors and the police was also found to be problematic, because these authorities represent the traditional criminal justice system that emphasizes other procedures rather than the timely commencement of actual conflict resolution. Another general finding of the study is the low level of awareness within the general public about selected activities of the Probation and Mediation Service, especially at the pre-court level.

45 On a scale of 1 to 4, with 1 and 2 referring to the degrees of having felt better.

At least one particular project of the Probation and Mediation Service, which is not in fact research, has to be mentioned as well. The project „Restorative Justice – Victim Support and Counselling (2011-2012)“ was implemented by the Probation and Mediation Service in partnership with the Association of Civil Advice Centres (JUST/2009/JPEN/AG/655). The long-term goal of the project was to develop a functioning network of advisory services for victims in ten new locations, to train twenty new staff-advisors according to previously tested training models, and to establish pilot "Victim Liaison Offices" in two selected cities that work with victims of serious and violent offences. Another notable outcome of this project has been the "Manual of Good Practices", which is also available online in English.[46]

5. Summary and outlook

Without any doubt, the Czech Republic belongs to the countries that have incorporated elements of restorative justice into an otherwise traditional (punitive) criminal justice system. Even though progress has been made over the last two decades, in terms of restorative justice the Czech Republic remains a "developing country". While a typical 'top-down' approach through legislation has been visible, a viable impetus for activities that led to the introduction of some elements into the legal system and into practice has also been noticable (see *Section 1.2*).

Two pieces of legislation that sought to mainstream restorative justice in the last decade have to be highlighted: the Probation and Mediation Act (act no. 257/2000 Coll.) and the Juvenile Justice Act (act no. 218/2003 Coll.). With special regard to mediation in criminal matters, it is obvious that the development of mediation measures was closely related to the establishment and legal recognition of the Probation and Mediation Service in 2001.

On the other hand, to be more critical, the days of regarding restorative justice as a panacea are gone in the Czech Republic. Nonetheless, we need to accept that restorative justice has gained increasing influence on the Czech criminal justice system, however rather as an addition than as a replacement. This is strongly underlined by the fact that restorative approaches play only a side-role in the context of diversion. The most frequently applied diversionary route (conditional discontinuation of criminal proceedings) has less restorative potential than conciliation, for example. Answering the question why the "less restorative" measure prevails is not all too difficult – conditionally discontinuing proceedings is much easier for the gatekeepers of the traditional criminal justice system to apply. This corresponds with the general finding that the Czech criminal justice system contains a considerable amount of restorative justice

46 Http://www.restorativnijustice.cz/en/downloads.

elements, but the delivery of such measures is basically in the hands of the criminal justice authorities who are likely to adhere more closely to traditional approaches to resolving criminal cases. This state of affairs should be viewed as being closely linked to an overall lack of knowledge about restorative justice within the general public – knowledge in terms of the possible benefits of participating in a restorative process, but also knowledge about the availability of restorative practices in general.

We are facing more objectives in the field of restorative justice – to promote e. g. family group conferencing, community reparation groups and other forms of restorative justice. There is also a will to implement such interventions or at the very least to promote them, especially from the Probation and Mediation Service together with other NGOs. From this point of view, restorative justice is far from being used to its full potential in the Czech Republic.

Looking to the future, the role of restorative justice will probably gain more influence – at the very least in an indirect way, like in a number of other countries – because there is an urgent need to "do something" about crime.[47]

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47 *Miers* 2012, p. 532.

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Denmark

Anette Storgaard

Introduction

In Denmark, "Restorative Justice" is not a particularly dominant issue in public political debates or among practitioners. However, if we refer instead to "Alternative Dispute Resolution" (ADR) and thereby include civil law conflicts we can in fact find private institutions that offer alternative conflict resolution and/or training in conflict resolution for company-leaders, leaders in trade unions etc. Also, the Danish Lawyers' Union runs a higly regarded specialist course for practicing lawyers and organises a subgroup in the Lawyers' Union for those who have completed that course.

It appears as though both the owners and solvers of civil law conflicts or conflicts without a legal dimension have found a "profitable" corner in ADR. But when the conflict involves a punishable act there is a dominant tendency to stick to classical notions of equality, just deserts, fair trial and proportionality between crime and punishment. In that sense a clear distinction between criminal law conflicts and civil (law) conflicts still exists.

This report is about crime and legal reactions to crime that are chosen and executed in accordance with the law right now in 2014. This means that for instance punishment imposed in the private sphere is not included. The same applies for informal punishment such as not getting the job one applied for due to a criminal record.

It is necessary to stress that the program in Denmark that has the most in common with the ideas behind restorative justice, namely *Konfliktråd* (hereafter: Victim-Offender Mediation, VOM), is *not* a program that replaces a criminal justice procedure, but is a *supplement* to a criminal procedure. This means that, in principle, even if VOM is successfully fulfilled, an ordinary criminal justice procedure including conviction and sentencing will follow. Furthermore, it must be underlined that VOM solely includes the victim, the offender and the mediator. No other stakeholders can be involved. With this background in mind

it is debateable whether VOM is restorative justice in the understanding of important theorists like *Howard Zehr*[1] or *Tony Marshall,*[2] who both argue that other stakeholders like for instance schoolteachers, colleagues, NGO's or other relevant community representatives should be included. Yet on the other hand, the relevant European international standards and recommendations are very specifically focussed on VOM, so it makes good sense to draw the scope of restorative justice more widely to include it.

In Denmark, VOM was first developed on an experimental and geographically limited basis after the introduction of the idea of reflexive law[3] in the late 1980s and the restorative justice ideology in the world wide criminological debates up through the 1990s. Today VOM must mandatorily be offered to the parties in all criminal cases that are found suitable by the coordinator. However, if either victim or offender refuses to willingly participate VOM cannot be arranged. There are no explicated restrictions in the applicability VOM, for instance in terms of offence categories, age, gender etc. but the offender must confess at least to the actual objective circumstances surrounding the crime. VOM is organised as such by the police.

Due to the background, the history and the current legal position of VOM in the Danish criminal justice system it makes good sense to take a step back and start by differing between alternative criminal procedures and alternative reactions to crime. This will be presented at the beginning of *Section 2*. *Section 1* is dedicated to the background and the understanding of VOM in Denmark, whereas VOM is described in more detail in *Section 3*. *Section 4* is devoted to a small scale evaluation from one of the experimental periods of VOM and *Section 5* provides an outlook and a few recommendations for the future.

1. Origins, aims and theoretical background of Restorative Justice

In order to provide some context and background forVOM, this chapter gives a short introduction to the political tradition and history (mainly crime policy) in Denmark.

Law and codification in Denmark are based on a continental tradition. All main national regulation is laid down in national laws decided by the majority of the Members of Parliament and most often initiated by the relevant minister, i. e. the Government. It is not uncommon in Denmark that the Government rules on the basis of less than 50% of the parliamentary votes. This implicates a necessity

1 *Zehr* 2002, pp. 6-43.

2 *Newburn* 2007, p. 247.

3 In Denmark the idea of reflexive law was inspired among others by *Günther Teubner*, see: *Born* 1998, pp. 21-82.

of cooperation and consensus in policy making which traditionally has been dominant – not least in criminal matters – in Danish political culture.

In terms of crime policy, the tradition of consensus had never been an issue and had never come to be questioned until the beginning of the 1990s. Until then, crime policy had not been based only on political consensus but was also closely connected to national and international criminological experiences. Political decisions (including new regulations) were mainly based on dialogue between criminologists, other academics, practitioners and politicians. However, over the past two decades we have witnessed a shift in the development of crime policy, away from experts and more into the hands of politicians. Policy on crime has even become a hot issue in the context of election campaigns. In this context, policy has *mainly* developed in a less tolerant and more punitive direction. Some political parties distinguish themselves as being tough on drugs, others voice desires for a "more rigorous" (i. e. less tolerant) approach to juvenile crime. One recent example for the "politicisation" of criminal justice policy is the lowering of the minimum age for criminal responsibility from 15 to 14 in 2010 and the change back to 15 in 2012. The Government in 2010 was to be classed as belonging to the "right" political spectrum, and was dependent on a populist approach with strong viewpoints against foreigners and juvenile crime, while in 2012 the country got a new Government under the leadership of the Social Democrats. The reform of the age of criminal responsibility was the most debated change, and while it was revoked in 2012 by the new Government, other elements of the legislative reforms were not. For instance, a rule limiting a prison sentence to a maximum of eight years when the offender is not yet 18 years old, which was removed by the former (right wing) government, was *not* re-implemented in 2012 by the new Government. On the other hand, there have also been some non-repressive initiatives, for which the introduction of VOM as a national program as of 1 January 2010 is a good example.

VOM is a nationwide concept of voluntarily confrontation between offender and victim with the support of a neutral mediator. The 2010 Code on VOM states directly in § 4 that VOM does not replace punishment or other formal legal responses (like psychiatric treatment or the so-called "youth sanction") to offending. This has been questioned from different angles.

The committee behind governmental report no. 1501 was divided into two subgroups in the debate on whether VOM should go on from the experimental local status to the permanent nationwide status solely as a supplement to the ordinary criminal procedure or whether it should be developed into (partly, i. e. in minor cases) an alternative/a replacement of that procedure.

The majority, namely seven persons, argued that it was preferable for VOM to retain its role as a supplement to the criminal justice process as it had been during the pilots. Some of the arguments voiced in this regard were along the lines of "it will become too easy to be a criminal", while others were predictions that some offenders would not be deeply regretful and would only participate in

VOM to avoid the formal criminal procedure and sentencing (the issue of "sincere remorse"). One of the arguments that was mentioned very often by the majority was that, because it is an unbreakable principle that taking part in VOM must be absolutely voluntary, replacing the ordinary criminal procedure with VOM would put very much power in the hands of the victims. A victim of a minor theft would in that case – by denying VOM – have the power to dictate a criminal justice procedure whereas another victim of a serious assault by accepting VOM could divert "his" case into the alternative procedure. As a consequence, this could result in unacceptable losses of proportionality and equality.

The need for voluntariness of participation *per se*, both for victim and offender, never really came to be scrutinized in the debates. Rather, this was a factor in which there appeared to be blanket consensus.

The minority, which consisted of five members of the committee, stated that VOM should be used in lieu of a criminal procedure (and punishment) in some cases where the sentence to imprisonment would not be long. Cases that would otherwise result in sentences to community service orders or electronic tagging (see further below) were mentioned as being possibly appropriate in this regard, as were cases with young and/or first time offenders. The minority argued that this should at least be tried on an experimental basis. The viewpoints were mainly that there are very positive international evaluations indicating that VOM used in lieu of a criminal procedure and punishment correlates to a much lower level of recidivism than ordinary criminal justice cases[4]. Regarding the risk of "fake" apologies and insincere remorse on behalf of offenders, the minority was of the opinion that the mediators would "catch" these (expectedly few) cases and simply abort mediation, which of course would result in an ordinary criminal justice procedure.

Ultimately, the viewpoints from the majority prevailed in the drafting of the bill and in the subsequent Code on VOM.

VOM – as it may be obvious from above – is very much victim-focussed in Denmark. This was echoed in the remarks of an external evaluator in an evaluation of the second experimental period of VOM, who stated that in Denmark, " […] there is a dominant focus on the victims and it might be considered to draw in a crime preventive perspective in the Danish model for VOM."[5]

The meeting is prepared by a mediator who is also present at the actual VOM session. VOM is mandatory in the sense that it must in principle be considered in all cases in which the victim can be identified as an individual, but it is also facultative in the sense that it can only be arranged if the VOM

4 See for instance *Annika Snare* in a presentation of international research on recidivism and restorative justice, available at http://nsfk.org/Portals/0/contactsem_no22_1.pdf.

5 Report 1501 point 3.3 in detail.

coordinator of the police district deems a case suitable for VOM, and only if both parties freely consent. The VOM program is run by the police, and the initiative to arrange VOM and the education of mediators is their responsibility.

The nationwide program was implemented after two periods of local experiments dating back to 1994. While the experiences from the experiments were not quantitatively overwhelming, from a qualitative perspective they were evaluated positively. The codified VOM strategy is almost a carbon copy of the most recent pilot, and there were only few differences between the two experimental programs.

International Standards have never been mentioned in political or public debates in relation to VOM, nor has classical literature like *Nils Christie's* article "Conflicts as property".[6] Also, international experiences with restorative justice, like they are illustrated by i. e. *Bazemore/Ellis*, have also received very little attention.[7]

Compared to many countries (for instance Norway, a very popular comparison) in Denmark VOM has been introduced and implemented both comparatively late and more slowly. The specific driving forces for this process are not exactly pinpointable, but there has been a (albeit rather restrained) political will in recent years to do something for victims of crime (or to be seen as doing so).

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

In order to present VOM in a proper legal context we need to take a step back and introduce the framework of the ordinary criminal justice system including existing alternative criminal procedures and alternative reactions to crime. It must be stressed that the term "alternative" is not to be taken as synonymous for restorative justice, as shall become clear over the following pages.

Formally and legally the Minister of Justice carries the responsibility for (and is in principle the superior of) investigation, prosecution, courts and the execution of punishment. The main legal source governing investigation and procedural matters is the Administration of Justice Act, first book (different sections) and fourth book (§ 683-§ 1021h). The basic conditions for conviction, the legal definition of the main crimes and the maximum and minimum penalties for each crime are all regulated in the Criminal Code. Finally, the rights and duties of prisoners, disciplinary measures in prisons etc. are regulated in the Corrections Act.

6 *Christie* 1977, pp. 113-132.

7 *Bazemore/Ellis* 2007.

The Commissioner of Police is the national head of the police and he reports directly to the Minister of Justice. The investigation of crime is carried out by the police, who at the national scale are divided in 12 districts. Each district has its own director. The police director is a lawyer him- or herself and not only the head of the police but also the head of the District Attorney, who is responsible for prosecutions in city courts.

Prosecution is carried out by the prosecutors, who are lawyers (academic jurists with specific supplementary courses and training). The prosecutors are divided into a hierarchy of three levels. The national superior of prosecution is the Director of Public Prosecutions, who is prosecutor in cases before the Supreme Court. In practice the director himself does not in fact assume the role of active prosecutor very often – in the vast majority of cases prosecutors from his office prosecute under his responsibility. Below him rank 12 public prosecutors, six of whom are responsible for geographical regions covering the whole country, while the other six are assigned to specific types of cases, like for instance complicated cases of economic crime. Each public prosecutor has prosecutors working for him or her and they act in cases which are tried before one of the two High Courts in the country. Finally, the prosecutors from the 12 district attorneys prosecute cases in one of the 24 city courts. The organisation of the prosecution and the division of competences is mainly regulated in the Administration of Justice Act, chapter 10 (1st book).

Exceptions to this main structure are more important jury-cases carried out in city courts of first instance, where prosecutors from the office of the Director of Public Prosecution act as prosecutors.

It is explicitly stated in § 65.2 of the constitution that lay judges must be included in criminal court procedures. The Administration of Justice Act, chapter 6-8 (1st book), defines the scope and the competences of lay judges.

At all procedural stages it is the duty of the prosecutor to proceed the case as quickly as the circumstances allow and to not only seek the conviction of guilty offenders but also to ascertain that no innocent person is convicted (§ 96, 1st book in the Adminstration of Justice Act).

The decision of taking a suspect into pre-trial prison (custody) may be made for a period of a maximum of four weeks at a time. Up until 2008 there had been no legal limit as to how many times pre-trial detention could be extended by four weeks, i. e. no maximum term for which a person suspected of an offence could be detained had been stated by law. Since 2008 however the total maximum duration of pre-trial detention has been limited to one year for adults and eight months for suspects below the age of 18 years. These time limits may be exceeded by court ruling under special conditions (§ 768a, 4th book). Judges who place suspects in pre-trial detention must be replaced by another judge when the case is tried in court if there is any doubt that he can act impartially (§ 60 and § 61, 1st book).

During the past decade on average 25% of all prisoners in Denmark are not yet convicted, i. e. they are in pre-trial custody. The majority of unconvicted prisoners are held in city-jails but a small number, mainly juveniles and persons with mental disorders, are placed in more adequate facilities, like youth pensions[8] or appropriate treatment institutions.

The Danish Criminal Code provides for two main penalties for adult offenders: fines (day-fines or fixed-sum fines) and imprisonment. Fines and imprisonment are not to be understood as alternatives to each other. The former are predominantly used in cases of violations of punishable rules not included in the Criminal Code (such as the Traffic Code), but also find application for relatively minor violations of the Criminal Code. Imprisonment on the other hand is used in more serious violations of the Criminal Code as well as other codes including grave violations of the Traffic Code. Imprisonment is imposed by the court either conditionally or unconditionally. Conditional and unconditional imprisonment are used equally often, i. e. about 10.000 times each per year. However, there are noticeable differences in terms of the offence types for which the different sentence types are handed down. Unconditional imprisonment is almost always used in cases involving personal assault, whereas conditional imprisonment is often the first choice in theft and burglary cases.

While the courts decide the length of the prison-sentence, the location and the security regime of the exact prison is decided administratively by the Department of Corrections. In Denmark there are two main categories of penal institution. On the one hand, there are pre-trial detention centres (or "custodies"), which are located in close proximity to the court-buildings in the cities. These institutions house persons awaiting trial as well as convicted persons who are serving relatively short sentence or who are waiting to be transferred to a prison, the second kind of penal institution in Denmark that are used almost solely to accommodate convicted offenders serving sentence. On a nationwide scale, the custodies have about 1.700 places, while there is a total of about 2.400 places in the prisons. The average yearly utilization rate in the penal institutions as a whole is 94-97%. After having been sentenced in court the person is either moved to imprisonment via a pre-trial detention centre, or he/she is released until recalled to serve the sentence. The decision about where a sentence must be served must be made within the framework of §§ 20-30 of the Corrections Act, where guidelines for the choice of institution and the transfer of prisoners from one institution (or institutional regime) to another are regulated.

The sentences available to the courts and daily life in the prisons are regulated in the Criminal Code and the Corrections Act respectively.

Turning our attention to alternative (but still legally founded) criminal procedures, the main option in Danish criminal procedure is so-called *withdrawal of*

8 Youth pensions have different security degrees. Some of them are as secure as closed prisons, i. e. monitoring and perimeter walls.

charges by the prosecution. Withdrawal of charges has been part of the Administration of Justice Act since it was first adopted in 1939. § 722 (4th book) of the Act defines the very limited scope of minor cases where the prosecuting authority may withdraw a charge. Juveniles are mentioned as a group of offenders where withdrawal of the charge might be considered in cases with limited criminal damage. Withdrawal may be combined with conditions of the same type as a conditional sentence to imprisonment. Where withdrawal is conditional, it has to be confirmed by a court so that a judge can ascertain the properness of the conditions. However, the offender's guilt is not tested in court. Instead, withdrawal is based on a confession that must be seen (by the investigator, the prosecutor and the court) as confirmed by the circumstances. Ordinary withdrawal of charges is deleted from the criminal record after two years.

In 1998, the so-called *youth contract* was introduced in Danish criminal procedure by §§ 722, 723 of the Administration of Justice Act in combination with § 52 of the Law on Social Services. The signing of a contract is one special condition for a withdrawal of charges in court and may only be used when the offender is not yet 18 years old and the crime committed does not involve personal injury.[9] The contract runs for a period of one year.

Like all non-custodial measures the youth contract always contains a standard condition of not re-offending within a certain period of time. Furthermore, it imposes individual obligations on the juvenile to participate in certain activities, for instance to finish school and go through a social training program. If the juvenile fulfils the period and the obligations laid down in the contract the offence will be deleted from his or her criminal record one year after the contract was signed, i. e. practically once the conditions have been fulfilled. Like the withdrawal of charges described above, the youth contract is based on a confession and the offender's guilt is not tried or tested in court.

By including not only the juvenile but also the parents and the social authorities in the preparation and signing of a contract before having it approved by the court, the original aim of the youth contract was to introduce a quicker procedure and more adequate reaction where all parties (not least the parents) would feel more committed, and that would subsequently (hopefully) reduce the risk of reoffending by young offenders.

After about five years the youth contract was evaluated by a researcher from the Ministry of Justice,[10] who came to the conclusion that the concept did not speed up the process, nor did it lower recidivism markedly. However, the evaluation report added that, bearing in mind that the general rate of recidivism following a withdrawal of charges is very low already, it seems like a rather optimistic ambition to minimize recidivism even further.

9 Instruction from The Commissioner of Police 4/2007, latest revision September 2011.

10 See *Stevens 2003*.

Moving on from alternative *procedures*, the criminal justice legislation in Denmark also makes provision for *alternative sanctions*, the most prominent of which are the community service order (CSO), the electronic anklet (EA) and the so-called youth sanction (YS) which is only an option for juveniles who were below the age of 18 at the time when their crime was committed.

CSOs, currently regulated in chapter 8, §§ 62-67 of the Criminal Code, were first introduced in the 1980s. When the court is convinced that an unconditional prison sentence would be appropriate, it can be converted into a community service order if it is reasonable to believe that locking the offender up would not be necessary. The court decides how many hours (between 30 and 300) of community service the person shall perform, and the probation service is responsible for finding appropriate work-places. Even if a CSO is defined as an alternative to unconditional imprisonment, it can technically be regarded as a condition of a conditional sentence to imprisonment, the condition being that the offender does not commit a new offence during the period when the work has to be performed.

Secondly, there is the *electronic anklet* (EA), which was introduced gradually from the beginning of the 2000s. In case the length of a sentence to unconditional imprisonment is five months or shorter the convicted person will, shortly after being sentenced, receive a letter from the Department of Corrections informing him of his right to apply for a so-called "home detention curfew". This implies that the person must wear an electronic tag around his ankle for a period equal to the length of the prison sentence to which he/she has been sentenced. The tag enables the probation service to monitor the offender's movement and whereabouts, and to thus monitor that he/she does not leave his home except for the periods of the day agreed upon with the probation service, for instance to go to school or work etc. EA is not a form of permanent electronic monitoring. The anklet is linked to a device in the home of the person whereby it is controlled that the person is at home when he is not allowed to be out. Contrary to the CSO the electronic anklet is not "imposed" in court but rather by the Department of Prison and Probation after the sentence in court. Accordingly, the anklet is not mentioned in the Criminal Code but is instead described in the Corrections Act, §§ 78a-78 f. EA is not an option where a convicted person has already started to serve sentence. Only those persons who are sent home following sentencing in order to wait for further information about when and where to report for serving sentence, receive the letter mentioned above.

Thirdly there is the *youth sanction* (YS), which was introduced by an amendment to the Criminal Code on July 1, 2001 and which is now regulated in § 74a. YS is imposed by the courts but fulfilled by the social authorities. YS was introduced as a result of a strong political demand for more rigid responses to serious offending by persons aged under 18 at the time of the offence. In the preamble to the amendment of the Criminal Code of 2001, the YS is defined as

an alternative to imprisonment in cases where a sentence of between one and 18 months of unconditional imprisonment is to be expected. The execution of YS is divided into three phases that together last for a total of two years. In most cases YS begins with up to 12 months of deprivation of liberty (secure accommodation in a social/pedagogical institution), followed by mandatory accommodation in an open social institution. The sentence is finalised by a period of not less than six months in supervised freedom. YS is described not as a primarily punitive measure, but rather as a means of helping and supporting juveniles to direct their lives into a noncriminal future. However, in practice the secure institutions in which YS is served very much resemble prisons, with perimeter walls, monitoring, small units and locked doors in the night. The powers in the hands of the institutional staff are very much like those of prison staff.[11]

The only manifestation of procedures and practice with a "restorative edge" in Denmark, VOM, must be understood in the context described above. After several years of local experiments the Code on VOM came into force on 01 January 2010.[12] Responsibility for appointing mediations and coordinators, arranging VOM and informing the relevant authorities of the "outcome" of mediation lies in the hands of the police. Since the majority of VOMs are conducted prior to any court involvement in the case, VOM should most adequately be regarded as a pre-court arrangement.

The Code on VOM comprises just eight sections and merely "sets the scene". More detailed descriptions and elaborations are provided in the preparatory documents[13] to the Act and further developed through practice. Due to the fact that the courts do not play any role in the VOM procedure, there is a very low risk of court prejudices developing. However, as time passes by, some administrative prejudices may develop, for instance in regard to the selection of cases for VOM.

The wording of § 4 of the Code on VOM is short and clear. It says: "VOM does not replace punishment or any other court decision as a consequence of a crime." Further, the Code is silent about *at which procedural stage, to whom and in case of which kind of crime* VOM can take place. Consequently VOM may be arranged at whatever stage in the procedure it seems convenient, i. e. before the conviction, between conviction and sentence or during the execution of the sentence, for instance when the offender is in prison.

Accordingly, VOM can be arranged in case of serious as well as non-serious crime. The Code on VOM is absolutely silent in terms of which offence types

11 For further information on YS: *Storgaard*, p. 381.

12 Code on VOM, Lov om konfliktråd i anledning af en strafbar handling. Nr. 467 from 12 June 2009.

13 The Bill with comments (Lovforslag med bemærkninger) and the Report (White Paper) 1501/2008.

should be eligible for VOM, and in point 3.2.1 of the comments to the Bill, it is stated explicitly that being too specific would be inappropriate as there will be a need for continuous practical development. In point 3.4.1 it is even stated more directly: "The committee is of the opinion that the experiences from the latest experimental period prove that VOM may be practiced with positive results for both victim and offender in all cases with an identified victim.[14] This is also the case in criminal cases involving more serious crimes such as for instance robbery."[15] The committee is thus of the opinion that there should not be any codified general limitations on the types of crimes for which VOM can be considered.

Both the victim and the offender must voluntarily consent to take part in VOM before it can be arranged. If one of the parties is below the age of 18, consent must also be given by the parents. Apart from that the code does not specify any preconditions regarding age, gender, criminal record, mental health, nationality or the like.

Also, according to § 2 of the Code on VOM and point 6.6 in *Report 1501*, VOM will not be arranged until the offender has confessed to the crime (admitted guilt) or at least to the main facts surrounding the case.

According to both point 3.5.3.1 of the comments to the Bill and to point 6.4.1 of *Report 1501*, it is possible that VOM is arranged when the offender has not yet reached the age of criminal responsibility.[16] It is argued that this is for reasons of crime prevention. Of course a minor will not be taken to court after VOM like everybody else will be. This subject is not mentioned in the Code but § 6 in more detail states that the Minister of Justice may decide that cases other than criminal cases may be eligible for VOM as well.

The Code on VOM also makes no explicit reference to mentally ill offenders. § 16 of the Criminal Code explicitly and clearly states that persons who 1) are found by psychiatrists to have been mentally ill at the time of the offence *and* 2) about whom the court is convinced that the illness caused the crime, cannot be punished under any circumstances. They may, however, be sentenced to different forms of psychiatric treatment possibly including forced institutionalisation. *Report 1501* states in point 6.4.3 that individuals to whom § 16 applies are *not* suitable for VOM. However, it is also stated that, in cases where it is in the strong interest of the victim that he/she meet the offender, the local VOM coordinator may – under the condition that the offender seems to be

14 This means that for instance so called victimless offences cannot be taken into VOM, i. e. tax fraud, pollution and the like. It is also debated if for instance shoplifting in big supermarket chains is suitable for mediation because also in these cases the victim's identity is unclear or at least very abstract.

15 My translation.

16 Which is 15 in all the Nordic countries.

able to understand what VOM is all about – arrange VOM with a mentally ill offender.

There is nothing in the Code on VOM or in the preparatory works that indicates that VOM that ends in a "positive outcome" *must* have an influence on sentencing. However, the preparatory works, i. e. both Report 1501 (point 6.7.1) as well as the comments to the Bill (point 3.7.1.2) refer explicitly to § 82 no. 11 of the Criminal Code, which states that cooperation by the offender and efforts to repair the damage might be regarded as a mitigating factor in sentencing. It was argued that the wording of § 82 no 11 should explicitly include VOM in order to ensure that a successful VOM would always be taken into consideration in sentencing. Following debate the wording of § 82 no. 11 was retained after the Code on VOM came into force. Paradoxically one very strong viewpoint *against* mentioning VOM in § 82 was that the courts already are aware of VOM being taken into consideration. Until now there has been no official evaluation on such mitigation in practice. An unpublished students' thesis found that there is no systematic difference in the length of sentences in cases with and without VOM.[17]

Conclusively it is not codified whether and/or to which extent VOM should influence the sentence that an offender receives, but according to the preparatory works it is expected that VOM will have a certain (albeit unspecified) mitigating influence, so long as VOM was evaluated by the mediator as having been successful and took place before the court procedure. For the time being, it cannot be ascertained inhowfar this corresponds with current practice.

If VOM takes place when the offender is already in prison (which is not impossible but equally uncommon) it can obviously not have any bearing on how the offender is sentenced. Of course the Code on VOM is silent in this regard, too, but point 6.2.3 of report 1501 says very briefly that the mediator must immediately inform the Prison and Probation Service so that successful VOM can be reflected in the administration of the execution of the prison sentence. However, this is not clarified or exemplified further.

VOM is mainly an instrument that provides offenders and victims with an opportunity to meet face to face with the support of a neutral third party. VOM can result in agreements between the parties on the future conduct of the offender and on the delivery of reparation when damage has been caused. However, such agreements are voluntary and private and cannot be enforced by the court. Nor can they be appealed.

17 *Vestergaard*, p. 25.

3. Organisational structures, restorative procedures and delivery

The Crime Prevention Council, which is basically a State organisation, has been the promoter for VOM since the very beginning of the debate about this subject, i. e. since the 1980s. The Crime Prevention Council runs a secretariat with about 20-30 employees (partly academics). The council itself does not practice justice nor does it conduct research. The council acts as a communicator of research results and a consultant for local crime prevention initiatives, which are also basically financed from public funds. The Crime Prevention Council was the initiator and coordinator of the two periods of geographically limited experiments with VOM before the Code on VOM came into force. The Council has never argued that VOM should in any case be practised alternatively to a criminal justice procedure. On the contrary: they have always argued that VOM needs to be regarded and practiced as a supplement to the criminal procedure that should be voluntary for the parties.

Denmark does not have a long-standing tradition of NGOs like for instance the UK. Especially when it comes to criminal justice the focus has traditionally been very strongly on legal rights, proportionality, equality etc which does not provide NGOs with very much room to manoeuvre in. Therefore in a Danish context it is not surprising that NGOs do not play any role in relation to VOM.

§ 1 of the Code on VOM states that every police district must make provision for VOM. According to the legal definition VOM is a meeting between offender and victim under the presence of a neutral mediator. According to the comments to the Bill (point 3.3.2 thereof) every police district appoints a coordinator to be responsible for VOM. Policemen themselves do not act as mediators, but it is for the police to identify the cases that in their eyes are suitable for VOM and to refer them to the coordinator who is a not police trained colleague. After having studied the case and found it suitable he/she assigns the case to a mediator who establishes contact with the parties. The mediators are not full-time professional mediators. Instead, they are citizens with other jobs who are willing to be called on for specific VOM cases. The mediators are paid the same sum, about 200 Euros, per case no matter whether it is a very simple or a very demanding case, and regardless of whether or not an agreement is reached by the parties.

The police are responsible for the training of the mediators. Most typically a future mediator attends a one-week course, where the participants do role-play and have lessons in legal rights, ethics, different possibilities of victim counselling and compensation. Later there should be supplementary courses.

§ 6 of the Code on VOM delegate the competence to decide specifically on different subjects to the Minister of Justice. One such subject is the question of whether or not the mediator is allowed to accept the presence of third parties

during VOM. The Comments to the Bill (point 3.5.5) state that the questions that the mediator may take into consideration before allowing a third party to be present may be for instance differences in age or in checks and balances between offender and victim. Also there may be situations where the victim cannot attend (because he/she is dead or severely injured) and a third party may act as proxy for the victim. Lawyers are not allowed to be invited as professionals, but of course a lawyer can attend if he/she is the victim or the offender or a close relative to one of them.

It is indirectly mentioned in the Code on VOM (§ 2.2) and further in report 1501 (point 6.2.3) that the mediator has no decisive role to play at all. The mediator's task is to help the victim and the offender in finding their own solution. Report 1501 refers to a Danish author[18]who defines mediation as a reflexive, voluntary and confidential process where the parties themselves by the help of a neutral third person (the mediator) find a solution which is satisfactory for them. *Vindeløv* elaborates on *Riskin*'s matrix, stating that mediation may be *evaluative* or *facilitative*: the *evaluative* mediator is focussed on the output, he evaluates the viewpoints of the parties (or their lawyers), uses separate meetings and will not stand back from putting pressure on the parties in order to make them accept a proposal. The *facilitative* mediator asks more questions than he answers. He does not put any kind of pressure on the parties in order to make them accept a proposal.

Mediation may also be *broad* or *narrow*. In *broad* mediation all kind of questions may in principle be included. The mediator tries to learn about all interests and needs that the parties have. The *narrow* mediation, however, sticks to the issues of the conflict and does not include other (related) needs.

Mediation may technically be described as all four combinations: evaluative and narrow, evaluative and broad, facilitative and narrow and facilitative and broad. Transferred into *Riskin*'s matrix the ideal in Danish mediation in (both civil and) criminal cases is that the mediation is a facilitative and broad "event" focussing on all relevant interests and the needs of the parties and not solely (or rather not at all) on possible outcomes of the conflict in court.

As a consequence of the fact that VOM is confidential, § 5 of the Code on VOM extends the scope of § 152 of the Criminal Code (which defines criminal responsibility of civil servants who breach their duty to confidentiality with their clients) to include mediators. Further, § 5 also brings mediators into the coverage area of § 170 of the Administration of Justice Act, which practically excludes specific professions[19] from testifying against the wish of their client.

18 *Vindeløv* 2013.

19 Such as priests, medicals, lawyers.

However, § 170.2 states that the court may order some of the professions[20] to testify in cases where this is seriously necessary, and mediators are included among these professions.

Regarding the provision of premises for conducting VOM and the payment of mediators, VOM in Denmark is financed by the State through the police budget. VOM is only rarely arranged at the police station but more often in public places with the possibility of privacy like for instance in libraries. The parties do not have to pay anything themselves for VOM.[21]

Compared to the ordinary criminal procedure VOM is extremely cheap, mainly due to the fact that the wages for mediators are remarkably lower than those for judges and that neither prosecutors nor lawyers are to be present when VOM takes place. On the other hand, however, in practice VOM is an extra (albeit modest) burden on the State budget as VOM does not replace the criminal case.

In criminal cases the offender has the right (and often the duty) to legal defence. This is initially paid for by the State, but if he is found guilty and sentenced he will receive a bill for the procedural costs after he is released from prison or has paid his fine. These costs are not seldom very high as they also include the expenses for technical evidence, blood tests etc.

4. Research, evaluation and experiences with Restorative Justice

Like the rest of this paper, this chapter focuses only on VOM, as this is the only program in Denmark that to a certain degree comes close to the understanding of Restorative Justice. There are no official statistics on VOM as there are for measuring crime levels and sentencing practices. Instead, we can (and have to) draw on a few evaluations from which we might be able to draw some knowledge.

The first four years (1998-2002) of the second pilot phase have been evaluated and reported on. The pilot took place in three police districts and in the four-year period the police deemed 1.430 cases suitable for VOM and asked the parties if they would be willing to participate. Of these 1.430 cases, 360 cases were referred to the VOM coordinator and in 150 cases VOM took place. As there were markedly more VOM cases in the last part of the period than the

20 Medicals and lawyers may be ordered to testify but not the defense lawyer in the concrete case.

21 This goes for crime cases only. Mediation in civil cases may be very expensive for the parties but on the other hand here mediation replaces a (even more expensive) court conflict solution.

first there is reason to believe that it took some time for everybody to become familiar with the concept.

The evaluation was both quantitative and qualitative. Interviews were conducted with as many offenders and victims as possible and large amounts of anonymous data were collected from the police.

More than 50% of the victims and more than 90% of the offenders were male, shares that were comparable to general criminal statistics. However, regarding age, on average the VOM participants were a couple of years older than the general average age of victims and offenders.

More than 50% of the cases which were found suitable for VOM as well as the cases where VOM was arranged concerned minor violence. Burglary was the second most frequent offence type, though below 10%. However, more serious crimes were also included, such as robbery and serious personal injury, but only to a very small scale.

Victims as well as offenders were interviewed about their experiences with VOM. Among all of them over 80% felt that VOM had been successful or very successful. The offenders tended to be more positive than the victims. Less than 10% stated that VOM had been unsuccessful or very unsuccessful, with a slight majority of dissatisfaction among the offenders. The offenders tended obviously to choose the extreme answers, where a few more victims answered "neither successful nor unsuccessful".

The responses were analyzed and quantified, but it was also pointed out in the evaluation report – and this is very important – that only those who in fact participated in VOM were included in the evaluation and they represented about 10% of the number of cases which the police found suitable in the first place. As VOM is absolutely voluntary it is obvious that victims and offenders must have had positive expectations from the beginning. This gives them a better chance for a positive outcome. Further it was voluntary to take part in the interview and not all did so. Finally: only parties involved in cases of simple violence were interviewed, as the case numbers for all other crimes was too small so as to be able to draw any reliable conclusions.

Among the more important subjects for the victims was whether VOM had provided them an opportunity to express to the offender what the crime did to them and that it frustrated them. More than half of those who responded stated that VOM gave them this opportunity. Furthermore, about half of the responding victims said that VOM to a large or to some degree helped them to be less scared about what happened. 70% of the responding victims had the impression that the offender changed his view on the crime during the mediation process.

Regarding offenders, 70-80% replied that VOM to a large or to some degree gave them the opportunity to prove that they regretted what they had done and to apologize, and that this was good for them. Also 70-80% answered that they felt that they to a large or to some degree understood the victim better now (one response: "… it is good to be able to smile and say hallo when we meet"). Some

respondents also pointed out that VOM had helped to resolve other problems between the parties, with one offender saying "I have got my wife back".[22]

A new evaluation report is published on the first two years of VOM being implemented nationwide. This report indicated, like the evaluation of the pilot, that VOM needs time to be implemented locally. In order to secure a satisfactory scope, the national head of the police set a target level which for 2010 was 510 cases. The actual number turned out to be 341, and the target level for 2011 was 480, where the actual number of VOM cases was 595.

There is no type of crime which is defined as unsuitabale for VOM per se. in 2011 there were for example 8 cases of (attempted) homicide and 9 rape-cases which were found suitable. Out of 1,000 cases found suitable, 500 were (mainly minor) assault.

During the first three and a half months in 2011 a qualitative evaluation was carried out involving 102 cases. 90% of the offenders and 55% of the victims in this pool were male. 32% of the offenders and 18% of the victims were aged under 18, whereas 6% of the offenders and 24% of the victims were over 50 years old.

The attitude towards VOM is not particularly different among offenders and victims, with overall satisfaction measured at about 80% for offenders and 74% for victims.

Out of the 102 cases that were deemed suitable for VOM in the period, VOM was actually carried out in only 68 cases.

The reasons why the victims wanted VOM were mainly that they wanted to meet the offender in person and that they wanted an explanation (45 cases, but it was possible to give more than one answer). The reason why the offenders wanted VOM was to apologize and to show respect to the victim (48 cases, but also possible to give more answers).

Among both victims and offenders, between half and two thirds were very satisfied after VOM. They were satisfied with the general outcome; they found that there had been time enough and that they had had the chance to express what they had wanted to express. More than 80% in both groups described VOM as successful or very successful. Likewise the mediators found 85% of the cases successful or very successful.[23]

5. Summary and outlook

In Denmark the approach to defining and reacting to crime tends to be very formal and based on legal rights principles. However, principles very closely related to Restorative Justice – or maybe rather alternative dispute resolutions –

22 See *Henriksen* 2003.

23 See *Hansen* 2012.

are introduced in quite different contexts. One very remarkable idea is that several schools teach pupils ADR-principles and train them in solving conflicts among pupils. These ideas are described very optimistically. Also, workplaces are implementing schedules or programmes for caretaking when employees tend to be sick often or when workers are fired due to operational reasons or the like. These ideas have something in common with the ADR-ideas in that they take a holistic perspective to the person and the situation in order to uncover needs and interests in a broader sense to help establishing a new positive situation as alternative to the more defeatist approach where a temporary problem maybe initiates a negative snowball effect and ends up in a deeply rooted conflict.

It is still seen as relatively new in Denmark that VOM has been introduced in crime cases as a program that must be available all over the country. It may turn out in the future that successful VOM will more systematically result in a mitigation of sentence, but for now this is not the case.

Like it has been described above the Danish way of understanding crime and punishment is legalistic and formalistic compared to many other countries and also compared to a general tradition of pragmatism in Danish policy. Apart from that and in spite of a recent increase in sentence lengths, Denmark does not really have a very punitive policy of sentencing compared to other countries. The Community Service Order has a long history, but has never connected or confronted offenders and victims in the same case. Essentially, CSO is just a prison sentence that is suspended on the condition that a certain number of hours work are delivered at a certain place within a certain time. Therefore, in the Danish context there are zero grounds for even remotely considering CSO to be restorative in nature.

In Denmark, in the absence of restorative practices and processes like conferencing, sentencing circles or community reparation boards, only Victim Offender Mediation has the "taste" of Restorative Justice. But contrary to many other countries, "successful" VOM does not replace a criminal justice procedure in Denmark. The founding fathers of the Danish VOM-concept, namely the Crime Prevention Council, have never argued that VOM should be a replacement. It is not clear whether this attitude was founded on tactics (the idea of VOM was not welcome among politicians for many years, they needed to "sugar the pill" so to speak) or whether the Council really was convinced that this would be the best solution. Anyway the committee which prepared the Code on VOM on the background of local experiments debated this intensively. The viewpoints are described above and the outcome was status quo – VOM is a supplement, not an alternative to a criminal justice procedure.

Experience has shown (among others experience from the introduction of CSO) that introducing new popular/progressive strategies often brings with it a risk of net-widening, and this risk might well also apply to VOM if it were introduced purely as a replacement of ordinary criminal procedure. On the other hand, there is also a net-widening aspect in the current Danish model, namely

concerning persons below the age of criminal responsibility. By opening VOM for children below that age threshold there is a risk that when these children reach the age of criminal responsibility and then come into contact with the police again, they might be met with the viewpoint that they have "had their chance" and that therefore diversion (which should always be the first choice for minor first-timers) should not be considered.

Experiences from abroad have shown that it is a very small risk to use VOM as an alternative to criminal justice in first-time cases of non-serious offending. If the offender reoffends, he will be sentenced next time and if he does not reoffend his life will be much better and society will save money. As is mentioned in the evaluation (see *Section 4* above) the Danish model should develop from a purely victim-oriented perspective into a combined victim/crime prevention-perspective.

Though VOM has existed on an experimental basis for decades local police felt that the nationwide implementation was expected to go very fast. The Code on VOM was published six months before everything was supposed to be in function. Among other things mediators had to be found and trained. The relatively poor education of the mediators must be understood in that light. Now that the first rush is over it should be seriously considered how to educate and train the first mediators further. It should also be considered to evaluate the education and on the basis of the evaluation to develop it if this turns out to be a good idea. Specific attention should be paid to the fact that the mediators are not full-time professionals. There may be both pros and cons to this fact, but this practice should not be retained only because "this is the way we are used to do it."

In cases where VOM does not replace criminal justice it should be considered to (re)offer VOM during the offenders' time in prison. In some cases where one of the parties was not ready before court it may be that they would be able to profit from VOM after some more time has elapsed. When listening to the good experiences from victims as well as offenders it might also be considered seriously to develop ways of motivating the parties without pushing them in an unethical manner.

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England and Wales

Jonathan Doak

1. Origins, aims and theoretical background of restorative justice

Restorative justice has penetrated the English criminal justice system in a somewhat sporadic fashion. While there is undoubtedly a growing body of proponents keen to promote its benefits, there has been also been a pronounced skepticism in many policy circles as to the wisdom of giving restorative initiatives a more central stage. As a common law jurisdiction, traditional English legal doctrine dictates that the relationship between the offender and victim is private in nature, and thereby falls within the remit of the civil, as opposed to the criminal law. The majority of crimes against the person or against property also constitute civil wrongs; therefore it has been traditionally held that restoration is the proper function of the civil, rather than the criminal courts.[1]

This conception exposes the tensions which are inherent in any attempt to integrate restorative values in a fundamentally adversarial system which remains strongly orientated towards a retributive model of criminal justice. However, there is some evidence that such a purist view of criminal justice is being gradually eroded. The late 1990s witnessed a shift in youth justice policy, with an increasing emphasis on more restorative-based solutions. In the last decade or so, a similar shift has been evidenced in respect of adult criminal justice. However, it is still the case that, on the whole, restorative justice applications remain on the periphery of the English criminal justice system.

1 *Doak* 2008, p. 26.

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

Restorative justice is most developed within the juvenile justice arena, which underwent a radical overhaul in 1998. Restorative principles were first given a statutory footing in the Crime and Disorder Act 1998, which provided for the introduction of 'Reparation Orders' and 'Action Plan Orders 'as low-level court disposals for young offenders between the ages of 10 and 17. The following year, legislation was enacted to make 'Referral Orders' a mandatory court disposal for first time low-level juvenile offenders between the ages of 10 and 17. The Referral Order operates through diverting most first time offenders away from court (following conviction) for sentencing before a Youth Offender Panel, comprising volunteers from the local community as well as professional input from a member of a Youth Offending Team. Victims may also attend and contribute to the hearing.

In addition to these statutory schemes, police forces in England and Wales have significantly amended their cautioning practice – 'restorative cautioning' and 'conditional cautioning' are now relatively commonplace. These practices differ from the traditional 'simple' caution by attempting to reintegrate the young person and by focusing on repairing the harm through such things as reparation and apology.[2] Other restorative tools which have recently become available to the police are the Youth Restorative Disposal and the Youth Conditional Caution – both of which were recently introduced by the government with a view to incorporating more restorative practices within contemporary policing.

Restorative practices with adult offenders are much less developed than those that exist for their juvenile counterparts. There are currently no statutory schemes in place. However, as with juveniles, many police forces now also use restorative and conditional cautioning for certain adult offenders. In addition, there are numerous mediation and reparation schemes that lie outside the formal parameters of the criminal justice system, and as such are not enshrined in legislation. These are often overseen by voluntary organizations, which work closely in conjunction with local government and various state agencies, including the police, probation, social workers, and the Prison Service.

As with juvenile offenders, there are also a number of penalties available to the court on conviction which can contain some reparative elements, though the process itself cannot be described as restorative. Such penalties include the power to order the offender to pay compensation as part of a sentence for any personal injury, loss or damage resulting from the offence.

2 *O'Mahony/Doak* 2004.

1.2 Reform history

The only restorative practices operating in the English criminal justice system before 1997 relied on the discretionary powers of the police and probation officers to divert offenders to a limited number of locally-based mediation and reparation schemes. Most of these programmes were aimed at young offenders and were used in conjunction with an official police caution, though there were a small number of schemes which sought to adopt mediation techniques to effect reparation with adult offenders.[3] Notwithstanding, many of these schemes struggled to secure funding and the necessary number of referrals from the criminal justice agencies to make such projects viable.

The election of the 'New Labour' government in 1997 introduced a radical overhaul of the juvenile justice system which gave rise to a number of restorative practices. There were also some moves to encourage the more widespread use of restorative practices within the adult justice system, although most commentators accept that their potential remained largely underdeveloped. In 2010, a new Conservative/Liberal Democrat coalition was elected. The new government produced a consultation paper, *Breaking the Cycle*,[4] in December 2010, which expressed considerable support for the wider use of restorative justice in the criminal justice system. However, the full extent of reform which will follow in the wake of that paper remains to be seen.

1.3 Contextual factors and aims of the reforms

Some of the earlier developments in restorative justice can be attributed to a sense of failure with the formal justice system. During the 1970s and 1980s, it became increasingly clear that the criminal justice system was failing to meet the needs of victims,[5] and had also failed in terms of tackling re-offending, particularly among juveniles.[6]

New Labour came to power in 1997, and was quick to adopt sound-bites such as 'tough on crime, tough on the causes of crime', 'rebalancing the criminal justice system', and 'putting victims at the heart of criminal justice'. This type of punitive rhetoric was a political response to media coverage of moral panics concerning, inter alia, youth crime, paedophilia, rising crime rates generally, and the perceived rise in anti-social behaviour. Despite the inherent contradiction between such rhetoric and the welfare-orientated nature of restorative

3 See *Marshall* 1984; *Dignan*, 1990; 1992.

4 *Ministry of Justice* 2010.

5 See e. g. *Shapland et al*. 1985.

6 See *Audit Commission* 1996.

justice,[7] the government was keen to adopt 'victim friendly' policies – including the increased use of RJ – so that they were seen to be doing something to address the public's concern about violent crime.8 Restorative justice approaches were viewed as 'constructive, community-based responses to crime'.[9] In the field of youth justice in particular, reforms were based around the 'three Rs', namely responsibility, restoration and reintegration, which were regarded as the cornerstone of law and policymaking.[10] In a strategy document published in 2003, the Government signalled that it wished to provide victims with a greater voice in the criminal justice system, and to extend the use of reparative measures and processes for both adults and young people, and to include serious as well as minor offences.[11] To this end, the government agreed to fund an evaluation of three programmes, detailed in *Section 3.4* below.

The new coalition government's policy paper, *Breaking the Cycle*, envisaged that RJ might be expanded in a number of significant ways. First, RJ was seen as a superior intervention for low-level offenders, rather than a caution given by the police. By the same token, it was also seen as an appropriate diversion from prosecution, where prosecution would be likely to lead to a fine or community sentence rather than a custodial sentence. The paper also envisaged the wider use of RJ for offenders prior to sentencing who had pled guilty. Used in this way, it was suggested that RJ processes could help inform the court's decision about the type or severity of sentence passed. The full effect of the Government's proposals remains to be seen, although in the interim period it can be noted that the Government appears to have backtracked somewhat, with concerns over the costs of implementing new criminal justice programmes – along with a desire to be seen to be tough on crime – apparently impeding the pace of reform.

1.4 Influence of international standards

Few would dispute the observation that restorative justice has risen to a position of prominence on the international platform, and a variety of international instruments send a clear signal that restorative initiatives are ought to be prominently located at the forefront of any given society's response to crime. Article 10 of the EU Framework Decision, which calls on Member States to promote mediation in criminal cases for offences which it considers appropriate

7 *Newbury* 2011.

8 *Garland* 2002.

9 *Home Office* 2002, para 5.8

10 *Home Office* 1997.

11 *Home Office* 2003.

for this sort of measure, was clearly instrumental in providing support for the government's new policy platform, although its vague terminology meant that it was not a key driving factor. The same can be said in respect of the Council of Europe's Recommendation (99)19, 'Concerning Mediation in Penal Matters', the UN Vienna Declaration on Crime and Justice, and the more recent UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. Although such instruments certainly exerted a downward pressure on the UK government to develop more restorative policies, the use of non-prescriptive language (and the fact that they were not legally binding) meant that the main catalysts for policy development lay firmly in the domestic political arena.

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

Although policymakers in England and Wales have become increasingly keen to promote restorative justice as an option within the mainstream criminal justice system, there has been a marked reluctance to legislate to this end. The existing legislative framework thus grants only a partial insight into the types of restorative practices currently adopted within the English criminal justice system. In many cases, existing legislation is silent, and as gatekeepers to the criminal justice system, the discretion of the police and the Crown Prosecution Service is vital in sustaining a number of restorative programmes outside the formal parameters of the criminal justice system. As with many jurisdictions, restorative practices contained within existing legislation relate primarily to young offenders.

2.1 Pre-court level

2.1.1 Adult criminal justice

The only restorative measure prescribed in legislation for adults at the pre-court stage of criminal procedure is the conditional caution. The caution differs from that traditionally given by police officers insofar as it emphasizes restorative principles, including rehabilitation and reparation. Conditional cautions are provided for a range of low-level offences including common assault, theft, and criminal damage under section 23 of the Criminal Justice Act 2003. The decision to offer a conditional caution rests with the Crown Prosecution Service (as opposed to the police, who still decide whether or not to offer traditional 'simple' cautions). A conditional caution may only be offered under the terms of the legislation if:

- the officer has evidence that the person has committed an offence;
- the relevant prosecutor decides that there is sufficient evidence to charge the person with the offence and grounds for giving a conditional caution;

- the offender admits the offence to the authorised person;
- an explanation of the effect of a caution and the warnings about the consequences of failure to observe the conditions has been given;
- and, finally, the offender signs a document that sets out details of the offence, an admission, consent to the caution and consent to the attached conditions.

Guidance issued by the Director of Public Prosecutions assists prosecutors in formulating the appropriate conditions to achieve the rehabilitative, reparative or punitive objectives of a conditional caution.[12] Factors to be taken into account include:

- Opportunities to provide reparation or compensation to any victim or relevant neighbourhood or community;
- Use of conditions to reflect and secure the interests of the victim and neighbourhood or community (for example by requiring the offender to stay away from a specific area);
- Use of restorative and reparative processes to have a positive impact on the community or individuals affected by the offending behaviour;
- Opportunities to provide reparative unpaid work that benefits the community;
- Use of a financial penalty condition to punish the offender and deter future offending.

The victim will be consulted in relation to the nature of these conditions – particularly where they entail some form of direct reparation (in which case the victim must give his/her consent).

Whilst the conditions themselves may thus be restorative in nature, participation in a complementary restorative process may also be a condition of the caution itself. In such a case, positive participation in the process is all that is required of the offender by the caution; any further actions arising from the restorative encounter will form a voluntary agreement between the offender and the victim. These interventions are generally administered by a voluntary or community organisation; prosecutors themselves do not act as facilitators or mediators. The outcomes of such interventions are not usually binding, and failure to perform such actions will not generally result in a breach of the conditional caution.

Alternatively, if the caution is administered after the offender has already participated in a restorative process, the conditions of the caution may reflect the outcome of that process. In this scenario, the agreement reached between the victim and offender will be referred to the prosecutor for approval. Before

12 *Director of Public Prosecutions* 2009.

incorporating the agreement within the terms of the conditional caution, the prosecutor must ensure that the measures agreed to by the offender are appropriate insofar as they are proportionate to the offending and meet the public interest requirements of the case. Prosecutors are, however, discouraged from interfering with agreements since this would potentially undermine the effectiveness of the restorative process.

Where the conditions attached to the caution are complied with, the case will be discharged and no further prosecution and/or proceedings for the offence(s) will be commenced. The responsibility then lies with the offender to show that the conditions have been met, and caution will stipulate what will be acceptable as evidence that it has been done. However, he or she must abide by any conditions laid down in the caution; failure to do so may result in prosecution for the original offence.

If the specific criteria for offering a statutory conditional caution are not met, it is increasingly common practice for the police to vary the form of the traditional caution to incorporate restorative elements (see *Section 3.2* below). Alternatively, if the offence is a particularly minor crime, the police may use their discretion to refer the matter to a locally based voluntary or community scheme which operates within the particular locality (see *Section 3.3* below).

2.1.2 Juvenile justice

Restorative principles have underpinned police cautioning and final warnings for young offenders since the enactment of the Crime and Disorder Act 1998. The Act introduced a new 'final warning' scheme to replace the traditional police caution. This provided that young offenders would generally be afforded a reprimand, followed by a final warning, before prosecution would be considered. The guidance issued to the police emphasised that final warnings should be carried out using a restorative framework.[13] Police officers administering final warnings were thus advised to organise a restorative final warning for all young offenders that would have been formerly dealt with by way of a traditional caution. Those affected by the offence, including the offender, victim and any relevant supporter/family member may thus be invited to attend the final warning and police officers received training to facilitate a restorative-based discussion about the harm caused by the offence and how it might be repaired. The police should also refer the matter to a local Youth Offending Team who should in turn arrange for the offender to participate in a rehabilitation programme unless they consider it inappropriate to do so.[14]

13 *Young* 2001.

14 Crime and Disorder Act 1998, s 66(4).

Conditional cautions were also introduced for young offenders following pilots established in January 2010. Section 48 of the Criminal Justice and Immigration Act 2008 extended the scope of applicability of conditional cautions to allow the police to use the measure for young people aged 16 or 17 years. The Youth Conditional Caution is the highest tariff out-of-court disposal for young offenders, and operates on a similar basis to the scheme in place for adults. Only first-time offenders who admit their guilt and consent to the process are eligible to receive a conditional caution. It is available for the same range of low-level offences, and operates in the same way as the adult conditional caution described above. In the same way, the Youth Conditional Caution emphasizes restorative principles, including the provision of reparation to victims or the community and the reintegration of the offender into the community at large. Where the offender fails to fulfill any of the conditions, he or she may be prosecuted for the original offence. A second Youth Conditional Caution should not generally be offered unless there are exceptional circumstances.

A further recent development relating the policing of juveniles is the introduction of the new 'Youth Restorative Disposal' which allows for a quick form of 'street justice' based on restorative principles. This new disposal offers an alternative to dealing with low-level, anti-social and nuisance offending through arrest and formal criminal justice processing. Under the scheme, 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. 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.

2.2 Court level

2.2.1 Adult Criminal Justice

The adult criminal courts remain retributive in their practice, both in terms of the process that is used and the sentence that is imposed. However, there is some potential for restorative elements to be imposed as part of the sentence. These include the power of the court to order the offender to pay compensation as part of a sentence for 'any personal injury, loss or damage resulting from the offence'.[15] Criminal courts are now under a duty to consider making orders in all cases and must now state reasons if not doing so.[16] As with any element of a

15 Criminal Justice Act 1972, s 1.

16 Powers of Criminal Courts (Sentencing) Act 2000, s 130(3).

sentence, these orders may be subject to appeal. Failure to comply with such an order will constitute a contempt of court, meaning that the offender may be then be sentenced to a term of imprisonment.

2.2.2 Juvenile Justice

Under the Youth Justice and Criminal Evidence Act 1999, referral orders are made available to the youth courts as a primary court disposal method for first-time offenders between the ages of 10–17 years. These orders involve the young person being referred to a panel to determine how the offending should be dealt with and what form of action is necessary. Panels comprise volunteers from the local community and also provide for professional input from a member of a Youth Offending Team. Victims may also attend and contribute to the hearing. Parents are required to attend the panel meeting (if the young person is under the age of 16) and meetings are usually held in community venues. 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.[17] 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'.

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. The order should last between 3-12 months. The young person must agree to the plan; if they refuse they will be referred back to the court for sentencing. This will also happen where the young person does not abide by the terms of the agreement.

Where the criteria for imposing a referral order are not met, the court may consider imposing a 'reparation order' or an 'action plan order' pursuant to the Crime and Disorder Act 1998. Both types of order may be made in respect of young offenders between the ages of 10 and 17, and may contain a number of restorative elements. Reparation orders require young offenders to make specific reparation either to individual victims or to the community. Such reparation should be proportionate to the seriousness of the offence, but should not exceed a total of 24 hours in aggregate. In addition, it must be carried out over a maximum period of three months from the date that the order is made by court. Examples include writing a letter of apology, offering compensation to the victim, repairing criminal damage, cleaning graffiti or picking up litter. The Order may not be made to any person without their consent. In those cases where the victim of the offence does not wish to receive reparation directly,

17 *Home Office* 2002.

reparative measures may be undertaken which are likely to benefit the wider community.

Action plan orders are similar in nature (though are rarely used in practice),[18] and usually combine forms of reparation with other (possibly punitive) elements aimed at tackling the underlying causes of offending behaviour. Neither reparation orders nor action plan orders can be made if the sentence is otherwise fixed by law. Breach of such an order will constitute contempt of court and in such an event the young person will be returned to the court for re-sentencing.

2.3 Restorative Justice elements while serving sentences

There are currently no formal measures for either adults or juveniles that provide for the use of restorative practices while serving sentences. Nor is there any formal means by which an offender's participation in such a programme counts as a potential ground for early release.

There are, however, a number of initiatives established by voluntary organisations, which are run with the co-operation of prison authorities and/or local and national government. It should be stressed that these programmes do not, and never have had, any legislative status. Moreover, they tend to differ somewhat in the nature and form of the intervention. It is therefore impossible to generalise about the operation of the schemes, other than to stress that they were entirely voluntary and operated as an adjunct (rather than as a substitution) to the formal criminal process. Further details of the schemes funded by the Home Office are set out below at *Section 3.4*.

3. Organisational structures, restorative procedures and delivery

3.1 Young Offender Panels

Referral Orders are the primary court-based disposal for young offenders in England and Wales. Panels comprise two volunteers from the local community along with one professional drawn from the Young Offender Team (YOT). YOTs are multi-agency teams tasked with helping to prevent young people from

18 The Action Plan Order, along with a range of other community sanctions, has recently been abolished through the introduction of a generic, "menu-based" community sanction known as the Youth Rehabilitation Order (YRO) in the Criminal Justice and Immigration Act 2008. It remains available, however, for offences that were committed prior to the commencement of the relevant YRO provisions.

re-offending.[19] They are funded and co-ordinated by local government. 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.

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.

3.2 Court-based reparation and compensation orders

Both youth and adult courts can order offenders to pay some form of reparation to the victim or the community. As noted above, reparation orders and action plan orders are available in the youth court for those cases that do not meet the statutory grounds for referral to a Young Offender Panel. Both types of order may be made in respect of young offenders between the ages of 10 and 17, and as outlined above, may contain a number of restorative elements. 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.

Although reparation and action plan orders are restricted to juveniles, compensation orders may be handed down by adult courts as part of the

19 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.

sentencing process. Any criminal court may order that compensation be paid to the victim in addition to any other penal sanction. The level of the compensation order is based on a list of tariffs based on the injuries/damage suffered by the victim, although the level of compensation awarded will normally be adjusted to take account of the offender's means and ability to pay. Victims are entitled to make a statement to the court which can be taken into account in calculating the extent of the harm suffered.[20] Offenders sentenced to imprisonment will not normally be required to pay any compensation owing to their loss of income. Offenders are usually allowed time to pay, and to pay by instalments. An enforcement officer (an official of the court) will follow up any failures to make payment, which could ultimately amount to a contempt of court.

3.3 Restorative Cautioning

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 adult offenders, although they are deleted from juvenile records once the offender turns 18.

Conditional Cautions may be applied in cases involving both adults and juveniles subject to a number of conditions (see *Sections 2.1.1* and *2.1.2* above). The cautions 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. As noted above, participation in mediation or conferencing may form an 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

20 This is known as a Victim Personal Statement.

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 office, consent to the caution and to the attached conditions.

In cases of minor crime and anti-social behaviour, a formal caution would be considered inappropriate. As such, police may be able to rely on tools such as the Youth Restorative Disposal (YRD). 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.

3.4 Interventions by Voluntary and Community Organisations

On occasions, the police and other criminal justice agencies may work in conjunction with local voluntary organisations providing restorative justice services as part of a conditional caution or YRD, or may rely on their services as alternatives (or in addition to) proceeding with prosecution at court. These schemes differ substantially in the form of intervention adopted, the target stakeholders, the funding arrangements, training provided, and as regards the stage of the criminal process at which the intervention occurs. Moreover, their precise operation is not enshrined in legislation and is very much dependent on the exercise of police and prosecutorial discretion within local areas. It is therefore difficult to generalise about their operation, but the role of some of the most significant programmes is considered in this section.

In 2001, three programmes were funded by the Home Office to examine how restorative projects might work with the adult offenders convicted of serious offences. CONNECT, a London-based organisation, focused on providing a variety of restorative interventions, including mediation (direct and indirect) and conferencing for adult offenders who have committed a wide variety of offences. A second scheme managed by the Justice Research Consortium (JRC) provided conferencing for adult offenders involved in burglary and street crime. It operated in a number of English regions, with conferences being organised after a guilty plea and prior to sentence. It also dealt with young offenders and

adults at a police level, when they were receiving a police final warning (caution) as well as adult conferencing at community sentencing and pre-release from prison stages. A third scheme, REMEDI, operating in South Yorkshire, provided both indirect and direct mediation at various stages of the criminal justice system, including a police final warning stage and a resettlement stage prior to release from prison. These schemes were subject to an extensive evaluation, the findings of which are set out below in *Section 4.2.4*.

In a few areas of England, Neighbourhood Community Justice Panels also provide a form of restorative justice outside the formal parameters of the criminal justice system. Pilot programmes were established in Sheffield, Somerset and Manchester in 2009, but these programmes are not entrenched in legislation and their operation relies heavily on volunteers from the local community. Referrals are generally made by local police forces for low-level offences and anti-social behaviour on a discretionary basis. Offenders will often be referred to panels comprising local volunteers from the community by the police. The most common matters dealt with include criminal damage, assault, and disputes between neighbours. Victims and offenders are invited to discuss the causes of the offence, its impact, and the best means of providing reparation. If agreement is reached between the parties, a failure to comply with its conditions will lead to the reconvening of the panel, which may in turn lead to referral back to the formal criminal justice system.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

Official data is only available in relation to those processes which currently form part of the official youth justice system. 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.[21] 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 dependent on local circumstances. Accordingly, data on such practices cannot be centrally recorded.Currently no

21 *Ministry of Justice* 2011a; see further Cap Gemini Ernst & Young 2003.

official data is published on the use of restorative justice measures adopted for adults, as here too the majority have no statutory footing and are provided at the local level.

4.2 Findings from implementation research and evaluation

Considerably more information is available from research and evaluation into the various types of restorative justice operating in England and Wales.

4.2.1 Young Offender Panels

In their study of schemes piloted in eleven different areas, *Newburn et al* found that referral orders were, on the whole, working well. Many young offenders played an active role in their panel meetings and were satisfied with their experience.[22] An overwhelming majority felt that they were treated with respect (84%) and with fairness (86%). Three quarters of the young people agreed that their plan or contract was 'useful' and 78% agreed that it should help them stay out of trouble.[23] Parents also appeared to be positive about the orders, and compared with the experience of the Youth Court, parents appeared to understand the referral order process better and felt it easier to participate.

Yet the research also found that the restorative potential of the referral order was significantly hindered by the very low levels of victim participation: just 13% had attended panel meetings. In practice, this meant that, like reparation orders, it was much more commonplace for reparation to be directed towards the somewhat elusive concept of 'the community', rather than to individual victims who had suffered direct harm. Whilst it was found that 82% of contracts agreed at Youth Offender Panel meetings involved some form of reparation, this only took the form of direct reparation to victims in 7% of all contracts. Fears have also been expressed to the effect that some young defendants engage in 'tactical' pleading in order to either avoid or receive a Referral Order.[24] On a positive note, it is nonetheless clear that the referral order scheme has integrated certain restorative principles into the youth justice system. *Newburn et al's* study concluded that panel sessions were 'constructive, deliberative and participatory forums.'[25]

22 *Newburn et al.* 2002.

23 *Ibid*.

24 *Cap Gemini Ernst & Young* 2003.

25 *Ibid*, 62.

4.2.2 Restorative Cautioning

The use of restorative cautioning by the police was subject to an intense evaluation based in the Thames Valley area from 1998-2001.[26] 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. In the evaluation, the researchers reported that offenders, victims and their supporters were generally satisfied and felt they had been treated fairly. However, a minority of victims and offenders felt they had not been adequately prepared for the process, or felt they had been pressured into it. Nonetheless, both victims and offenders generally believed that the encounter helped offenders to understand the effects of the offence and induced a sense of shame in them, which is a particularly important goal of a restorative intervention. 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, the researchers also found that the implementation of the restorative cautioning model in individual cautions was sometimes deficient, with facilitators occasionally excluding certain participants or asking inappropriate questions (e. g., relating to prior offending or attempts to gather criminal intelligence). Some two-fifths of offenders reported feeling stigmatised as a 'bad person' and some officers appeared to pressurise offenders into apologising or making reparation. More generally it was found that some officers tended to dominate discussions and did not allow other participants to freely express themselves. However, the researchers noted that practice had improved considerably towards the end of the research period. Overall, their view was that restorative cautioning represented a significant improvement over traditional cautioning, and was more effective in terms of reducing recidivism.[27] The research found the police to be enthusiastic and sincerely committed to the restorative process. They had been generally well trained and it was clear from the interviews with the young people and their parents involved in the process that they placed a high degree of confidence and support for the scheme. There was also some evidence that it had other beneficial effects especially in terms of helping improve police/community relations.

26 *Hoyle et al*. 2002.

27 *Ibid*.

The new Youth Restorative Disposal has also been subject to a recent evaluation.[28] 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 reprimand which would result in a police record). It was also noted that many victims did not want the offender to be criminalised in this way; most simply wanted an apology and some form of assurance that the young person would not do the same thing again.

By the same token, the YRD was also popular with police officers not because it was perceived to save time, but because officers also 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 Youth Offending Teams or involve any further intervention.

4.2.3 Court-based reparation and compensation orders

There has been no recent research into the use of compensation orders in adult criminal justice. However, *Dignan's* 2002 research into the operation of reparation orders grants us a useful insight into the operation of reparation orders in the youth justice system. While the participation of victims was supposed to be voluntary, in some cases it was found that victims were not being consulted; and practice in four pilot areas was found to be largely inconsistent.[29] 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.[30] *Dignan* argues that, like the other measures contained in the 1998 Act, 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.[31] He observed that a substantial majority of reparation orders (80%) had no impact on the direct victim, and almost two-

28 See *Rix et al* 2011.

29 *Dignan* 2002, p. 78.

30 *Dignan* 2002, p. 79.

31 *Dignan* 2005, p. 111.

thirds of orders (63%) contained reparation directed at the community rather than the victims.[32]

4.2.4 Interventions by Voluntary and Community Organisations

As noted above, three RJ programmes operated by the community and voluntary sector were independently monitored and evaluated during the period 2001-2006. The research, conducted by a team from the University of Sheffield, drew on the records of 840 restorative events, observed 285 conferences and held interviews with 180 offenders and 259 victims who had experienced the restorative justice process.

Overall, the research produced very positive findings. Victims and offenders were engaged with the process, and overwhelmingly felt that they were fairly treated and had been given a chance to express themselves. Most victims stated that offenders had attempted to address the harm they had caused and this had helped them contribute to a sense of closure. The conferences also provided a forum in which offending-related problems were discussed. Most victims felt their participation in the scheme had lessened the negative effects of the offence on them and most offenders felt the intervention would lessen their likelihood of re-offending. Nearly three quarters of participants said they would recommend the process to others for similar offences.[33] Facilitators and mediators were well-trained, and were knowledgeable about matters such as accountability to the criminal justice system, protection of human rights, confidentiality of the proceedings and the exclusion of what was said from being used as evidence in court.[34]

The schemes that provided direct mediation seemed to evoke better reactions from participants than those providing indirect (not face-to-face) mediation. The researchers suggest that direct mediation may be a better way of providing a restorative environment, in which the potential of restorative justice may be more likely to be achieved, especially relating to facilitating communication and moving forward. Overall, the research was positive about the restorative interventions and showed that they offered considerable advantages to the participants.

In their final report, the researchers also investigated whether restorative justice 'works' in terms of reducing the likelihood of recidivism and whether the schemes represented value for money.[35] The scheme's use of random control groups allowed comparisons to be made between restorative and conventional justice processes. Statistically, offenders who participated in the three schemes committed significantly fewer offences in the subsequent two years, compared

32 *Dignan* 2002, p. 80.

33 *Shapland et al* 2007.

34 *Shapland et al* 2006.

35 *Shapland et al* 2008.

with their counterparts in the control groups. The report also found that a positive likelihood existed of avoiding re-conviction over the next two years.

5. Summary and Outlook

As with many jurisdictions, restorative justice is much more developed in the juvenile justice system in England and Wales. The system of referral orders, in particular, operates relatively efficiently, and is perceived positively by young offenders themselves. However, referral orders tend to target low level offending and first time offenders and the research evidence suggests that they have provided limited engagement with victims.

As regards adult criminal justice, there are a number of practices within the current framework that include certain restorative elements, but restorative justice remains very much of the periphery of the criminal justice system. Mediation and conferencing schemes do exist, but they cannot be regarded as a formal part of the criminal justice process since their role is not entrenched in legislation and they only operate in certain parts of the country. Despite the Home Office having funded an intensive evaluation of three schemes, and overwhelmingly positive findings emanating from the research, there is no immediate prospect of RJ becoming more widely incorporated within the adult justice system.

Notwithstanding the positive tone of a consultation paper published by the new coalition government in 2010,[36] the government now appears to have backtracked somewhat and have reverted to using much more cautionary language concerning the future of RJ.[37] While the tone of its latest policy paper is broadly supportive of RJ as a concept, proposals for reform seem somewhat vague and the prospect of any radical reorientation of the criminal justice system in not likely to be forthcoming in the short of 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.[38] 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.

Nevertheless, the place of RJ in the criminal justice system continues to be a fruitful topic for academic and policy debates. There is, undoubtedly, a plethora

36 *Ministry of Justice* 2010.

37 *Ministry of Justice* 2011b.

38 *Sherman/Strang* 2007.

of questions about the overall place of restorative justice within the wider criminal justice system. These include questions as to whether the existing structures of the conventional paradigm can be enhanced to accommodate reparation in a meaningful way through harmonisation with restorative principles, or whether the conventional paradigm ought to be entirely usurped by a new restorative-based framework. Some commentators have suggested that a process of harmonisation of the two paradigms may take what is best from both paradigms and address the flaws in each system to create a strong, unitary model of criminal justice.[39] Others, however, have argued that such an approach would mean that restorative perspectives and practices would be submerged owing to the predominance of existing formal structures;[40] or that the retributive paradigm is fundamentally incapable of accommodating restorative principles.[41] It is clear, however, that if a restorative model is ever to replace the role of the conventional paradigm of criminal justice, the concept itself needs to be significantly developed and refined.

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39 *Dignan* 2003; *Van Ness* 2003; *Groenhuijsen* 2004.

40 *Walgrave* 2002.

41 *Zehr* 2005; *Braithwaite* 2003.

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Estonia

Jaan Ginter

1. Origins, aims and theoretical background of restorative justice

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

Estonia employs:

- conciliation of teenage delinquents with their victims;
- community service as a substitute for imprisonment;
- termination of criminal proceedings if the person suspected or accused of the offence has remedied or has commenced to remedy the damage caused by the criminal offence or has paid the expenses relating to the criminal proceedings, or assumed the obligation to pay such expenses;
- conciliation as a distinct ground for termination of criminal proceedings.
- Conciliation, where it does not effect termination of proceedings, can be taken into account at sentencing as a mitigating circumstance.

1.2 Reform history

All RJ interventions have become available as a result of top-down reform by introducing new measures via legal acts. First of all restorative justice avenues became available for young delinquents. On 1 September 1998 Juvenile Sanctions Act made conciliation available in the criminal justice system for juveniles who are prosecuted for a crime but the prosecutor's office or court has decided that the teenager can be influenced without imposition of a criminal sanction and refers the criminal file to the Juvenile Committee of the place of residence of the minor. The Juvenile Committee then decides whether to employ conciliation or some other alternative.

Since 1 September 2002, when the Estonian Penal Code entered into force, community service can be employed as a substitute for imprisonment. Community service as it is employed in Estonia does not automatically include a restorative element or approach, but if applicable, courts and probation services can seek to do so (see below).

Since 1 July 2004, when the incumbent Code of Criminal Procedure entered into force, it has been possible for a court to terminate criminal proceedings at the request of a Prosecutor's Office where there is a lack of public interest in continuing proceedings, the degree of guilt is negligible and the person suspected or accused of the offence has remedied or has commenced to remedy the material damage caused by the criminal offence or has paid the expenses relating to the criminal proceedings, or assumed the obligation to pay such expenses, and the suspect or accused consents to such termination of proceedings. So, where the offender has remedied or attempted to remedy the damage caused, the proceedings can be terminated by the prosecutor, but only if the victim consents to it. Thus the victim's opinion is decisive for this form of diversion.

On 17 January 2007 the Code of Criminal Procedure was amended, making conciliation available as a distinct ground to terminate criminal proceedings. If the facts relating to a criminal offence in the second degree (i. e. maximum punishment available does not exceed five years of imprisonment) are clear, there is no public interest in further prosecution and the suspect or the accused has reconciled with the victim pursuant to the procedure provided for in § 203^2 of the Code of Criminal Procedure, the Prosecutor's Office may request termination of the criminal proceedings by a court with the consent of the suspect or accused and the victim.

1.3 Contextual factors and aims of the reforms

Regarding the context in which the above described restorative avenues and measures came to be introduced, unlike in many other European countries there was almost no influence from a victims' rights movement for instance. Rather, the central motivating factors underpinning the reforms were pragmatical political decisions to lower the number of inmates in prisons.

The aim of the reform was to introduce new routes for diversion and to reduce the workloads of the formal justice system. The Ministry of Justice emphasized in its explanatory notes to the 2007 Bill that the informal conciliation procedure can be applied either in connection with the criminal proceedings or independently to reconcile victim and offender and address the causes of the conflict that led to the criminal offense. The objective was that it would allow the victim more involvement in decision-making, and that would increase people's sense of security and involvement. Likewise, it was anticipated that it would reduce the tension, fear, anger and similar emotions associated with

crime that can lead to taking justice illegally in one own hands (vigilantism) in extreme cases.[1]

1.4 Influence of international standards

The Explanatory Notes (2007) emphasize that the bill was drafted with the intention to implement Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, which obliged member states to introduce mediation in penal matters into their national legislation by 2006. The Explanatory Note refers to the Council of Europe Committee of Ministers Recommendation No. R (99) 19 concerning mediation in penal matters as well. However, the Explanatory Note also underlines that the Council of Europe Recommendation does not have any legally binding effect and has therefore been taken into account only as a policy suggestion.

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

2.1 Pre-court level (police and prosecution service)

2.1.1 Adult criminal justice

In Estonia Restorative Justice is mostly available in the context of different avenues for diversion and follows or serves as a precondition for termination of criminal proceedings (The Estonian Code of Criminal Procedure, the Victim Support Act, Conciliation Procedure Regulation). Conciliation can serve as one ground if the maximum punishment prescribed for the crime in the Penal Code does not exceed five years of imprisonment. Termination of criminal proceedings on the grounds of conciliation can be initiated at the request of a Prosecutor's Office or a Court.

A Prosecutor's Office or court may send a suspect or accused and the victim to conciliation proceedings with the objective of achieving conciliation between the parties and a remedying of the damage caused by the criminal offence. The consent of the suspect or accused and the victim is necessary for conciliation proceedings to be applicable. In the case of a minor or a person suffering from a mental disorder, the consent of his or her parent or another legal representative or guardian is also required.

A Prosecutor's Office or court sends the order or ruling that conciliation proceedings should be applied to the conciliator so that such proceedings be organised. The conciliator shall formalise the conciliation as a written

1 *Explanatory Note* 2007, p. 1.

conciliation agreement that has to be signed by the suspect or accused and the victim (and the parents, legal representative or guardian of a minor or a person suffering from a mental disorder). The conciliator shall subsequently send a report with a description of the course of conciliation to the Prosecutor's Office. Where conciliation between victim and suspect/accused is successfully achieved, a copy of the conciliation agreement shall be appended to the report.

After the termination of the criminal proceedings, the conciliator shall verify whether or not the conditions of the conciliation agreement are met. A conciliator has the right to request submission of information and documents for confirmation of the performance of the obligation. The conciliator shall notify the Prosecutor's Office of performance of the obligation or of failure thereof.

A conciliator has the right, in performing his or her duties, to examine the materials of the criminal matter with the permission of and to the extent specified by the court. The conciliator shall maintain the confidentiality of facts which have become known to him or her in connection with the conciliation proceedings. A court or a Prosecutor's Office may summon a conciliator for oral questioning in order to clarify the content of the agreement of the conciliation proceedings.

A conciliation agreement becomes binding by a ruling of a judge sitting alone.[2] If necessary, the conciliator, the prosecutor, the victim, the suspect or accused and, at the request of the suspect or accused, also their legal counsel are summoned to the judge for the adjudication of the request of the Prosecutor's Office.

Where criminal proceedings are terminated, the court imposes, at the request of the Prosecutor's Office and with the consent of the suspect or the accused, the obligation to pay the expenses relating to the criminal proceedings and to meet some or all of the conditions of the conciliation agreement provided for in subsection 203^2 (3) of the Code of Criminal Procedure on the suspect or accused (a conciliation agreement shall contain the procedure for and conditions of remedying of the damage caused by the criminal offence. A conciliation agreement may contain other conditions as well). The term for the performance of the obligation shall not exceed six months. A copy of the ruling shall be sent to the conciliator.

If the judge does not consent to the request submitted by the Prosecutor's Office, he or she returns the criminal matter on the basis of his or her ruling for the continuation of the proceedings.

If the object of criminal proceedings is a criminal offence for which the minimum period of imprisonment is not prescribed as punishment or only a pecuniary punishment is prescribed as punishment by the Special Part of the

2 Court ruling is necessary for conciliation procedure only if it is prescribed in the Special part of the Penal Code that the punishment for the crime can not be less severe than indicated term of imprisonment.

Penal Code, the Prosecutor's Office may terminate the criminal proceedings and impose the obligations on the grounds specified above.

If a person with regard to whom criminal proceedings have been terminated pursuant to conciliation fails to perform the obligations imposed on him or her, the court, at the request of the Prosecutor's Office, resumes the criminal proceedings by an order.

The victim has the right to file an appeal against a ruling that criminal proceedings be terminated following reconciliation within ten days as of receipt of a copy of said ruling.[3] As a conciliation agreement can only come into being with the victim's consent, this provision appears rather illogical.

Termination of criminal proceedings is not permitted on the grounds of conciliation:

- in cases of torture, enslaving, abduction, unlawful deprivation of liberty, illegal conduct of human research, illegal removal of organs or tissue, rape, satisfaction of sexual desire by violence, compelling person to engage in sexual intercourse, extortion and aggravated breach of public order;
- in criminal offences committed by an adult person against a victim who is a minor;
- if the criminal offence resulted in the death of a person;
- in crimes against humanity and international security, against the state, criminal official misconduct, crimes dangerous to the public and criminal offences directed against the administration of justice.[4]

2.1.2 Juvenile justice

The Juvenile Sanctions Act introduced conciliation as an alternative punishment for persons who:

- at less than 14 years of age, have committed an unlawful act corresponding to the necessary elements of a criminal offence prescribed by the Penal Code; or
- at less than 14 years of age, have committed an unlawful act corresponding to the necessary elements of a misdemeanour prescribed by the Penal Code or another Act; or
- between 14 and 18 years of age, have committed a criminal offence prescribed by the Penal Code, and a prosecutor or court finds that the person can be influenced without the imposition of a criminal sanction and criminal proceedings with respect to him or her may be terminated; or

3 Code of Criminal Procedure § 2031, Subsection 7.

4 Code of Criminal Procedure § 2031 Subsection 1.

- between 14 and 18 years of age, have committed a misdemeanour prescribed by the Penal Code or another Act, and a body conducting extra-judicial proceedings or a court finds that the person can be influenced without the imposition of a punishment and misdemeanour proceedings with respect to him or her may be terminated.

Hence, the Juvenile Sanctions Act made conciliation available in cases of juveniles who are prosecuted for a crime, but the prosecutor's office or court has decided that the juvenile can be influenced without the imposition of a criminal sanction, and refers the criminal file to the Juvenile Committee of the place of residence of the minor. In turn, the Juvenile Committee decides whether to employ conciliation or some other alternative (warning; referral to a psychologist; addiction specialist; social worker or other specialist for consultation; obligation to live with a parent, foster-parent or guardian or in a children's home; surety; participation in youth or social programs or rehabilitation service; community service; sending of students acquiring basic education who have behavioural problems to separate classes; sending to long day groups in their school; referral to medical treatment; sending to a school for students with special needs).

Conciliation as it is provided for in the Juvenile Sanctions Act is also deemed to be within the responsibility of the Conciliation Service,[5] and the procedure (which is described in *Section 3* below) is provided by the Conciliation Procedure Regulation.[6]

2.2 Court level (Restorative sanctions as independent or ancillary court-ordered sanctions)

2.2.1 Adult criminal justice

In Estonia, the courts can initiate conciliation during court proceedings as well. In practice, however, the majority of conciliations are initiated by a Prosecutor's Office. The majority of cases in which the courts have initiated conciliation are such in which the parties did not agree to participate in the conciliation procedure during the pre-trial proceedings.[7] The conciliation procedure initiated during trial does not differ in any way from conciliation procedure initiated during pre-trial proceedings as described in *Section 2.1.1* above.

5 Victim Support Act, § 63.

6 Conciliation Procedure Regulation, Official Gazette RT I 2007, 46, 327, (in Estonian). Available: https://www.riigiteataja.ee/akt/12854160.

7 *Klopets/Tamm* 2010, p. 8.

If conciliation with the victim does not bring about termination of the criminal proceedings it shall be taken into account in sentencing as a mitigating circumstance.[8] However, an analysis of conciliation practices could not identify any cases in which successful conciliation had not resulted in non-prosecution.[9]

In the Estonian Penal Code, the principal punishment in the case of natural persons is a pecuniary punishment or imprisonment, and in the case of legal persons, a pecuniary punishment or compulsory dissolution. None of these principle punishments serve restorative goals. Community service can be employed as a substitute for detention of imprisonment if a court imposes detention or imprisonment for a term of up to two years (one day of detention or imprisonment corresponds to two hours of community service). However, community service as it is implemented in practice in Estonia does not mandatorily include elements or approaches that could fall under the term restorative. However, if applicable, courts and the probation service can seek to apply community service in a matter that brings the practice closer to what can be regarded as restorative, in that employers must meet at least one of the following conditions:

- the work helps to remedy the damage caused by the criminal offence;
- the work includes physical work for improvement of upkeep of the neighbourhood;
- the work is to the benefit of the eldery or people with disabilities;
- the work helps the local community;
- the work does not compete with paid jobs.

State and local government institutions, non-profit organizations and employers offering placement for community service during the evenings and weekends receive preference over other employers.

2.2.2 Juvenile justice

The same measures can be applied to juveniles. In addition if a court finds as a result of the hearing of a criminal matter that a minor can be influenced without imposing a punishment, the court may, upon the making of the court judgment, release the convicted offender from punishment and apply the sanctions provided for in § 87 of the Penal Code with regard to him or her:

- admonition;
- subjection to supervision of conduct;
- placement in a youth home;

8 Penal Code, § 57, Subsection (1) 9.

9 *Klopets/Tamm* 2010, p. 11.

- placement in a school for pupils who need special treatment due to behavioural problems.

These alternatives make no difference in terms of the restorative measures that are available for responding to crimes committed by young offenders.

2.3 Restorative Justice elements while serving sentences

In both adult criminal justice and juvenile justice it is possible to notice some occasional manifestations of restorative justice at the stage of serving sentences. Sometimes social programmes offered for prisoners include RJ elements as well. E. g., program "Work at the Church" was designed for inmates who serve long-term sentences (more than 5 years) and who have behaved well in the prison, who lack prior work experience and/or even aversion to physical work, and who have less than one year to their release. The selected inmates ride bicycles up to twice a week on a weekend day (on Saturday or Sunday) to the Harju-Madise Church 15 km from the Murru Prison where they perform jobs that need to be doing at the object. The jobs include mowing the law; cutting and uprooting the brush; tidying up the cemetery, if necessary; shoveling snow and cleaning the roads; cleaning the church's vicinity; and heating the church and the pastoral building during the winter. The inmates leave the prison at 8.00 and return by 20.00. Lunch is prepared by the inmates from the groceries taken along from the prison.

3. Organisational structures, restorative procedures and delivery

The Prosecutor's Office or court sends the order or ruling that conciliation[10] proceedings should be initiated to the conciliator. He/she then formalises the conciliation as a written conciliation agreement which is signed by the suspect or accused and the victim (and the parents, legal representative or guardian of a minor or a person suffering from a mental disorder where applicable). A conciliation agreement contains the procedure for and conditions of how the damage caused by the criminal offence shall be remedied. A conciliation agreement may contain other conditions as well. The conciliator sends a report with a description of the course of conciliation to the Prosecutor's Office, and where conciliation ends in an agreement, a copy of the conciliation agreement is annexed to the report.

10 In the semi-official translations of the Estonian legal acts the term „conciliation" has been employed instead of term „mediation".

After the termination of the criminal proceedings, the conciliator verifies whether or not the conditions of the conciliation agreement are met. A conciliator has the right to request the submission of information and documents for confirmation of the performance of the obligation. The conciliator notifies the Prosecutor's Office of performance of the obligation or of failure thereof. The conciliator has the right, in performing his or her duties, to examine the materials of the criminal matter with the permission of and to the extent specified by the court. A conciliator shall maintain the confidentiality of facts which have become known to him or her in connection with the conciliation proceedings.[11]

Some aspects of the conciliation procedure are regulated in the Victim Support Act. The Conciliation Service is a public service whose tasks consist of organising the conciliation procedure provided for in the Code of Criminal Procedure, and monitoring compliance with the requirements of a written agreement entered into as a result thereof. Putting conciliation provided for in the Juvenile Sanctions Act into practice is also deemed to be the responsibility of the Conciliation Service.[12] The provision of Conciliation Services is ensured by the Social Insurance Board in accordance with the principle of regionality.[13]

More detail on the conciliation procedure is provided in Government Regulation of 13 July 2007 No. 188 (Conciliation Procedure Regulation). The Social Insurance Board appoints a conciliator within five days after the Prosecutor's Office or court has registered the order or ruling that conciliation proceedings be instituted.

Officials of the Victim Support Department of the Social Insurance Board with special training serve as conciliators. Their training includes meetings for theoretical and practical training and independent work. Training is organised in two three-day cycles. The first cycle deals with the main principles of conciliation and the work procedures, styles and instruments of a conciliator including the legal framework for conciliation. The second cycle is conducted after the first six months of service as a conciliator and includes case-discussions and theoretical aspects of the conciliators' work. On 1 October 2010 out of 26 victim support officers 24 had received the special training and could act as conciliators.

Regarding the course of the conciliation process, the conciliator contacts the victim and the suspect or the accused (and any legally incompetent person's legal representative where applicable). The mediator verifies that the parties consent to conciliation and explains to them the objective and procedure of conciliation, their rights in the procedure and the effects of non-compliance with

11 Code of Criminal Procedure, § 2032.

12 Victim Support Act, § 63.

13 Victim Support Act, § 64.

the conciliation agreement. The first meeting of the parties is organized within one month of receiving the case from the referring body.[14]

The purpose of the conciliation procedure is to reach an agreement between the suspect/accused and the injured party to achieve conciliation and to remedy the damage caused by the offence. Conciliation allows an increase in the involvement of the injured party in the decision-making process regarding how the offence is responded to, and serves to reduce the stress, fear, anger and similar feelings that the offence has caused. The conciliation procedure is carried out with due respect to the interests of the injured party/victim. Conciliation enhances the value of the injured party/victim and increases his/her involvement. Conciliation deals with both parties to the offence.[15]

A conciliation agreement between the parties is concluded in writing within two months.[16] Within five working days after the conclusion of the conciliation agreement the conciliator shall report to the Prosecutor's Office describing the course of conciliation, the meetings with the parties, the parties' discussion with each-other and the behaviour of the parties.[17]

If a party withdraws his/her consent or other circumstances arise which make it impossible to continue the conciliation procedure, the conciliator shall inform the Prosecutor's Office about the discontinuation of the conciliation procedure and of the causes for such discontinuation.[18]

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

The use of measures that bear the hallmarks of restorative justice has increased year by year. On 26 May 2014, 1,379 offenders were serving community service sentences, compared to the Estonian prison population of 2,979 persons.

14 Conciliation Procedure Regulation, § 3.

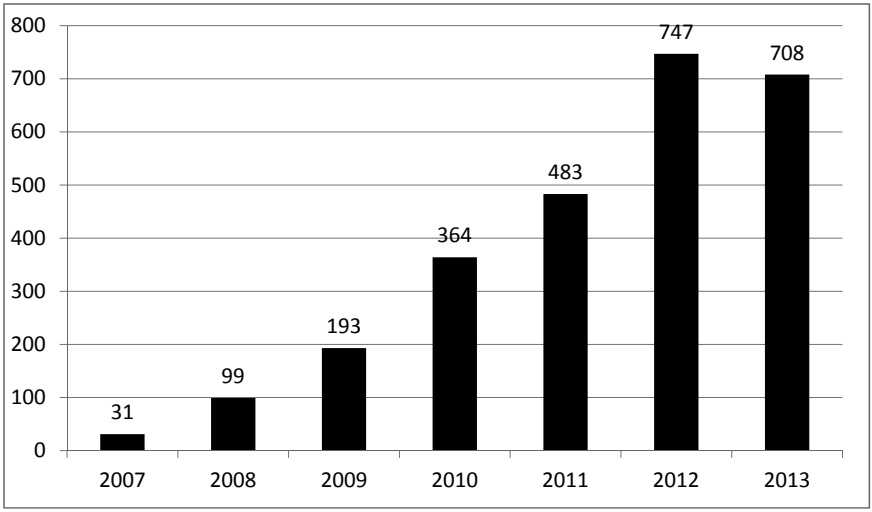
15 Social Insurance Board. Victim support and conciliation service 2012.

16 Conciliation Procedure Regulation, § 4.

17 Conciliation Procedure Regulation, § 5, Subsection 1.

18 Conciliation Procedure Regulation, § 5, Subsection 2.

Figure 1: Number of conciliation cases



Data from Statistics Estonia indicate an increase in the use of conciliation up to 2012.[19] While in 2007, i. e. the first year when conciliation was used as a ground for termination of criminal proceedings, there were only 31 (out of 35 cases in which the conciliation procedure was initiated) cases of successful conciliation, in 2008 that figure had already risen to 99 (out of 109) cases. The trend continued in 2009 (193 cases), in 2010 (364 cases) and in 2011 (483).[20] The absolute fugure peaked at 747 in 2012, and dropped insignificantly to 708 in 2013.

Conciliation is becoming a more and more popular ground for terminating criminal proceedings on the grounds of the opportunity principle. While in 2007 only 2% of cases terminated on the grounds of the opportunity principle were conciliation cases, by 2010 that share had already increased to 8%.[21] However, this upwards trend does not apply to the use of conciliation by Juvenile Committees. There, its use has been very limited in practice for some time, and has in fact been on the decrease. In 2001, there were 20 cases of conciliation (of a total of 1.798 Juvenile Committee cases). Ten years later that number had

19 See the website of Statistics Estonia: 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.

20 *Mehide-Valtin* 2005.

21 *Klopets/Tamm* 2010, p. 7.

decreased to 11 out of 2.608 cases, and in 2012, only four out of 2.653 cases coming before Juvenile Committees ended in conciliation.[22]

The structure of offending of 461 criminal cases that were terminated on the grounds of conciliation between February 2007 and July 2010 were:

- 422 violent crimes (mostly physical abuse[23] in family violence[24]);
- 17 property crimes (mostly theft);
- 4 violations of obligations to provide child maintenance;
- 26 other crimes.[25]

If a criminal case is terminated on the grounds of conciliation, the court shall impose, at the request of the Prosecutor's Office and with the consent of the suspect or the accused, the obligation to meet some or all of the conditions of the conciliation agreement. The analysis by *Klopets/Tamm* indicated that between February 2007 and July 2010:

- 84% of the conditions were courtesy conditions (to avoid violence, to ask for forgiveness, polite and respectful behaviour, etc.);
- 27% referred to pecuniary compensation;
- 18% implied avoiding or limiting consumption of alcohol or illegal drugs;
- 14% related to treatment or therapy;
- 11% were obligations in kind (renovation of the flat; help in housekeeping; visit to a cinema, theatre or concert; etc.).[26]

The absolute number of cases terminated on the grounds that "the guilt of the person suspected or accused of the offence is negligible, and he or she has remedied or has commenced to remedy the damage caused by the criminal offence or has paid the expenses relating to the criminal proceedings, or assumed the obligation to pay such expenses, and there is no public interest in the continuation of the criminal proceedings" (CCP § 202) is declining. However, CCP § 202 still accounts for a very substantial number compared to the number of criminal cases sent to court.

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

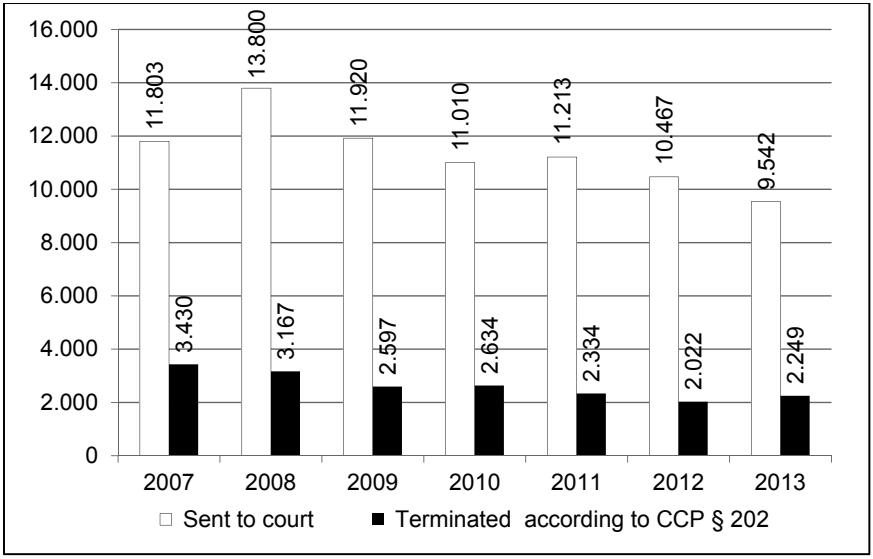
23 Defined in the Penal Code § 121 as Causing damage to the health of another person, or beating, battery or other physical abuse which causes pain.

24 There were 267 family violence cases terminated on the grounds of conciliation, 58% of all conciliation cases.

25 *Klopets/Tamm* 2010, p. 10.

26 *Klopets/Tamm* 2010, p. 25.

Figure 2: Number of cases sent to court and number of cases terminated according to CCP § 202



4.2 Findings from implementation research and evaluation

To date, there have been no in-depth analyses of restorative justice practices in Estonia. One measure for the success of restorative practices can be that an offender who has participated in conciliation for instance does not go on to re-offend. *Klopets/Tamm* measured that the one-year recidivism rate[27] for offenders whose cases were terminated on the grounds of achieving conciliation with the victim was 12%. By contrast, the recidivism rate among offenders whose cases were terminated within the principle of opportunity yet on other grounds was 18%.[28]

Another indicator of success is whether or not the obligations into which the offender enters as a result of conciliation are fulfilled in practice. There have in fact been very few cases of non-performance. A study by *Leps* indicated that in two years there was only a single case in which a person, with regard to whom criminal proceedings had been terminated, had failed to perform the obligations of mediation imposed on him or her.[29] Overall, the criminal proceedings were

27 Persons interrogated by police as suspects were defined as recidivists.

28 *Klopets/Tamm* 2010, p. 30.

29 *Leps* 2009.

resumed because the accused failed to perform the obligations imposed on him or her in only 15 cases (less than 4 per cent of all conciliation cases). The criminal proceedings were resumed because of:

- failure to pay pecuniary compensation – 7 cases;
- new crime – 2 case;
- failure to go to psychologist – 1 case;
- failure to apologize – 1 case; and
- cause not known – 4 cases.[30]

Research by *Tamm* has revealed that, based on results from interviews with Juvenile Committees, the main worries of Committee members regarding the use of conciliation by Juvenile Committees are the following:

- the content and aim of victim-offender mediation in committees is insufficiently regulated;
- there is a lack of qualified mediators – it is not possible to use the victim support officers who act as mediators in criminal justice conciliation cases;
- the procedure is too drawn out – the interval between committing the offence and applying the sanction is too long.[31]

Interestingly, conciliation for juveniles has not attracted that much attention, which goes against the European trend, and therefore there have been no substantial efforts to spread conciliation for settling Juvenile Committees' cases. Conciliator-training has been focused on preparing conciliators for adult cases. However, the conciliators for juvenile cases need different training as juveniles have different needs and pose (and are subject to) different risks, and a structure that would be able and willing to do the job has yet to emerge or be provided for.

5. Summary and outlook

Broadly speaking, restorative justice principles are employed in the Estonian justice system mainly through the victim support services and conciliation. Restorative principles are recognized in the criminal procedure. It is possible to terminate criminal proceedings on the basis of conciliation according to the Code of Criminal Procedure, and the Juvenile Sanctions Act also makes provision for conciliation.

Since 2003 the Victim Support Act has provided the basis for State-organised victim support, for the organisation of the Conciliation Service, for the compensation of the cost of psychological care paid within the framework of

30 *Klopets/Tamm* 2010, p. 29.

31 *Tamm* 2008.

provision of victim support services, and the procedure for payment of state compensation to victims of crime.

The requirements established by the Council Framework Decision 2001/220/JHA of the European Union have been fulfilled. Alternative forms of punishment have been developing constantly since the creation of probation supervision in 1998. A formal legal basis and a competent institutional framework have been created to support the realization of the conciliation procedure. The funding of the conciliation procedure has been guaranteed by the State budget.

In the next couple of years:

- mediation should become a more typical instrument for resolving conflicts in schools, for example in the conflicts between teacher and pupils or parents and school or in bullying cases between pupils;
- peer mediation has to be developed in school mediation – there are several conflicts in schools pupils themselves can resolve;
- mediation in prisons between offenders and their close relatives and friends has to become available.

The Estonian universities are today devoting more attention to mediation in their teacher-training curriculae and this should make our future teachers more able to rely on mediation in resolving conflicts.

Concerning the organization of conciliation there is need for:

- In-depth analysis of the results of the mediation process;
- monitoring re-offending rates;
- collecting feedback about participant's satisfaction; and
- organising extra training courses for mediators.

Such analyses would serve to clarify and sensitize people to the advantages of conciliation while at the same time help to distinguish the types of cases in which using conciliation can be a more cost-effective form of resolving criminal cases. At the same time, such analyses would help to improve targeting or identifying suitable or unsuitable cases and victim-offender constellations. Filtering out cases in which coming to an agreement can be estimated as being unlikely can help to improve the overall success-rate of conciliation (i. e. increase the share of initiated conciliation procedures that end in a fulfilled agreement) which in turn could serve to decrease the distrustful attitude towards mediation among decision-makers who can indeed regard it as a tool that is too lenient for handling criminal cases.

In closing, it may be asserted that, regarding restorative justice, Estonia still has still a lot to learn and much more to put into practice, but a promising start has indeed been made.

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Finland

Tapio Lappi-Seppälä

1. Origins, aims and theoretical background of restorative justice

1.1 Forms of Restorative Justice

Four structures serve the interests of the victim's restorative needs in Finland.[1] In practice, the main devices in granting compensation for immaterial crime damages are *insurance and civil law compensation schemes*. Both compulsory social insurance and different voluntary schemes provide protection against damages caused also by criminal offences. General rules for compensation for damages entitle the injured party to receive compensation from anyone that has caused damages, either through negligence or with intent. All damages caused by crime are compensated on the basis of a court order, imposed – as a rule – by the same criminal court that deals with the criminal offence.

The second important institutional arrangement for meeting the restorative needs of the victim is the *state compensation system.* The state compensation system for criminal damages was adopted in 1973. Its grants victims compensation directly from state funds. The system covers mainly damages caused by violent offences. Damages eligible for compensation also include immaterial damages such as pain and suffering. The state has the primary responsibility for these damages with regression claims towards the offender.

The adoption of the state compensation system was argued also on theoretical grounds at that time. The idea that the state should bear a more substantial responsibility of crime damages fitted neatly with the newly formulated general aims of criminal policy in the 1970s. The aim of "harm minimization" required that the harms and costs caused by crime and control

1 The elements of reparation and restorative justice in the Finnish criminal justice system are discussed in greater detail in *Lappi-Seppälä* 1996.

should be minimized for all parties. "The aim of fair distribution", in turn, demanded that the remaining costs should be allocated in a manner that meets the demands of social justice. The victim as the weaker party should not be left alone, but be compensated through state funds should there be no compensation from the perpetrator.[2] After its adoption the scope of this system has been gradually expanded. The most important extension was the inclusion of all immaterial damages into state responsibility in the 1990s.

The third practice to be mentioned is *diversion in the form of non-prosecution*. Diversion in Finland relates to restorative justice insofar as mediation may serve as one ground for non-prosecution. The legislative history of diversion is unrelated to the development of restorative ideas, but closely linked with developments in youth justice. First diversion provisions were incorporated in the Finnish law in connection with the enactment of the Young Offenders Act in 1940.[3] For a short period of time, and inspired by the Swedish models of treatment and rehabilitation, there was a drive to also move all children aged 15-17 from the scope of the criminal justice system to that of child welfare. To do so, in 1940 the prosecutors and courts were granted the right to drop the charge or to refrain from imposing sanctions, and instead to direct the case to the social welfare services.

While the courts did show some flexibility in the application of these norms, prosecutors were more cautious, especially if we compare our practices to those in Sweden and Denmark. This inflexibility gained further criticism during the 1980s, which eventually led to the reform of the rules governing non-prosecution in 1991. This reform extended the possibility to drop charges especially in juvenile cases. As part of this reform, mediation and the settlement between the offender and the victim were defined as one possible ground for prosecutors to waive filing charges, and for courts to waive the imposition of punishment. In connection with a reform of the general part of the Criminal Code in 2004, mediation was also defined as one general ground for the mitigation sentence.

The most important restorative justice practice in Finland is undoubtedly *mediation*. Mediation started on an experimental basis in the early 1980s, to be soon expanded in to a national practice during the 1990s. Mediation does not constitute a part of the criminal justice system, but it has frequent interrelations with that system as far as referral of cases and their further processing is concerned. The Criminal Code mentions an agreement or settlement between the offender and the victim as a possible justification for prosecutors to waive charges, for courts to waive punishment and as grounds for sentence mitigation.

2 See *Lappi-Seppälä* 1996, about the position of crime vivtims in criminal justice system, see *Joutsen* 1987.

3 See *Lappi-Seppälä* 2012.

Given its principal role, the remainder of this report shall be mainly focussed on mediation practices, with only isolated observations on traditional compensation rules and processes.

In addition to victim-offender mediation, there are mediation services in schools, new practices in social mediation, family mediation, workplace mediation, and court mediation. In many cases victim-offender mediation has served as a model for these newly emerging mediation schemes. In 2001, the Finnish Red Cross started to provide training for *peer mediation in schools* in order to reduce bullying and promote a peaceful working environment in schools. The purpose of *social mediation* is to resolve multicultural disputes between people representing different nationalities and cultures. A new phenomenon in Finland is *workplace mediation.* In workplace mediation, a company employs a mediator to assist in resolving conflicts within the work community. Disputes can, for instance, relate to workplace bullying. Other forms of mediation also include *civil court mediation*, which was adopted in Finland in 2006, modelled on the experiments carried out in Norway and Denmark. Civil court mediation is a procedure, voluntary to the parties and managed by the judge, aiming at a situation where the parties themselves find a satisfactory resolution of their conflict. There are currently 500 cases each year, which equals to six per cent of disputed civil cases. Despite some close resemblances with victim-offender mediation these other mediation practices will also be excluded from the remainder of this article as they do not primarily focus on conflicts arising from the context of offending.

Besides the schemes listed above, restorative arrangements play only a very modest role in other branches of the sanctions system. Release on parole and the use of conditional sentences are not tied to the offender's possibilities to pay compensation or deliver reparation. Such options have in fact been discussed in law drafting working-groups, but were rejected on the basis of the risks of social discrimination (poor offenders would risk going to prison while the wealthy offenders would be able to "buy themselves out"). Community service (20 to 200 hours) is widely used in Finland as an alternative to short term prison sentences (below eight months). The service consists of unpaid beneficial work, usually to the benefit of municipalities or for other branches of the public or third sector (but not private enterprises). As it is not directed to the immediate victim, it can hardly be classified as a restorative practice (but this is ultimately a matter of definition). As regards the enforcement of prison sentences, see *section 2.4* below.

1.2 Relevant reform history

The first mediation experiment in Finland started in 1983.[4] The roots of Finnish mediation initiatives are located in restorative justice theory and the abolitionist writings of *Thomas Mathiesen* and *Nils Christie* in Norway and *Louk Hulsman* in the Netherlands in the 1970s, as well as in the practices and experiments in New Zealand and North America.[5] The elements of informality, voluntariness, and community involvement were crucial from the very beginning.

The forerunners of the mediation movement were careful not to integrate the system too closely into the criminal justice as there were suspicions against "institutionalization". Mediation had been presented as form of diversion and as an alternative to criminal justice. First signs of institutionalization – however, not in the context of criminal justice but social welfare – were seen in 1986 when the city of Vantaa established mediation as a regular part of municipal social work. From here mediation spread first to other cities and afterwards also to smaller municipalities. During the 1990s the movement expanded quickly, and reached also other forms, such as mediation in schools and within families.

This expansion continued into the 2000s. By the early 2000s mediation services were available to about 80 percent of the population, but not for all. In order to secure equality before the law, proposals were put forward for a national statutory basis. The issue was taken up in several committees and working groups, which played a central role in the development of mediation in Finland. In 2005 a governmental bill was presented to the parliament, which eventually led to the new Mediation Act in 2006.

The main aims of the 2006 Mediation Act include efforts:

- to secure equal access to mediation;
- to safeguard sufficient government funding for mediation services;
- to organize national management, supervision and monitoring;
- to create conditions for their long-term evaluation and development;
- to ensure that the procedures followed in mediation are more uniform;
- to pay more attention to the legal protection of the parties in the mediation process.

The act also created a new organisation. Provincial governments are obliged to arrange mediation services in their region, either in co-operation with municipal authorities or with other public or private partners. The overall organizational responsibility and supervision lies within the Ministry of Social Affairs. Since 1 June 2006 mediation services have been available throughout the entire country.

4 See further: *Grönfors* 1989 and *Iivari* 2000.

5 See *Grönfors* 1989.

The 2006 legislation did not change the basic character of mediation. However, it gives closer instructions on how to handle mediation cases where minors are involved. Furthermore, there are general guidelines for the selection of cases suitable for mediation. In other respects, the law is quite flexible and much less formal that the corresponding Norwegian law, to state just one example.

Mediation was also given an "official definition" in the law, referring to "a non-chargeable service in which a crime suspect and the victim of that crime are provided the opportunity to meet confidentially through an independent conciliator, to discuss the mental and material harm caused to the victim by the crime and, on their own initiative, to agree on measures to redress the harm."[6]

1.3 The role of international standards

The mediation movement in Finland began long before the establishment of international Standards, prominent early examples being Council of Europe Recommendation Rec (99) 19 on Mediation in Penal Matters or the 2001 EU Framework Decision on the standing of victims in criminal proceedings. It cannot be said that these standards have had no influence on legislative or practical contexts of mediation. In fact, the introduction of the 2006 Law on Mediation also sought to fulfill the requirement to introduce legislation governing mediation by 2006 as stated in Article 17 the 2001 Framework Decision. Also, it appears as though the introduction of the 2006 Law on Mediation has had an inflationary effect of the use of mediation in practice.

2. Legislative basis for Restorative Justice

The legislative basis for restorative justice in Finland does not differ substantially in terms of juveniles/adults or the pre court/court level. In order to avoid repitition and to maintain readability, the report does not make structural distinctions along these lines, as the differences are so minor. Where there are differences, they are highlighted accordingly.

2.1 Compensation for damages and the State compensation system

The Compensation for Damages Act (2006) entitles the injured party to receive compensation from anyone that has caused damages either intentionally or through negligence. All damages caused by crime are compensated on the basis of a court order, imposed – as a rule – by the same criminal court that deals with the criminal offence. Finland follows the adhesion process in its full sense. The

6 Law on Mediation 2006, Chapter 1, section 1.

victim always has the right to present claims for compensation in the courts. He/she is also inclined to get assistance from the prosecutor in doing so.

Damages – including immaterial damages such as pain and suffering – caused by violent offences are compensated by state funds. The state has the primary responsibility for these damages, with regression claims towards the offender. Compensation from the state funds does not require that the offender has been convicted or even detected. Compensation practice in personal damages (under both procedures) is guided by detailed compensation guidelines, confirmed by the *Council for Personal Damages,* established in Finland in 2007.

2.2 Diversion (non-prosecution)

Finland follows the principle of legality in prosecution. The prosecutor is basically entitled to prosecute in all cases in which there is sufficient evidence of a suspect's guilt. However, the rigid requirements of the principle of legality are softened through the provisions of (diversionary) non-prosecution. The grounds for non-prosecution are defined in detail in the law.

The main grounds relate to the *seriousness* (petty nature) of the offence and the *young age* of the offender (young offenders under the age of 18). Thus, the prosecutor can waive prosecution when a penalty no more severe than a fine is to be expected for the offence, and the offence is deemed to be petty considering the harmfulness of the act or the culpability of the offender.

A second possibility for a waiver is when an offence is committed by a person under 18 years of age and a penalty no more severe than a fine or imprisonment for at most six months is to be expected for the offence, and the offence is deemed to be the result of thoughtlessness or imprudence rather than heedlessness at the prohibitions and commands of the law.[7]

Non-prosecution can also be based on *reasons of equity or criminal policy expediency* "when trial and punishment are deemed unreasonable or pointless considering the reconciliation between the offender and the complainant or other action taken by the offender to prevent or remove the effects of his offence,[8] his personal circumstances, other consequences of the offence to him, actions by the social security and health authorities, or other circumstances."[9] This section covers non-prosecution also on the basis of reconciliation and mediation (as well as other reparative actions taken by the offender). Victim-offender-mediation

7 Chapter 1, section 7 of the Criminal Procedure Act.

8 Note that the Finnish law does not recognize the possibility of plea bargaining and offers no "crown witness" provisions. However, at the moment, the ministry of justice is planning to propose an arrangement that would allow the prosecutor and the suspect to negotiate on some parts of the charge.

9 Chapter 1, section 8 of the Criminal Procedure Act.

was specifically added to the law in 1995. Since then it has quickly gained more and more importance as a factor justifying non-prosecution. The fourth ground for non-prosecution deals with cases where an offender is charged for several offences, and prosecuting this particular offence would be of no practical relevance. In addition, there are specific provisions on non-prosecution in connection with certain offences (such as drug-offences and tax-offences).

Non-prosecution is most widely applied in cases of juveniles. In the 15-17 years age group, the share of non-prosecution varies at around 20% of all court disposals and 6% of all disposals (prosecutors' fines included). More recently the expansion of mediation has been reflected also in the prosecution practices, as the number of cases diverted on the bases of "equity related" reasons has been increasing. However, no exact data are available about the number of decisions made on the basis of mediation.

2.3 Mediation

2.3.1 Formal requirements for mediation

Mediation is possible according to the Act of mediation (2006) only between parties that have "personally and voluntarily expressed their willingness for mediation" (§ 2). Furthermore it is required that the "parties are able to understand the meaning and significance of mediation and of the decisions that are carried out during the mediation process". Consent is required for all parties. Consent can also be withdrawn at any stage of the process, in which case the mediation process will be terminated.

Mediation is available for all age groups, but its principle relevance lies in younger age-groups. As mediation is informal by its nature, and not defined as a criminal punishment, it may be applied also for offences committed by children below the age of criminal responsibility. However, in this respect the law further requires that "if a child under 18 years of age is likely to be a party to mediation, his/her parent or guardian must give consent". Also, certain restrictions may apply when the victim is young.

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

1. violence in close relations should be mediated only in cases referred by the police and the prosecutor;

2. mediation of violence in close relationships should be excluded if violence was repeated or there had been earlier, unsuccessful mediation processes;
3. mediation is forbidden if the victim is below the age of 18 and he/she is in a specific need of protection due to his/her young age.

The first two restrictions relate to violence in close relationships. Following critique from women's organisations, the parliament, when approving the bill, added extra limitations for the use of mediation in cases of domestic violence. These cases may be submitted to mediation only on the initiative of the police or prosecutor. In addition, mediation would be excluded if violence was repeated or there had been earlier, unsuccessful mediation processes. Also the governmental program for the year 2011-2015 obliges the authorities to evaluate the existing mediation practices in cases of intimate and domestic violence. The restrictions related to the young age of the victim refer first and foremost to sexual offences against children. While the restrictions related to domestic violence are much disputed, the latter limitations have been taken as granted.

The law accords the criminal history of the offender no general relevance as a selection criteria with the exception of domestic violence (see above). However, in practice at least the police seem to exclude offenders with long criminal histories from mediation in cases of other offence types as well.

There are no formal requirements related to the admission of guilt. However, the case has to be "clear" in the sense that the offender admits his/her guilt. In mediation, there can be no dispute whether the crime has occurred and who was the perpetrator.

2.3.2 The consequences/effects of mediation

What happens after a successful mediation depends largely on the category and seriousness of the offence. In complainant offences, successful mediation automatically means that the police will close the investigations. If the case has already gone to the prosecutor, he/she will drop the prosecution.

In non-complainant offences it is at the discretion of the prosecutor whether or not the process is continued. This is regulated by the grounds on non-prosecution. Dropping the charge would be possible according to the law if prosecution seemed "either unreasonable or pointless" due to successful reconciliation, and if non-prosecution did not violate "an important public or private interest". In these cases non-prosecution remains discretionary. Unlike in some other countries, mediation does not automatically divert the case from the criminal justice system. This may narrow its diversionary effect, but on the other hand, it also prevents mediation from becoming restricted to trivial cases.

Should the prosecutor take the case to the court, the court may also waive from penal measures, or mitigate the sentence according to general sentencing rules, which nominate mediation as a general ground for mitigation.

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

2.4 The use of Restorative Justice while serving sentence

Enforment of prison sentences includes participation in different sort of programs, some of which include discussions also about the meaning and impact of crime from the victims' point of view. But this alone does not imply the adoption of the idea of "restorative prison" in Finland. However, there has been increased interest in expanding mediation in the prison context. At the moment, there is are small scale pilot projects running in two prisons, both with groups of 6-8 prisoners convicted for violent offences.

3. Organisational structures of mediation procedures

3.1 The mediation process

Mediation can be initiated at any time between the commission of the offence and the execution of the sentence. While in theory VOM can be conducted upon the primary initiative of any of the involved parties, in practice the majority of referrals to mediation are made by the police and the prosecutor. There are no differences in the mediation process according to different stages of the criminal procedure at which the mediation has started, which is why the presentation of mediation in *Section 2.3* above made little differentiation in this regard.

The initiative for submitting cases to mediation comes, as a rule, from the police or from the prosecutor. Once a case has been referred to the mediation office, the office contacts the parties in order to ascertain their willingness to participate in mediation. Where this is agreed, a first meeting is arranged. The sessions are often held in the evening, participants are addressed on first-name terms and the flow of discussion is relatively free. As a rule, it can be enough to have just one session, but quite often more are needed. The mediators' guidelines include suggestions on how to arrange the sessions. However, it is also emphasized that each session is an individual one.

In terms of confidentiality, while court proceedings are public, Finnish mediation processes are not. This is also stated in the law: "Mediation is organized closed from the public". This was already the informal norm before the new law came into force. The strong emphasis on confidentiality also means

that research information of the mediation process remains partly hidden as it has also been difficult for researchers to gain access to mediation sessions.

The 2006 law also requires personal participation: "The parties must attend mediation meetings in person" (§ 18). Supporters are allowed to attend, but this must be agreed upon beforehand. Mediator's guidelines take a critical stance towards the use of legal advisers as they fear this could essentially revert mediation to a legal process. Children under 18 may have their parents/ guardians present in the sessions if they so wish. They can however be excluded from participating should their presence be regarded as contrary to the interests of the child over the age of 15. However, the parents of a child under 15 always have the right to attend the meetings.

There are no formal procedural safeguards that extend beyond those that apply to children as described above. Cases of violence in close relationships are a partial exception in this regard. Taking into account the demanding nature of such cases, the mediator's guidelines advise that mediation sessions always be attended by two mediators.

The mediator's principal role is only to mediate and to act on a neutral basis. They have no formal authority, but their knowledge of the ways and means of the criminal justice system does give them some power to influence the content of the settlements. They can, for instance, say that this or that amount would or would not stand if compensation were to be decided by the court. As noted by *Elonheimo*, "the probable outcome of a full-blown judicial procedure is a horizon against which both parties must assess their options".[10] This applies not only to the defendant, who must take into account the probability of punishment and the likely amount of damages that the court would set. It applies also to the victim who must take into account the additional trouble of court proceedings, the risk of ending up appearing as someone who has rejected a fair proposal for settlement, the risk of being awarded even less in damages than what the defendant had offered during mediation, and so on. All this reasoning takes place against the backdrop of the existence of the criminal justice system.

The legislation states no formal time limits for the duration of mediation. However, the prosecutor – when referring a case to mediation – usually announces the time within which mediation should be carried out before he/she will decide on the prosecution. This time is – as a rule – from two to three months.

Once the process has started it normally leads to a written contract that contains the subject (what sort of offence), the content of a settlement (how the offender has consented to repair the damages), the place and date of the restitution as well as consequences for a breach of the contract.

10 *Elonheimo* 2003.

3.2 Organization and coordinating agencies

The key co-ordinating agencies include the Ministry of Social and Welfare Affairs (which is responsible for organizing and supervising mediation), the Advisory Board on Mediation in Criminal Cases, the mediation office, and the mediation officer in charge.

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

The Advisory Board serves as a focus for co-operation between the administrative branches of government and the other parties primarily involved in the mediation of criminal cases. It includes representatives from the social welfare and justice branches, the court system, prosecution, police administration, the State Provincial Offices, parties providing mediation services, organizations operating in the sector, such as Victim Support Finland, and conciliators. Volunteer organizations further include the Finnish Forum for Mediation (SSF), founded in 2003. Its board represents the entire mediation field, including also mediation in schools, family, work and environmental issues.

The actual delivery of mediation services is organized by publicly funded mediation office. The municipal social welfare authorities usually have a hand in coordinating the mediation services and providing them with some logistics.

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

Staff training for mediators is provided by volunteer mediation organizations. Meditation courses are typically 30 hour training courses and include some basics of criminal and tort law, as well as data of the existing compensation practices. On average, mediators handle around 10 cases a year, even though there may be strong individual differences in workload.

The National Institute of Health and Welfare has the responsibility to take care of statistical follow up of mediation services.

4. Research, evaluation and experiences with Mediation

4.1 Statistical data on mediation

In numbers mediation plays a substantial role in the Finnish justice system. Mediation cases can be counted in different ways. The often used unit "referral" may include several offences, several victims and/or several offenders. The statistics published by the Ministry of Social and Health Affairs tries to keep these units separate.

According to official statistics, in 2012 there was a total of 8,472 referrals to VOM involving 11,908 offences (see *Table 1*).[11] These offences in turn involved 11,994 suspects and 9,265 victims (see *Table 2*). During the year 2012 mediation-processes started in 7,957 cases (some of which may well have been initiated during the previous year). 1,090 mediation processes were interrupted, some of which had been started during the previous year. In all, 574 of the 7,957 processes that were initiated in 2012 were interrupted, which equals an overall failure rate of about 7%. More detailed information is provided in the tables below.

Table 1 offers information on the number of referrals coming in each year and the number of offences included in those referrals (A), as well as the number of mediations that have started and the number that failed during the year (B). The table also contains data on the number of agreements reached as well as the number of failed mediations (C). Since the enactment of the Mediation Act the number of referrals has increased by 35%.

Table 1: National statistics 2007-2012

		2007	2008	2009	2010	2011	2012
A. Flow rates							
	All referrals	6,825	8,385	8,458	8,925	9,290	8,472
	Criminal offences covered	9,583	10,879	11,604	11,971	12,895	11,908
	Of those close-partner violence	775	950	1,033	1,063	1,950	2,072
B. In mediation offices during the year							
	Started mediations	6,877	7,681	8,034	8,459	9,002	7,957
	Started C-P-violence mediations	-	-	-	710	1,209	1,338
	Incl. interrupted mediations		1,044	1,290	1,332	1,261	1,010
	Incl. interrupted C-P-violence med.	-	-	-	160	163	161

11 All data is for the National Institute of Health and Welfare.

	2007	2008	2009	2010	2011	2012
C. New agreements during the year	5,540	6,203	6,821	6,908	8,042	6,681
D. Started mediation not reaching an agreement	-	568	528	667	749	574

Source: National Institute of Health and Welfare.

Due to the difficulties involved in the use of different statistical units, the picture of mediation may vary depending on the unit in use. A separate detailed analysis by *Vesikansa* of mediation practices in one of the 25 major mediation district units has treated each case on the basis of offender-victim relation, reaching a different picture. Out of 1,733 mediation processes requested by the authorities, mediations were started and agreements reached in the following manner.

Table 2: Initiatives and their outcomes by offence type 2010 and 2012 (2010 separate analyses, 2012 National statistis)

	Started plus agreement %	Started but interrupted %	Started but no agreement %	Not started %
All offences	49 (54)	8 (8)	7 (5)	36 (33)
Complainant offences	44	8	6	42
Non-complainant offences	56	7	8	30

Source: *Vesikansa* 2012, National Institute of Health and Welfare 2012.

This analysis implies that about 2/3 of mediation initiatives actually result in the initiation of mediation procedures, and that half of all initiatives and three out of four started mediations result in an agreement. The main difference compared to national statistics is in the share of initiated mediation processes. While the official statistics imply a rate between 67–71% (depending on the units used), these data give an overall starting rate of around 64%.

Mediation procedures were started more frequently in cases of non-complainant offences. This may come as kind of a surprise. However, this could well be a reflection of the fact that, in these cases, mediation has an independent relevance for the instigation and course of the criminal process. While in complainant offences the victim may decide not to press charges even in the absence of mediation, in non-complaint crimes successful participation in mediation can well result in a diversionary outcome or a mitigation of sentence. Furthermore, should the parties wish to avoid the criminal process – a motivation that has been indicated in the findings from numerous interview-

studies – it is in their interest to start mediation, as that may have an influence on the prosecutor's decisions.

Data on the number of mediators are presented in *Table 3*, and as can be seen, while the case numbers have been increasing till 2011 (*Table 1* above), the number of mediators has remained fairly stable. There are about 1,300 active mediators (mediators that have participated in sessions during the year), and a reserve of around 200-300 (mediators that have not received any cases during the year.

Data on the offences that were concerned in mediations in the year 2011 are provided in *Tables 4* and *5*. The clear majority of cases involve either minor forms of assault and battery (56%) or minor property offences (26%). As can be seen, a majority (about 64%) of offences are non-complainant offences.

The figures in *table 4* and *5* can be reflected against cases dealt by the criminal justice system. However, since the statistical units may differ (the classification in the mediation statistics is presumambly less consistent than in the justice statistics), comparisons need to be carried out on a fairly general level. It looks like one out of five assaults (22%) known to the police has been diverted to mediation. The share is almost equal in disturbing domestic peace and defamation (17%). More than one out of ten (14%) cases of damage to property are referred to mediation. But for theft offences the share is 2%. In the younger age-groups (below 18 years), more than one third of the offenses eligble for mediation are diverted.

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

Four out of five offenders are male, but about 40% of (natural) victims are female (see *Table 7*).

Table 3: The number of mediators

	2008	**2009**	**2010**	**2011**	**2012**
Active mediators	1,232	1,234	1,211	1,284	1,279
Mediators in reserve	385	365	399	274	213
Avg. caseload per mediator*	6.2	6.5	7.0	7.2	6.6

* Based on number of started mediations as stated in *Table 1* above. Not taking into account the possible use of multiple mediators for one case.

Source: National Institute of Health and Welfare.

Table 4: Statistics on mediation by type of offence in 2011

	N	%
All offences	11,733	100
Minor assault	1,391	12
Assault	4,978	42
Aggravated assault	69	1
Robbery	33	0.3
Theft	877	7
Fraud/embezzlement	537	5
Damage to property	1,664	14
Car theft	70	0.6
Disturbance of domestic peace	397	3
Unlawful threat	706	6
Defamation	412	4
Other	689	6

Source: National Institute of Health and Welfare.

Table 5: complainant and non-complainant offences

	2007	2008	2009	2010	2011	2012
Complainant offences	4,242	4,520	4,946	5,361	4,816	4,319
Non-complainant offences	4,772	6,361	6,559	6,539	7,953	7,538

Source: National Institute of Health and Welfare.

Table 6: Statistics on mediation according to the initiator, 2012

	N	%
In criminal cases, mediation was initiated by:	11,785	100
Police	9,541	81
Prosecutor	1,763	15
The parties	119	1.0
By the victim	46	0.4
By the offender	75	0.6
Social welfare authorities	267	2
Parents	10	0.1
Other	85	0.7

Source: National Institute of Health and Welfare.

Table 7: Victims and offenders

	2007	2011	2012
Offender/suspect	10,269	13,710	11,994
Male	8,291	10,522	9,286
Female	1,987	3,188	2,788
Victim/complainant	8,868	12,177	10,503
Male	4,625	6,325	5,380
Female	2,737	4,505	3,885
Company	1,506	1,347	1,238

Source: National Institute of Health and Welfare.

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

Table 8: Mediation according to the age of the parties, 2012

	N	%
The age of the offender/perpetrator (at the time of the offence/event)	12,305	100
< 15 y.	1,516	12
15-17 y.	2,053	17
18-20 y.	1,536	12
21-29 y.	2,475	20
30-64 y.	4,456	36
65-y.	269	2
The age of the victim/plaintiff	9,762	100
< 15 y.	725	7
15-17 y.	726	7
18-20 y.	1,106	11
21-29 y.	2,126	22
30-64 y.	4,710	48
65+ y.	369	4

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

Out of the 11,558 agreements drafted, 37% consisted of monetary compensations and 5% compensation through work. The majority of agreements consisted of symbolic compensation, for instance an apology (40%), withdrawal from claims (10%) and promise not to repeat the behaviour (8%) and return of the property (0.5%). The total monetary value of compensations was 1.94 million euros.

Table 9: The content of mediation agreements, 2012

	2011		2012	
Agreements	N	%	N	%
In criminal cases during the year	11,558	100	9,239	100
Agreements by contents of N				
Monetary compensation	4,316	37	3,605	39
Work compensation	545	5	348	4
Property returned	54	0	39	0,4
Behavioural agreements	894	8	887	10
Apologies	4,602	40	3,206	35
Withdrawal from demands	1,147	10	1,154	12
Monetary values €	1,937908	100	1,983874	100
Monetary compensation – €	1,808737	93	1,904813	96
Work compensation – value in €	129,171	7	79,061	4

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

4.2 Findings from implementation research and evaluation

First empirical surveys on the mediation experiments were conducted in the late 1980s.[12] Since then, the experience of the participants and the views of different stakeholders have been explored in several reports.

4.2.1 Measuring the experiences of the participants

Iivari (2010) studied participants' experiences with mediation after the introduction of the 2006 Mediation Act. All persons participating in mediation October 2007 to March 2008 were delivered a questionnaire consisting of questions about their observations, experiences and satisfaction with the mediation process. 2,399 questionnaires were delivered, of which 952 (40%) were returned, and the response rates were significantly higher among victims (48%) than among offenders (32%). The questions included a 15 item set of assertions about the contents of mediation. Answers were provided with a 4-

12 See for sources *Grönfors* 1989, *Järvinen* 1993 and *Iivari* 2000 (all in Finnish).

grade scale from 1 “totally disagree”, 2 “partially disagree”, 3 “partially agree” to 4 “totally agree” (and 0 “no response”). Results are summarized below in *Table 10*.

Table 10: Measuring satisfaction on mediation (in %)

Participants agreeing (totally or partially) with the following statements						
	Sex		**Role**		**Agreement**	
	Male	Female	Victim	Offender	Yes	No
I had enough information	89.2	87.2	90.8	88.8	89.2	86.3
Partipation was voluntary	97.9	98.1	99.7	98.2	95.2	96.3
I was correctly understood	94.5	93.5	94.6	94.1	95.2	79.2
Medation was useful	90.4	87.4	87.8	90.5	91.6	43.2
Mediators were impartial	95.2	91.9	96.8	92.5	95.1	81.5
Mediators acted professionally	96.6	92.2	95.2	96.0	95.8	79.2
Mental harms were addressed	**71.0**	**72.8**	**71.0**	**74.4**	**72.6**	**53.1**
It was only about compensation	43.7	34.0	40.1	47.0	37.2	59.6
I could influence the outcome	88.5	84.4	93.2	85.2	89.0	52.3
I could interrupt the process, if I wanted	93.5	92.3	94.9	92.6	93.0	97.9
There was a trustful atmosphere	94.9	93.3	95.9	94.0	95.3	80.4
Helped to understand the other party	**82.7**	**73.4**	**73.6**	**84.6**	**81.4**	**38.6**
I received information of other services	**67.5**	**66.6**	**65.6**	**72.1**	**67.7**	**53.7**
There was a strive towards a just outcome	93.5	92.1	94.2	92.6	94.6	66.7
I felt relieved after mediation	**86.1**	**81.3**	**84.5**	**86.2**	**87.0**	**35.4**
N	564	357	314	268	835	51

Source: *Iivari* 2010.

Overall, experiences were rather positive, with around 70-90% of respondents agree totally or partially with these assertions. Even if one has to take into account that certain aspects in the research design and context may have influenced the result (for example the fact that all but one assertion (8) were formulated in a positive manner), the overall impression remains a positive one.

There are no substantial differences between the different genders. The same applies to differences between offenders and victims. However, as could be anticipated, the level of satisfaction was systematically lower in cases that did not result in an agreement.

The most critical responses were given for the assertions relating to the question whether mental and immaterial harms were addressed sufficiently (7), whether mediation helped the participants to understand the other party (12) and whether they felt relieved after mediation (15). *Table 11* examines whether these views vary according to the type of offence committed. Increased understanding and the degree of relief seem to be at their lowest in cases of violence in close relationships, but still strongly on a positive side.

Table 11: Measuring satisfaction on mediation, selected items

	Assault	Violence in close relations	Theft	Damage to property	Disturbance of domestic peace
Mental harms were addressed	*72.1*	*79.1*	*74.1*	*65.8*	*79.4*
Helped to understand the other party	77.6	70.7	82.2	83.7	68.8
I felt relieved after mediation	85.4	63.4	84.0	86.4	82.1

Source: *Iivari* 2010.

4.2.2 Exploring the views of the police and prosecutors

The study by *Iivari* (2010) also measured the views and perceptions of the police and the prosecution service, those criminal justice agencies that are primarily responsible for making referrals to mediation. The aims of the study included an examination of the extent to which the 2006 law reform had changed the official view and the professional practices in police work and in prosecution.

One overall finding of the study was that the new legislation had clarified the situation and increased the officials' readiness to refer cases to mediation. Views regarding the types of cases that should be eligible for mediation showed a certain degree of variation compared to previous experiences. Officials with previous experience in mediation appear to have become more willing to also refer more serious cases to mediation. There was widespread consensus among police officers, though, that persistent offenders should not be included.

Prosecutors declared that mediation also has a substantial role in cases of non-complainant offences as a ground for non-prosecution, and some prosecutors would have been willing to in fact expand that role. Prosecutors also stated a readiness to increase the impact of mediation in the courts' sentencing decisions.

The perceived risks of mediation were mainly connected to the possibility that compensation sums agreed in the course of VOM would exceed the prevailing practices as a result of the fact that parties are unfamiliar with current practices.

4.2.3 Analyzing reoffending

Mediation has also been connected with the hope that it would be able to reduce further offending by enhancing the offender's ability to grasp the meaning of his/her offence and thereby enable a fuller accountability for the crime. *Mielityinen* (1999) examined reoffending rates in a quasi-experimental setting, controlling for offence type and prior criminality. The results indicate that reoffending was generally lower in the mediation-group (56% against 62% in the control group). However, one cannot rule out the impact of selection processes, as those willingly participating in mediation have already shown signs of pro-social attitudes.

4.2.4 Net-widening?

From the abolionist- and diversionary points of view mediation leads to net-widening if mediation fails to replace former criminal process. Instead of an alternative, it becomes just an addition. Whether this has been the case, is not easy to judge. In any case, the assessment needs to be done separately for complainant and non-complainant offences.

In the of non-complainant offenses mediation serves as a true diversionary alternative if it serves as a grounds for non-prosecutioon or mitigation. Whether and how often this has been the case is there is just on estimation of about 40% diversionary effect. In complainant offenses mediation in practice ends the case. Still, there could be net widening if charges would have been dropped in any case (in the absence of mediation).

For the moment an exact analyses on net-widening is missing. Some sort of net-widening may well have occurred, taken into account that the number of mediated cases exceeds easily the number of non-prosecutions, and that the latter have not increased in any substantial manner during the last years. However, there is indication that a successful mediation seems to be a powerful argument – not only for non-prosecution – but also in sentencing.

Another type of net-widening could occur when suspects under the age of 15 – and who are exempted from criminal liability – are taken into mediation. If mediation comes on top of other regular child welfare intervention, it may represent a sort of net-widening. However, one may also ask how detrimental this sort of net-widening really is, from a wide social policy point of view.

5. Conclusions

The expansion of mediation services in Finland may have come as a surprise for many. The high volume of cases is, in fact, unprecedented even for many Finnish professionals working in the field of criminal justice.

Evidently mediation filled a "gap" in the existing (criminal) justice system. The strong emphasis on legality in prosecution had given too little leeway for individual discretion in prosecution. The prevailing sanction-ideology – humane neo-classicism – had removed social- and re-integrative practices from criminal justice and transferred them to social welfare. Despite the fact that the position of the victim was secured by procedural guarantees, it was widely acknowledged that the official process was unable to meet the emotional and immaterial needs of the victim. Mediation brought a partial remedy in all of these three points. It served as a measure to enhance the unfounded rigidity of the penal process, it brought the social dimension back to the handling of criminal offences, and it took the immaterial needs of victims seriously.

Furthermore, it provided lay people an opportunity to "something else and something better" compared to the traditional criminal justice system. In this respect the informal and alternative nature of mediation may well have been a decisive reason for its popularity, both among the parties and the mediators who are willing to participate on a voluntary basis and against only nominal compensation.

Taken into account this strong ideological link to informality, the institutionalization that took place in a form of national legislation in 2006 would, in fact, have probably been regarded as suspicious for many of the early proponents of mediation. As *Martti Grönfors* wrote already in 1989, "now that the project is part of the social services which the city provides, it is no longer even considered an experiment in alternative justice, but a support service to the official justice system".[13] But other commentators have expressed different views. According to *Elonheimo* (2003), "most mediators would […] not see the role of the social services as overriding the idea of an alternative to the official justice system. They might not be happy with the phrase 'support service to the official justice system', but they might accept the idea that mediation cannot disregard the limits set by the criminal law. They might also be happy with the idea that the settlements that come out of mediation should not violate the material norms that the criminal law is set up to protect. In short, they are happy to help in reducing red tape and bureaucratic humiliation, but they do not want to overturn norms concerning, say, theft, vandalism, or assault."[14]

Recent evaluation reports might also protest against the claims that mediation has lost its basic characteristics in the course of the institutionalization process. The "social dimension of mediation" (as phrased by *Vesikansa*) has not disappeared anywhere. It is strongly present in the mediation meetings, and it reflects the needs of the victim to have a chance to meet the offender, to talk to

13 *Grönfors* 1989.

14 *Eleonheimo* 2003.

him/her, to have answers to the questions that have bothered the victim, and to be able to "close the case" in a form of resolution or reconciliation.

The further development of mediation will depend much on the extent to which the officials (who are now very much in charge of the developmental work) put emphasis on the different dimensions of mediation. The criminal justice officials and practitioners (prosecutors, judges) seem to recognize the value of social dimensions. Their interest is mainly to ensure that legal safeguards are met, and that the application of mediation schemes does not divert too serious cases from the criminal justice system. Today, the most visible disagreement concerns the value and suitability of mediation in violence in close relations. This debate is not run by the criminal justice professionals, but by other interest-groups. It has, undoubtedly, a strong ideological character, and much less to do with balanced evaluation of research based empirical findings.

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France

Robert Cario

1. Origins, aims and theoretical background of restorative justice

The question of restorative justice in France emerged in the early 1980s, when first victimological research was presented and the role of the victim in the criminal procedure was discussed. The improvement of the position of the victim was one of the main issues that the socialist government of president *Mitterand* and his Minister of Justice *Badinter* promoted in 1982. In 1986, the nationwide network of an Association for the Support of Victims was created (*Institut National d'Aide aux Victimes et de Médiation, INAVEM*). Thus, the idea of mediation also had its footing in the victim's movement. However, the first projects on mediation were developed within the framework of offender rehabilitation, i. e. the association for probation called *Comité de Liaison des Asssociations de Contrôl 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). The measures of mediation and reparation (in adult and juvenile criminal law) are promising, but have yet to be subjected to strict evaluation.

Furthermore, there are still manifest objections from prosecutors and justice practitioners against the idea of restorative justice. Therefore, its implementation depends to a large extent on the local structure and the attitudes of the local justice stakeholders (such as prosecutors and judges).

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 their aspirations to

participate, both in terms of how they are imposed and how they are executed in practice.[1]

The movement for improving the situation of victims as well as the introduction of mediation schemes was also influenced by international standards such as the Council of Europe's Recommendation on the Position of Victims in the Criminal Procedure of 1985 (R (1985)11) and the Recommendation on the Support of Victims and the Prevention of Victimisation of 1987 (R (87)21). The Council of Europe's recommendation on Mediation in Penal Matters (Rec (1999)20) in the late 1990s did not have a major impact as mediation and reparation had already been incorporated into the criminal justice legislation in 1993 (see above).

The European Commission's Framework Decision of 15 March 2001[2] and the present Directive of 25 October 2012 (replacing the framework decision of 2001)[3] have been met with major interest not only from academics in France.[4] In fact, the new socialist government in France (since 2012) seems to be in favour of an evidence-based and rational criminal policy that considers the principles of rehabilitation of offenders as well as of protecting victims and their relatives. Mediation and restorative justice in general, therefore, could constitute the core of crime policy in the near future. The recent reform law of 15 August 2014 that expanded the scope of restorative justice measures to all stages of criminal procedures, including the stage of sentence execution (see Art. 10-1 CPP), will be mentioned at the end of this chapter.

1 See *Cario* 2012a, pp. 227 ff.

2 See Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

3 See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Official Journal of the European Union L 315/57 of 14 November 2012.

4 See *Cario* 2010. See also *Cario* at the "Conference on Consensus" organised by the Ministry of Justice on the prevention of recidivism on 14/15 February 2013 in Paris (http://conference-consensus.justice.gouv.fr).

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

2.1 Pre-court level (police and prosecution service)

2.1.1 Adult criminal justice

In France, in general, only two forms of restorative justice are provided and they predominantly take place at the pre-court level. The police, however, are not involved, as police cautioning or police-ordered reparation is legally prohibited.

It is the level of the prosecutor's decision making where restorative justice measures are of importance. In France, the ruling principle of discretionary prosecution gives the prosecutor a large range of discretion (see Art. 41 CPP).

It is noteworthy to say that diversion (dismissal of cases) in theory is not restricted to certain offences or by previous offending, i. e. also crimes by recidivist offenders can be dismissed. However, in practice, the dismissal of cases is used to a large extent in cases of first and second time offenders who have committed minor offences.

The prosecutor may dismiss a case (which could otherwise be accused) (*classement sans suite*):

1) without any further action
   - because of the petty nature of the offence or
   - because, for example, the victim has been compensated beforehand, etc.
2) with further action (Conditional dismissal of the case, "*alternatives aux poursuites*" or so-called "*classements conditionnels*", see Art. 41-1 ff. CPP) such as
   - the obligation to make reparation or
   - to reach a settlement of the case under the rules of plea bargaining (*composition pénale*, Art. 41-2 CPP for adults)[5] or
   - (more specifically in terms of restorative justice) to participate in mediation.

Mediation in the context of conditional dismissal was introduced in 1993. Participation in mediation originally required the consent of all the parties. In 2010, the law was modified and now even more explicitly strengthens the idea of mediation by establishing a right of the victim to demand such a measure or to accept such a proposal of the prosecutor (Art. 41-1-5° CPP).

Whereas the law of 1993 had stipulated the three cumulative conditions that the measure should be appropriate to repair the damages or compensate the

5 And Art. 7-2 of the Ordonnance of 2 February 1945 for juveniles of at least 13 years of age, see *Castaignède/Pignoux*, in *Dünkel et al.* 2011, pp. 483 ff.

victim, to restore social peace and to contribute to the rehabilitation of the offender, a law reform of 1999 sought to extend the application of mediation by demanding that only one of these three conditions should need to be fulfilled.[6]

If – in the case of a conditional dismissal – the conditions are not fulfilled, the prosecutor can decide to continue prosecution and to submit the case to the court.[7]

An important opportunity for restorative justice measures exists in the field of alternatives to pre-trial detention. The "judge of instruction" may order reparation to the victim as a condition for placing a person under the supervision of the probation service as an alternative to pre-trial detention ("*Contrôle judiciaire socio-éducatif*"). This order, unfortunately, is not often imposed. It may include not only measures of control, but also the compensation of victims or their relatives.

2.1.2 Juvenile justice

The French juvenile justice system is based on the idea of education expressed in the Ordonnance of 1945.[8] This orientation is in harmony with the philosophy of restorative justice.[9] But amazingly, measures such as mediation, family group conferencing etc. have had only a small impact on juvenile law and practice.

In principle, the possibilities of restorative justice measures in the field of conditional and unconditional dismissals of the case (see above under *Section 2.1.1*) can be applied in a quite similar way as in the criminal procedure for adults, because also in juvenile justice the principle of discretionary prosecution applies (Art. 41 CPP). However, it is remarkable that the Ordonnance after the reform in the 1993[10] has even 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 or the judge of instruction as well as the deciding judge in the court are entitled to propose to the juvenile a measure or activity of reparation in favour of the victim or the society as a whole (such as a community service order). All measures in favour of the victim require the

6 There are, however, doubts from the point of view of promoters of restorative justice, as mediation can be abused for the simple purpose of reinforcing the observance of the laws, regardless of the rehabilition of the offender and the interests of the victim, see *Cario* 2010, pp. 150 ff.; 2013.

7 This will be the judge of instruction (*juge d'instruction*) or the juvenile judge (*juge des enfants*) in cases of crimes or serious misdemeanors, otherwise the court conducting the hearing (both in juvenile as well as in adult criminal procedure).

8 See *Cario* 1999, pp. 251 ff.; *Bailleau* 1996, p. 237; *Castaignède/Pignoux* 2011.

9 See *Cario* 1999, pp. 136 ff.

10 See the Law no. 93-2 of 4 January 1993.

consent of the victimized person, and at the stage of preliminary instruction also of the offender (see Art. 12-1 paragraph 2). Thus, in theory, a wide range of restorative measures is accessible, including in particular 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.

2.2 Court level

2.2.1 Adult criminal justice

In France, mediation does not exist as an independent measure or sanction of the criminal court. However, the compensation order (for material and immaterial damages) has been available as a criminal sanction since 1975, which at least contains certain elements of restorative justice ideas.

Under certain circumstances, in cases of misdemeanors a discharge ("*dispense de peine*") can be granted "if the rehabilitation of the offender has been reached, the victim has been compensated and the disturbed peace in society has been restored" (Art. 132-58 ff. Criminal Act, *Code Pénal*, CP).

In the same vein, the court may postpone the imposition of a sentence ("*ajournement du prononcé de la peine*") in order to give the offender the opportunity to repair the damage or to compensate the victim and to restore social peace and demonstrate rehabilitative efforts (Art. 132-60 ff. CP).[11]

Further elements of restorative justice can be seen in the supplementary measure of a reparation order combined with a suspended sentence with supervision of the probation service ("*sursis avec mise à l'épreuve*", Art. 738 ff. CPP).

As another means of restoring the social peace, one could mention the community service order ("*travail d'intérêt général*", Art. 131-8, 131-22 ff. CP), which was introduced in France in 1983. Although in general this sanction has some potential for restorative justice, the reality is more that of a more or less repressive criminal sanction, which in most cases excludes the victim and his/her interest in reparation and compensation. On the other hand, the law provides community service explicitly as a substitute for sentences to deprivation of liberty. The law does not specify the length of a prison sentence to be substituted (Art. 131-8 CP). For suspended prison sentences, community service may replace up to six months of imprisonment (Art. 132-54 ff. CP). The amount of hours to be imposed is between 20 and 210 hours (Art. 131-8 CP).

Finally, there exists a rather new sanction which aims at the compensation of the damages incurred by the victim, and which was introduced into the Criminal Code (CP) in 2007 (the "*sanction-réparation*", see Art. 131-8-1 CP).

11 See *Cario* 2010, pp. 66 ff.

The sanction of "reparation" may – with the consent of the victim and the offender – consist of a payment to compensate the victim, but also of repairing goods or damaged belongings. The judge imposes this sanction as a substitute or as a supplementary sanction to a prison sentence in cases of misdemeanors. The reparation order may substitute up to six months of imprisonment. The judge in this case fixes the length of imprisonment which has to be served in case the offender does not fulfill his obligation to repair the damages.

Fines in general have little to do with the idea of restorative justice. However, in France (like in other countries),[12] some discussions have emerged as to whether it would be pertinent to use the payment or at least parts of it (which is regularly to the benefit of the state) by transferring it either to the fund for the direct compensation of victims of serious violent offences ("*fonds de garantie des victimes d'actes de terrorisme et d'autres infractions*", FGTI) or to organizations that provide victim support services ("*Associations d'aide aux victimes*").[13] However, the legislator has – up to now – not yet followed up on this promising idea, which had been part of the draft law *Taubira* in 2013, but "censured" by the Constitutional Council (Conseil Constitutionnel) in its decision of 7 August 2014 (for the reform law see *Section 5* below.).

2.2.2 Juvenile justice

The wide possibilities of Art. 12-1 of the Juvenile Justice Act, which are also relevant at the court level, have been described under *Section 2.1.2*. However, one important difference has to be noted: the consent of the minor is not necessary in that stage of the procedure as the mesure can be imposed on him by a judgement. In that case the juvenile is only asked for his "opinion", not necessarily his consent (Art. 12-1 paragraph 4).

In addition, one should mention further possibilities of discharge of any judicial response of the juvenile judge (concerning educational measures, "*dispense de mesure*", Art. 8 al. 10-2˚ of the Ordonnance). Art. 8 stipulates that a discharge can be granted "if the rehabilitation of the juvenile offender has been reached, the victim has been compensated and the disturbed peace in society has been restored" (i. e. the same conditions apply as for adults, see *Section 2.2.1* above).

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12 See in particular Art. 737 of the Canadian Criminal Code which obliges all sentenced offenders to pay, in addition to their sentence, an amount of money to the victim support schemes of their region. See also *Contribution victimes*, *www.inavem.org*.

13 The Associations of victim support and mediation, because of the weaknesses of the public financial sector, are chronically underfinanced, which underlines the necessity to improve their infrastructure by further funding or by integrating them into the Public Service of Justice (*Service public de la Justice*).

Contrary to the General Penal Law, some forms allowing for reparation mentioned above such as the discharge ("*dispense de mesure éducative ou de peine*") and the postponement of a sentence ("*ajournement du prononcé de la mesure éducative ou de la peine*") were eliminated from the juvenile justice legislation in 2011 (see the changed Art. 20-7). However, the juvenile justice system provides wide possibilities for mediation and reparation.

The supplementary measure of a reparation order combined with a suspended sentence with supervision by the probation service ("*sursis avec mise à l'épreuve*", Art. 738 ff. CPP) is also applicable in the case of juveniles.

With regards to the community service order ("*travail d'intérêt général*", Art. 131-8, 131-22 ff. CP) the conditions have been equalized for juveniles and adults. However, the scope of application is restricted only to juveniles aged 16 and 17. As with adults, the consent of the offender is required. The number of hours to be imposed ranges from 20 to 210 and is thus the same as for adults.[14]

The educational sanctions introduced by the laws of 9 September 2002 and 5 March 2007 are also applicable to minors from the age of 10 onwards. Art. 15-1-5 provides that the measure of reparation and support to the victim can be pronounced not only as an educational measure but also as a punishment (*peine*).

As in adult criminal law, the compensation of damages was introduced into the Criminal Code (CP) in 2007 (the "*sanction-réparation*", see Art. 131-8-1 CP). The conditions are the same as described for adults under *Section 2.2.1*.

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. The measure is of an indeterminate nature and ends at latest when the offender subjected to it has turned 18.

2.3 Restorative Justice elements while serving sentences

At the moment no specific regulations exist within penitentiary law for applying restorative justice measures in penitentiary institutions, neither for adults nor for juveniles. The same is true of the execution of community sanctions or measures including probation, in particular for adults. The only consideration the legislator has taken into account is the (financial) compensation of the victim, either directly or through the FGTI-fund (on the basis of an application by the victim on his own initiative or upon a decision by the penal judge). Art. 707 paragraph 2 of the CPP stipulates laconically that "the execution of sentences – in the

14 Before a reform law of 1992, the maximum number of hours for juveniles had been half of that for adults, i. e. 120 instead of 240 hours (see the Criminal Law Reform Act of 1983). Today, for both groups, 210 is the maximum.

interests of the society and of the rights of the victims – favours the rehabilitation of offenders and the prevention of further crime". At least the pure financial interests of the victim are met, in particular in connection with relaxations of the prison regime such as prison leaves and the decision on conditional/early release from prison. The offender has to pay according to civil claims which have been adjudicated by the court. Unfortunately, in practice such compensation is adjudicated in only one out of ten cases. Fortunately, times will hopefully be changing for the better following the recent law reform of 15 August 2014 (the so-called Law *Toubira*, see *Section 5* below.).
Other protective measures for victims with regards to prison relaxations are also provided, which sometimes paradoxically aggravate the situation of the victim and his/her interests in restoration of peace and even endanger the interests of the offender in terms of his rehabilitation (see Art. D 49-64 ff).[15]

The new Prison Act of 24 November 2009 does not eliminate this unfavourable situation. In rather general terms, the "protection of the interests of victims" is mentioned (Art. 22), which constitutes a legitimate concern in itself. The new Art. 132-54 provides the possibility for the offender to complete community service in the traditional way. Some amendments to Art. 729 CPP – such as granting conditional release only with regards to the "efforts the offender has shown to compensate the victim" or in Art. 730 CPP concerning the lawyer constituting a civil claim within the criminal procedure (*partie civile*, i. e. combining civil claims for compensation of material and immaterial losses with the penal trial) or the hearings with the judge for the execution o punishments concerning conditional release of prisoners serving five years or more – are not really new.

Yet nothing is provided for implementing restorative justice measures in the context of prisons, neither in closed nor open facilities. There is some doubt that the legislator will stick to this "lost opportunity" during the ongoing reform of the Penal Law and the Law on Criminal Prosedure. During the preparatory discussions in 2012 and a conference held on the prevention of recidivism ("*Conférence de consensus sur la prévention de la récidive*"), the Ministry of Justice declared its intention to introduce prisoner-victim-meetings as well as to organise such meetings in the area of probation (see §§ 42 and 19 of the recommendations under *conference-consensus.justice.gouv.fr*).

However, interesting experiments have been developed in our country. In 2010, so-called victim-inmate-meetings (*Rencontres Détenus-Victimes*, RDV) were created in the central prison of Poissy. The "session 2014" ended in June 2014 and a new session will start at the end of the year. These meetings are group sessions of three to five victims and sentenced offenders serving a prison sentence. Victims and offenders do not know each other. Rather, the victims are selected because of the similarities of their victimization with the offences of the

15 See *Cario* 2003, pp. 145 ff.

prisoners. Such meetings demand preparation in the minutest details and professional, well-educated animators. The meetings are organized in a way that personal feelings and emotions are calmed down, an effect that has not been achieved by the penal process and in a variable rythm for each participant which – no doubt – also provides variable benefits for them. Other prisons have just recently begun to follow the Poissy prison experiment, and have started to organise such meetings as well. There are also meetings organized in open facilities.[16]

Another experiment has been developed in the field of post-release supervision ("*médiation pénale post-sententielle*") in a project funded by the European Commission with associated partners in *Bulgaria*, *Spain*, *Italy* and *France*. In France, 25 projects have been established in the three jurisdictions of the central courts (*Tribunal de Grande Instance*) of Marseille, Nantes and Pau. The projects have been directed by professionals of a non-profit organization called *Fédération Citoyens et Justice*. Post-sentencing mediation (*médiation post-sententielle*) is organized as a condition within the scope of three traditional sentencing options, which – with regards to the first two options – have been rarely used up to now: The measure of judicial supervision (*le contrôle judiciaire socio-éducatif*, in order to prepare the offender to undergo a mediation procedure after the sentencing decision); the deferment of imposing a sentence; and finally the suspended sentence with supervision by the probation service.[17]

Recently, in February 2014, Circles of Support and Accountability (*cercles de soutien et de responsabilité*) have been implemented by the Probation and Correctional Service (Service pénitentiaire d'insertion et de probation) of Yvelines. Other are in preparation at Bordeaux in the framework of the European programme COSA, and in Dax. Focussed on released offenders (regularly sex offenders) with a high risk of reoffending and particularly isolated social and family bonds, the results are very impressive. The recidivism rates of these high risk offenders are almost 8 times lower than those of a comparison group.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

After a long period of experiments based on fruitful cooperation between enligtened judges and dedicated social workers, the legislator wanted to regulate mediation by introducing a special rule for the prosecutor – with the consent of

16 See *Cario/Mbanzoulou* in les Chroniques du CIRAP-11, pub. ENAP 2011, 4; *Cario* 2012, p. 164; *Boulay* 2013, http://conference-consensus.justice.gouv.fr.

17 See *Dandonneau* in Actualité Juridique Pénale 2011, pp. 225 ff.

the parties involved – to propose mediation and thus to dismiss the case if this seems to be appropriate to successfully achieve reparation/compensation for the victim, to reconcile the problems that have emerged as a result of the crime and to contribute to the rehabilitation/reintegration of the offender (see the former Art. 41 paragraf 7 *CPP*). Interestingly, these three conditions are alternatives in the future, changing the sense of the initial reaction/sanction by expanding the scope of diversion.

As mentioned above, in France, mediation in the field of adult offenders is decided by one single prosecutor, theoretically at all stages of the criminal procedure. In juvenile justice, cases the measure is called "measure of assistance (help) and reparation" ("*mesure d'aide et de reparation*"), which is used extensively at the prosecutorial level by the prosecutor specialized in juvenile justice and family affairs.

The fear of weakening or losing an important element of the penal culture, and with that a loss of authority, had the result that mediation was incorporated into the model of supervision of conduct ("*modèle socio-judiciaire*") in a very strict manner.[18] However, the introduction of mediation in penal matters at the level of the prosecutor caused some juridical problems insofar as the real resolution of the conflict was not at the centre of the prosecutorial activities, but instead a more repressive thinking prevailed – clandestinely but a fact nonetheless. On the other hand, the ambition to restore the social problem seems to be incontestable, at least in theory.

In this sense, from the point of view of the actors as well as the penal system itself, mediation is a coherent measure for achieving negotiated justice ("*justice négociée*").

The actors: The victim seems to be better assured that the criminal justice system does not "steal" his conlict.[19] His/her active involvement in working on his/her own victimisation allows him/her to express his/her anger, feelings and emotions towards the offender and to observe how and in what way they can be moderated or even made to dissappear. The victim can show the offender the issues that are of major interest to him/her with regards the crime, in particular where the offender used excessive force and has caused a loss of control for the victim over his/her and living conditions.

Mediation also contributes to the responsibilisation of the offender, who, by compensating the material losses caused by the crime, is concretely made aware of the psycho-social and affective dimension of the victimised person or, in a more general sense, becomes aware of the reality of the trouble he has caused to society. This restorative synergy allows the (juvenile as well as adult) offender

18 See for a classification of diferent models of mediation in penal matters *Lazerges* 1992, pp. 14 ff.; *Faget* 1992, pp. 59 ff.

19 See *Christie* 1977; re-edited in *Newburn* 2009, pp. 712 ff.

"to explore that law experienced in a symbolic exchange is preferable to law imposed by force."[20]

The role of the *mediator* is totally innovative because of the mission attributed to him by the judicial authorities. He has to try to explore the conflict by activating the parties in order to bring them to a personal encounter and exchange to solve their problems. Because of his professional capacity to listen to the participants of the mediation procedure, he can motivate them to share their view of the problem with each other. The mediator can achieve a gradual reorientation and by that an appropriation of the competence to regulate the conflict, which has separated the parties and still separates them.

The criminal justice system: Mediation offers a different kind of conflict resolution and opens the floor to a different justice system – more humane, more amicable and more flexible. Due to the dialogue established between the conflicting parties, and due to the common search for a solution, the justice that mediation can provide is much less coercive and less traumatising and instead clearly much more participative in nature.[21]

The criminal justice system has beome more credible by the direct or indirect material reparation of damages caused by the offender. The mediation process and outcome invite the criminal justice system to be more pedagogic through the effective answer which is given to the offender's behaviour – often a meaningful search for its limits. The responsibilisation of the offender (reminding him/her of the law s/he has broken, making him/her aware of the human consequences of his/her act) gives the intervention a sense of social justice.

Finally, and most importantly, mediation will lead in the mid-term to a less expensive criminal justice system. Well beyond strictly repressive sanctions, a well-organised and soundly implemented mediation scheme is a warranter of rehabilitation (resocialisation). Being an authentic and effective measure to counteract recidivism, mediation contributes to the prevention of future damage and to reducing the individual and social costs of crime.

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). One can observe an unjustified expansion of social control (net-widening), from which real incoherences emerge which affect all actors in the field of mediation in penal matters.

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20 See *Vaillant* 1994, pp. 157 ff.

21 See *Bonafé-Schmitt* 1992, pp. 280 ff.

Incoherences at the prosecutorial level can be observed in the decision-making process when looking at the decisions concerning the parties involved, the mediator and in particular with regards to the evaluation of the outcome of the mediation procedure by the prosecutor. Speaking about the consequences of a mediation procedure, it is clear that the prosecutor has to use his jurisdictional powers in contempt of the separation of the juridical functions of the judge and the prosecution service. The prosecutor's power to dismiss the public procedure definively after a mediation has taken place (immediately or in due time before the prescription of a public indictment) must be seen in the same light.[22] It constitutes a violation of, or at least a threat to, the principle of *ne bis in idem* and gives mediation the character of a pre-sentence measure strongly influencing the later decision of the prosecutor (and the court). Other incoherences in mediation at the prosecutorial level are related to traditional legal guarantees such as the presumption of innocence (which is not sufficiently met by the consent of the offender to take part in mediation), the necessity and the proportionality of the measure (related to the pettiness of offences generally observed), the principle of equal treatment of offenders (criterium of selectivity, incomplete implementation with regards to the national level in different regions),[23] the non-existence of advertisement for mediation, the non-public nature of the procedure, the non-existence of judicial review etc.

The elements and outcomes of the mediation procedure itself can be even more problematic. Facts negotiated in the confidential situation of a mediation procedure may be (ab)used in later criminal or other proceedings, possibly without the consent of the parties.[24]

The incoherences at the level of the beneficiaries are to be seen in the need for the victim's consent (and only of the victim, as the consent of the offender is no longer legally required!) to participate in mediation, bearing in mind that, if denied, an unconditional dismissal of the case will be the probable outcome. Instead of a mutual restorative empowerment, what takes is place more closely resembles subtle penal bargaining. The additional expenses of time, sometimes observable in the hastiness of the justice agencies, often cannot be transferred to the situation of the victims, who by contrast need more time to address their problems properly. More generally, it is regrettable that the situation of the offender (today more an accessory part) and the victim are not systematically the subject of a global evaluation, at least in terms of their economic, familiar or social situation. Everybody knows the sometimes irreversible serial short-

22 The administrative decision of diversion without any sanction remains provisional, as long as the regulation is achieved, see in particular Crim. 5 déc. 1972 in Bull. Crim. nr. 375, 945 ff.

23 See *Delmas-Marty* 1994, pp. 32 ff.

24 See *Bareit* 2012, pp. 819 ff.; *Mbanzoulou* 2012, pp. 49 ff.

comings of interventions. The more timely a psycho-social intervention takes place, the better the chances are for rehabilitation and social integration on the one side, and receiving general reparation or compensation on the other.[25]

Another incoherence derives from the transactional character of the reparation/compensation measure from which the victim profits. Nothing prohibits further claims of the victim in a civil procedure to achieve total compensation in case of default of the offender in order to get "restitution for his primitive litigations".[26]

As to the presence of lawyers, it interestingly varies considerably for different reasons: the matter may not be really attractive; knowledge about the techniques of medition is modest in general; and – very importantly – the remuneration is low. Their role is not one of representation,[27] but instead to advise them as to whether or not the outcome of a mediation contract and its modalities should be accepted.

Concerning juveniles, the situation is very clear: the assistance of a lawyer is legally prescribed (see Art. 4-1 Ord. 1945). On the other hand, the philosophy of mediation prevents the lawyer from participating directly during the victim-offender meeting.

Incoherences at the level of the mediator refer to his actual legal status. If he must be a well-educated professional with a specialisation in mediation, holding on his neutrality and the confidentially of his observations, it may be difficult for him to keep this neutral position when it comes to communicating with the person who has commissioned him: the prosecutor. Indeed, such a nomination assignment as being "the mediator of the prosecutor" changes the supposed complementarity[28] of the mediation schemes and the justice agencies with regards to their independence. This is all the more true for those mediators who are recruited for individual cases, resulting more and more in a function of being the "delegate" of the prosecutor and of substituting the professional mediators

25 See Recommandation R(00)20 sur *le Rôle de l'intervention psychosociale précoce dans la prévention des comportements criminels*, Pub. *Conseil de l'Europe* 2001, multigraph., pp. 57 ff.; *Vitaro/Gagnon* 2001, pp. 535, 616 ff.; *Cario* 2004, pp. 108 ff.; *Tremblay* 2008, pp. 269 ff.

26 For this essential question, see the final conclusion of *G. Blanc*: La médiation pénale (commentary of article 6 of the Law 93-2 of 4 January1993 refering to the law reform of the criminal procedure), in Sem. Jurid., I, 3 760, 211 ff.; see also Art. 41-1-5° CPP mod. L. 9 March 2004, which offers the victim the possibility to achieve an order against the offender to pay reparation and to compensate all damages if the offender does not comply with these duties in time.

27 See *Mbanzoulou* 2012, pp. 65, 87 ff.

28 See against this *Faget* 1995, pp. 32 ff.

working in private non-profit organisations.[29] Often, some unjustified mistrust can be observed against social workers belonging to the Victims Assistance Organisations such as INAVEM or the "Citizen and Justice"-movement ("*Citoyens et Justice*"), in many cases because of simple financial reasons. Another source of subordination could come from the financial structure of the associations for mediation, which, in order to maintain their always fragile budgets, have to provide all measures that can be imposed by the prosecutor. The alltogether not criticisable anxiety to mainatin budgets in order to guarantee the employment of the staff risks to give priority to the logic of an entrepreneur over the logic of the "restorative mission". And with that rule in mind, one may fear two further consequences: the acceptance without discernment of any measure imposed, and a level of "excessive" success.

It is not always achieved that the vocational training of mediators contains profound legal and psychological knowledge, but at least fundamental capacities of listening and leading conversations and negotiations. In short: knowledge about techniques of human communication which favour dialogue and communicative behaviour and enable the staff to evaluate the results of mediation procedures.

3.2 Group conferencing

In contrast to neighbouring country Belgium, in France there have been no experiences with family or other group conferences.

3.3 Reparation, restitution orders etc.

See above.

3.4 Restorative measures in prison

See above *Section 2.3*.

3.5 Others

The question of using mediation for more serious cases of crime in the field of the execution of sentences after a conviction, and the desire to make an achievement in this direction, is discussed on some internet-websites as well as in the literature, without any clear methodological conception of its implementation and empirical evaluation. Direct meetings of offenders and victims in that

29 For the legal status of the delegates and mediators of the public prosecutor, see Art. R 15-33-30 ff. CPP D. of 29 January 2001, modified by D. of 27 September 2004.

area, well-known in other countries, require lengthy preparation of the involved parties in order to avoid any form of secondary victimisation.[30]

3.6 Summary

In summary, restorative justice measures are not very diversified and applied only reluctantly in France. Regarding adult offenders, mediation is restricted to the stage of prosecutorial decision-making and to petty crimes that would usually result in diversion with no further action. Mediation is implemented by an associate mediator, a delegate of the prosecutor or another authorized person. The length and remuneration of the measure depends of the legal status of the mediator. The suitability of the penal reponse depends on its professional qualification. In this context, it should be mentioned that the costs of mediation organized by an authorised individual person are 39 €, whereas the costs for the same measure organised by members of associations vary according to the length of the mediation procedure between 77 € (taking less than one month), 153 € (taking between one and three months) and 305 € (if the procedure takes more than three months, see Art. R 121 ff., A 43-4 ff. CPP). In the year 2010, 14.9% of all organised mediation cases at the level of the prosecutor lasted less than one month, 46.1% between one and three months and 37.4 % more than three months (see *Annuaire Statistique de la Justice* 2012, pp. 113 ff.).

Other sanctions or measures could be seen as containing some aims of restorative justice, but in general they do not really address the victim personally, focussing only on the material compensation of damages which offenders are liable to pay anyway.

With regards to juvenile offenders, the character of the measure of support and reparation could be seen as more restorative, although some scholars have their doubts. At least this measure allows for the victim and its relatives to play an active part in the mediation or reparation procedure. The same is true for other measures within the scope of juvenile justice – this all the more, because restorative efforts have to be considered at any stage of the juvenile criminal procedure. The professional staff of the juvenile probation service (*Protection Judiciaire de la Jeunesse*, PJJ) is generally responsible for mediation etc., if a case is not delegated to the non-profit mediation services.

30 See not. Association nationale de la justice réparatrice, anjr.fr ; Association de thérapie familiale systémique, atfs.fr ; *Millot* 2011, In Libération 22 février, Ensemble on travaille contre le passage à l'acte, liberation.fr ; Association L'Ange bleu, ange-bleu.com.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

As to the practice concerning juveniles the available statistics reveal for 2009 that juvenile prosecutors applied mediation in 1,294 cases, whereas in a further 9,383 cases a reparation order was imposed.

Table 1: The number of mediations in cases of adult offenders in the year 2010 according to offence type and outcome of mediation

Mediation in adult cases	Year 2010
Number of mediation cases received	21,104
Theft	896
Domestic violence	5,293
Other injuries and intentional violence	5,290
Non-compliance of a child	1,906
Default to pay alimony	2,116
Damage to property	1,379
Insults	1,719
Others	2,505
Numbers of measures taken	21,598 (sic!)
Successful mediation	11,953
Mediation not successful	9,645

Source: *Annuaire Statistique de la Justice* 2011-2012, pp. 113 ff., justice.gouv.fr.

At the level of juvenile courts, the following observations can be made: of the 76,164 cases in which juveniles judges were involved in 2010, 22,883 juveniles received a surveillance order, were placed in an istitution or received a reparation order (without statistical information about the concrete details of these dispositions) at the pre-sentence stage.

With regards to the 70,814 *court decisions* made in 2010, 53.2% were by juvenile judges and 46.9% were made in chamber hearings before the *Cour d'Assises* (including 360 decisions made in cases of serious felony offences

commited by juveniles between 13 and 15 years of age). The distribution of sentences or measures can be seen below in *Table 2*.

Table 2: Sanctioning of Minors (Juveniles, 13-17 years of age)

Crimes (Cour d'Assises)	502
Suspended prison sentence combined with community service (TIG)	0
Educative measures	32
Educative sanctions	7
Misdemeanors (J.E ou TPE)	50,999
Probation (TIG)	943
Community service order (TIG)	3,310
Educative sanctions	1,901
Discharge of punishment (*Dispense de peine*)	1,912
Supervision order (probation)	422
Sentencing by a local judge for minor misdemeanors (*Contraventions de 5è classe*)	1,021
Educational sanctions	24
Absolute discharge	69

It is regrettable that the judicial statstics[31] are not really helpful as they do not differentiate accordiing to the type of sanctions and measures. More detailed information can only be found in special studies which focus on a specific population or kind of sanction, thus giving a more detailed, but only selective and non-representative picture.[32]

Concerning juveniles, a recent study with the title "Judicial trajectories of minors and desistance"[33] contains rich information about restorative measures taken in the case of juvenile offenders. The data come from the "panel of minors

31 See *Annuaire Statistique de la Justice* 2011-2012, *justice.gouv.fr*.

32 See *Tournier* 2010, pp. 211 ff.; pierre-victortournier.blogspot.com.

33 See *Delarre* 2012, Infostat justice, 119, pp. 6 ff.; *justice.gouv.fr*; *Razafindranovona*/ *Lumbroso* 2007, pp. 4 ff.; *justice.gouv.fr*.

followed up by the justice system".[34] 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. Some small differences are visible according to the kind of offence: 6% in cases of simple theft, 8.7% in cases of bodily injury and other assaults, 9% in case of damage to property and 14.8% in the case of aggravated theft and handling.

The general conclusion to be drawn from these limited numbers is that measures that could be seen as restorative, or at least somehow oriented towards restorative justice, are applied only rarely.[35]

4.2 Findings from research and evaluation

It is almost unbelievable that in France there exist only very few research studies (general or evaluative) on restorative justice measures.[36] The majority of them deal with mediation in penal matters[37] or the reparation order concerning juveniles (measure of support and reparation, "*mesure d'aide et de reparation*" according to Art. 12-1 of the Ordonnance of 1945).[38]

The experiences of meetings of priosners with victims have not yet found the interest of restorative justice researchers as they might not be attributed to the field of restorative justice or they are so small in numbers that any evaluation would fail.

The lack of criminological studies is not so much a surprise in a country where criminology still is not really seen as a science! It is distressing to state that intra-disciplinary quarrels block any development of (inevitably trans-disciplinary) scientific knowledge about the phenomenon of crime. Under these conditions, teaching-staff and researchers will not take the risk to investigate in criminological studies which are not appreciated by anyone, not in their function as teachers nor as researchers. It is undoubtably these fights between small groups of criminologists in the past that have caused the underrepresentation of French researchers in international conferences and projects, a situation which is

34 Created in 2005, this panel covers the period from 1999-2010 and includes 117,000 juveniles and 304,000 cases concerning these juveniles; see *Delarre* 2012, Infostat justice, 119, p. 5.

35 See *Cario* 2010, pp. 163 ff.

36 See *Cario* 2012, Justice restaurative, pp. 147 ff.; Institut français pour la Justice restaurative (IFJR), justicerestaurative.org.

37 See *Faget*, *Bonafé-Schmitt*, op. cit.

38 See *Milburn*, op. cit.

even further aggravated by the "monolinguistic" orientation to the French speaking world.[39]

Nevertheless, some general remarks on the few research studies that *are* available should be made, although some of them are rather old. Interpretation should be conducted cautiously, as the results refer to limited samples, often restricted to the work of a specific service or organisation. Moreover, the methodological details are often not reported and do not meet the standards of a differentiated methodology such as randomized comparison groups or longitudinal approaches etc.

The first statement is that the French criminal justice system is rarely using restorative measures, in particular mediation and reparation, and this despite the fact that the expectations and needs of the protagonists in a general context of offences against property (which account for 80% of all penal sanctions pronounced) are much higher.

The second statement refers to the insufficient training of the mediators who do not belong to the national associations of victim support (*Institut national d'aide aux victims et de médiation*, INAVEM) or the probation service (*contrôle judiciaire*, *Citoyens et Justice*). The prosecutors, or in the juvenile justice system juvenile judges, can recruit mediators either directly – the so-called delegates of the prosecutors (people attached to the prosecutorial office) – or private mediators. The latter often lack specialized training for mediation procedures. There exist only few training centres in universities or private mediation training schools. This widespread absence of professionalisation is one of the reasons for the small proportion of successful outcomes in mediation procedures and the observable change of the restorative philosphy into a more repressive reminder to obey the law. Moreover, it is deplorable that economic reasons are responsible for recruiting the less trained mediators instead of the professionally trained social workers from the non-profit organisations who are more expensive because they dedicate more time to dealing with one case. The penal law orientation is another issue in this context.

The third statement refers to the juvenile offenders in particular. The "measure of support and reparation" imposed in more than 50% of the cases dealt with by the juvenile prosecutor only exceptionally involves the victim in the procedure of diversionary measures. Judges and social workers refuse any involvement of the victim, because they fear "revengeful attitudes" that might endanger the mission of education and which would impede them in their daily work. Therefore, the large majority of reparation orders are of an indirect nature to the benefit of institutions or associations.

Finally, an essential statement should be made with regards to the fact that the mediation procedure ends with a report of the mediator to the prosecutor. In

39 See *Cario*, *Herzog-Evans*, *Villerbu* 2012, La criminologie à l'Université. Mythes … et réalités, Ed. L'Harmattan, p. 104.

case of a successful outcome, the prosecutor will dismiss the case without any further action in most cases (diversion in the sense of non-intervention). Otherwise, further proceedings and possibly a conviction by the court will follow. It is regrettable that none of these two options have been followed up or evaluated. What is more problematic is that the consent given by the offender during the process of mediation can be used in further procedures and in particular further criminal proceedings (under denying the principle of *ne bis in idem*) as an admission of guilt which at least can have the consequence that a judge dispenses with the need to prove the question of culpability.[40]

Worried about these deficiencies, 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. Its conclusions, submitted in June 2006, contained 11 major propositions, amongst them: the promotion of all restorative justice oriented measures available; the acceptance of a general notion of emphasising the initiative and further application of these measures by judges and the involved parties (victims/offenders); the integration of these measures at all stages of the criminal procedure; the adequate training and education of the participants (mediators) on a continuous basis and under consideration of the private sector of associations of victim support as adequate partners of the justice system; the systematic evaluation of restorative justice measures in order to disseminate "good practice models" nationwide. Until, today no follow-up report has been launched; not even a confirmation letter for having received it.[41]

5. Summary and outlook

In summary, the application of measures of "real" restorative nature still remains of too little importance in the sentencing practice of prosecutors and criminal courts. The meaning of restorative measures could be better understood by a more intensive consideration of the victim, and through it of society as a whole. As these measures may appease the emotions caused by the crime, they offer the possibility for reconciliation, if not with the individual offender, with the penal justice system and the community.

In the same sense, their coercive character, where the voluntariness of the parties involved happens only accidently and is often not given by both sides of the conflict, prevents the parties to "appropriate the conflict" which separates them. What is even more problematic is that the measures available often do not allow for a personal meeting between victim and offender and their relatives.

40 See *Cario* 2012, Justice restaurative, pp. 158 ff.

41 See *www.criminologie.univ-pau.fr.*

Nevertheless, the development of traditional criminal justice towards a restorative justice oriented system which – under the umbrella of humanity and equality – comprises dealing with the past (facts, culpability, accountability, penal responsibility, criminal sanctions and measures of compensation for victims) and the repercussions (in actual day-to-day life, in the personal development, family, social and cultural life) of the crime. The focus on the crime indicates, however, that society has failed to prevent such transgressions. There is no doubt that the stress should be laid on crime prevention in order to reduce the many penal convictions and repressive sanctions which fail to solve the problem, and to instead establish crime prevention strategies, in particular early intervention, which contribute to diminish criminal behavior and victimization, the major task of criminology and criminal sciences.[42] Likewise, it seems to be of major importance to considerably decriminalize certain behaviour in our country, without arriving at a palace revolution.

To further develop this change of strategy, beneficial for all, a framework of restorative interventions must be established, in total complementary to the criminal procedure, careful to respect human rights and the fundamental principles of penal law. Relying on international and regional texts as well as on evaluated practices in countries which have well-developed restorative justice measures, it is inevitable to integrate such measures in a dynamic process. Indeed, restorative justice demands the active and voluntary participation of all those who feel to be concerned about the conflict behind criminal offences in order to negotiate through active participation, with the presence and under the guidance of a third party from the justice sector, but possibly accompanied by a third party with a psychological or social work background. The purpose it to find the best solution for everybody involved, from responsibilisation of the actors to restoration for all and, in a global sense, to harmony within society.[43]

But nothing will happen without adopting new legislation that brings restorative measures closer to the centre of crime policy and that enables their implementation on the initiative of judges or upon the demand of the parties, as has been recently introduced, for example, by the Belgium legislator. The quality of professionalisation of mediators depends on its authentic application on the basis of a transdisciplinary university education (general studies or specialized education in mediation etc.) for teachers, researchers and practitioners in the field of criminal justice. Indeed, restorative justice is everything else than improvisation. It needs at least regular, differentiated and longitudinal evaluation studies.

At the very last moment of reviewing the present chapter a very important law reform was passed on 15 August 2014, which came into force on 1 October

42 See *Cario* 2004, pp. 45 ff.

43 See *Cario* 2010, pp. 78 ff.

2014 (the so-called Law *Taubira*, according to the name of the present Minister of Justice). This law reform introduced a sub-chapter into the preliminary chapter of the Code of Criminal Procedure with the title "restorative justice" (justice restaurative, see Art. 10-1 CPP).

"Victims and offenders may propose restorative measures at all stages of the criminal proceedings including also the execution of a sentence, if the facts of the offence are recognized." A measure of restorative justice is defined as "any measure which allows for the active participation of the victim and the offender in order to solve the difficulties resulting from the offence committed and in particular providing reparation/restitution of all kinds of damages. This measure can only take place after the victim and offender have been fully informed about the case and have explicitly communicated their consent to participate.

Restorative measures shall be implemented by a third independent party, installed for this purpose, and working under the control of the judiciary or, if required by it, from the prison administration. The restorative procedure is confidential unless the parties agree otherwise or if the necessity to prevent further offences justifies that the carrying-out of the measure to bring information to the notification of the prosecutor."

The new Art. 707 CPP states more precisely in the same sense that, in future, "during the execution of a sentence the victim has the right … 2) to obtain reparation of damages through compensation or any other restorative measure, which he or she might propose".

This is finally the proof that the French legislator has moved away from a pessimistic rationale to an optimistic one by moving forward towards implementing restorative justice measures. Nonetheless, there is still a long way to go in order to integrate this approach into the legal practice in France. The mission that the French Institute for Restorative Justice (*l'Institut Français pour la Justice Restaurative*, IFJR) has to complete together with its partners should help allow the idea of restorative justice to flourish for the sake of all persons affected by crime.

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Germany

Frieder Dünkel, Andrea Păroşanu

1. Origins, aims and theoretical background of restorative justice

In Germany, since the end of the seventies the role of the victim in the criminal justice system has become a major issue.[1] Like in many European countries it had been criticized that the victim had no adequate rights to participate in the criminal procedure and that the State reactions rarely satisfied the needs of victims. In 1976 the law for compensating victims of violent crimes was passed (*Opferentschädigungsgesetz*).[2] There had not yet been a clear idea on what should be the future role of the victim in the criminal procedure or in extra-judicial procedures that could be defined in terms of restorative justice, but in the mid-eighties first pilot projects involving mediation started that would later on lead to an impressive restorative justice movement which will be outlined in this article.

1.1 Reform history, contextual factors and aims of the reforms

One of the premises for that development was the "rediscovery" of the victim, and of the potentialities of the conflict-solving and peace-enhancing quality of criminal law and procedure and of pre-trial informal procedures. In 1986 a reform law was passed that emphasized the necessity to improve the possibilities for victims to participate in the criminal procedure (the so-called Victims Protection Act, *Opferschutzgesetz*). This resulted in improved rights, especially

1 See e. g. *Jung* 1981; the recommendations of the Assembly of German Legal Scholars (*Deutscher Juristentag*) led to the reform legislation of 1986 mentioned below.

2 See *Dünkel* 1985. In 1993 the scope of the law was extended to foreign persons victimised in Germany.

concerning information and protection during the trial and also with respect to joint procedures on the side of the prosecutorial authority, or combining criminal and civil claims.[3]

The subject of debate in the following years shifted from the victim's position in the criminal procedure to efforts to improve the possibilities of mediation and reparation/restitution (see the reform of the Juvenile Justice Act of 1990, *Section 1.2 below*, and the amendment of the Criminal Code, § 46a, *Section 2.2.1 below*).

In light of several serious cases of child abuse, the legislator passed reform regulations to improve the protection of victims. These reforms allow the interrogation of child victims under the age of 18 by a single judge and introducing the hearing into the trial by video-tape (§ 58a CCP). Furthermore, the same regulations of victim protection apply independently to all witnesses, in particular in organized crime cases and regardless of age, who are at risk because of their witness status (the so-called Witness Protection Act, *Zeugenschutzgesetz*, of 1998; § 58a CCP).[4] Another form of witness protection is an audio-visual

3 The Victims Protection Act of 1986 introduced new regulations concerning: the possibility to refuse questions interfering with the privacy of the victim (§ 68a CCP, Code of Criminal Procedure); the possibility to temporarily exclude the accused while the victim is interrogated (§ 247 CCP); the exclusion of the public in order to protect the privacy of the victim (§§ 171b, 172 COA, Courts Organization Act); the right of the victim to be informed about the outcome of the trial (§ 406d CCP); the right to inspect the files of the trial (via an advocate, § 406e CCP); the right to call on a victim's advocate, who has the right to participate in any interrogation of the victim, put questions to the trial etc. (§ 406f CCP); the right to call on a victim's advocate already before trial when the victim has the right to participate in a joint procedure on the side of the prosecutor (§ 406g CCP); the obligation of the court to inform the victim about his/her rights (§ 406h CCP); the extension of the possibilities of the victim to join the prosecutor as an independent 'subject' of the trial with his own rights to put questions and to present evidence etc. (§§ 395 ff. CCP), and to get legal representation by a lawyer (state-funded where necessary, §§ 397, 397a CCP); the victim as a 'joint prosecutor' has the same rights as the prosecutor with the exception that he/she cannot appeal the concrete sentence (§ 400 CCP); the extension of combining civil claims for compensation of material and immaterial losses with the penal trial (§§ 403 ff. CCP, so-called *Adhäsionsverfahren*); the consideration of mediation efforts shown by the offender when determining the sentence through the court (the central sentencing guideline of § 46 CC, Criminal Code, now explicitly refers to mediation and reparation/restitution); the enforcement of fines, which has to be of secondary importance when otherwise the offender's limited resources would jeopardize the compensation of the victim (§ 459a CCP); for a critical empirical evaluation of the impact of the Victims Protection Act see *Kaiser* 1992.

4 There have been experiences on a voluntary basis and with the agreement of all parties in the court of Mainz, which have stimulated the legislator. For the "Mainzer Modell" see *Keiser* 1998, pp. 356 ff.

interrogation if the witness otherwise would not attend the public trial (see § 247a CCP).[5]

Notwithstanding the limited prospects for quantitative growth, mediation and damage restitution plaid a central role in crime policy since the mid-1980s. Accordingly, at the 59th Assembly of German Legal Scholars in 1992 a team of German, Swiss and Austrian criminal law scholars and the leading expert (*Schöch*) suggested transforming restitution in general criminal justice into an independent track (with priority) in addition to punishment and therapeutic measures.[6] In their view, voluntary and full damage compensation (§§ 1, 2 AE-WGM)[7] should be the preferred response to minor and moderate crime (e. g. cases attracting prison sentences of up to one year; § 4 AE-WGM). Offences incurring a sentence of more than one year should be subject to a compulsory reduction in sentence. Elsewhere, i. e. in cases where a prison sentence would be up to one year, the court will waive the penalty and merely find the offender guilty.[8] If a victim is unavailable or unwilling to settle, symbolic acts of restitution (community service, payment of fines to non-profit organizations) to restore the legal order may also be applied (§ 2 AE-WGM).

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5 In 2004 a Law for the reform of victims' rights increased the possibilities for a joint civil claim in criminal procedures, information rights for victims and extended the possibilities for relatives of (killed) victims to join the criminal procedure. In a second law for the reform of victims' rights of 2009 information rights were extended further, and the protection of juvenile victims was emphasized in particular. Audio-visual interrogations were expanded to victims up to the age of 18. The prescription of sexual offences starts only at the age of 18 thus giving child victims a longer period to bring the case to the court. The most recent reform law of 2013 for the protection of victims of sexual offences extended the possibility of audio-visual interrogations to victims in general if they were victimised as children or juveniles (see § 58a and 255a CCP). Victims witnesses are explicitly given the possibility to express the consequences the crime has had on them (§ 69 CCP), see *Gesetz zur Stärkung der Rechte von Opfern sexuellen Missbrauchs (StORMG)* of 26 June 2013 (BGBl. I S. 1805). Only one amendment improved also the rights of the offender: If an advocate has been assigned to the victim, the accused now must also be represented by a lawyer (§ 140 CCP).

6 *Arbeitskreis deutscher, schweizerischer und österreichischer Strafrechtslehrer* 1992; *Schöch* 1992.

7 "Alternativentwurf Wiedergutmachung", literally translated by "Alternative draft proposal on reparation/mediation".

8 The procedural basis of this model should come about through cooperative means, especially the in-depth instruction of the concerned parties regarding the opportunity for restitution and the freedom to take part in this process (§§ 10, 14, 15 AE-WGM). The trial may be stopped to enable settlement negotiations (§§ 13 III, 16 I AE-WGM), extra-judicial mediators may be called in (§§ 13 II, 16 II AE-WGM) and, finally, a judicial restitution negotiation in intermediary proceedings is possible (§§ 17, 18 AE- WGM), see *Arbeitskreis deutscher, schweizerischer und österreichischer Strafrechtslehrer* 1992).

While the 59th Assembly of German Legal Scholars basically agreed with these suggestions, it rejected restitution as a 'third track of sanctions' as well as compulsory exemption from penalty in the event of active remorse in accordance with the Austrian example (§ 167 Austrian Penal Code). The group advocated expanding restitution through existing arrangements in the criminal procedure (§§ 153, 153a CCP) as optional means for adjusting the proceedings.[9] The group also rejected the suggestion to implement community service as an independent sanction.[10] As part of the 1994 act to eradicate organized crime, the legislator changed these demands for reform only slightly upon implementing § 46a of the Criminal Code (see *Section 2.2.1* below).

In German Juvenile Law further reform considerations have been discussed. A reform committee of the German Association for Juvenile Courts and Juvenile Court Aid in 1992 called for more extensive decriminalization through the expansion of mediation and restitution as a preferred response.[11] This proposal was inspired by Austrian law and practice (§ 4 II Nr. 2 Austrian Juvenile Justice Act), according to which juvenile acts are not punishable if their consequences are non-existent or insignificant or essentially eliminate, compensate for or otherwise offset the act (*'Tatfolgenausgleich'*).[12]

It should be mentioned that in the former GDR some forms of restorative justice had existed in the so-called internal conflict- or neighbourhood committees of arbitration (however, strongly oriented to the socialist model of society).[13]

International documents such as the Council of Europe Recommendation concerning Mediation in Penal Matters R (1999) 19 and the EU Framework Decision on the Standing of Victims in Criminal Proceedings, Art. 10 calling Member States to promote mediation in criminal cases (2001/220/JI; UN-Economic and Social Council: Resolution on Basic principles on the use of restorative justice programmes in criminal matters, 2000/14) have been observed in Germany. Legal implementations in criminal law reflect international efforts to enhance the use of victim-offender mediation.

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9 *NJW* 1992, pp. 3,021 ff.

10 In Germany, community service in adult criminal law exists only as a substitute sanction to avert imprisonment in case of failure to pay fines and as a sanction associated with probation. Proposals to introduce community service as an independent sentence in the late 1990s have been abandoned by the respective governments, see *Dünkel/Morgenstern* 2003.

11 The reform proposal appeared in the *DVJJ-Journal* no. 1-2, 1992, pp. 3-39.

12 See *Kerner et al*. 1990, p. 172; see also *Bannenberg* 1993, p. 159.

13 See on this subject the GDR arbitration tribunal (*'Schiedsstellen'*) law of 13 September 1990 that dissolved such committees. The arbitration committees intended as replacements achieved no practical significance, especially since their area of jurisdiction was limited to decidedly trivial cases, see *Sabrotzky* 1997.

Recently also prison legislation reflects forms of conflict resolution and of reparation (*see 2.3 below*).

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

In Germany, elements of restorative justice were first introduced in the field of Juvenile Justice, i. e. for 14 to 21-year-old young offenders.[14] At the end of 1990, a new Juvenile Justice Act was enacted in Germany. In addition to other new community sanctions, this law provided a legal framework for both mediation as a judicial educational sanction and as an alternative prosecution strategy (diversion). The legal justification referred to the favourable experiences with various pilot projects launched since 1985, which increase consideration for the victim's special circumstances and "settle the conflict between the offender and the victim that results from the criminal act more appropriately and more successfully [...] than traditional sanctions have done in the past."[15] The legislator thus focused on restitution in dealing with crimes committed by 14 to 21-year-olds. This trend is especially surprising because the experiences with mediation projects at that time had been quite recent. The first pilot projects concerning juvenile law began in 1985.[16] In the late 1980s, about twenty major projects existed, including a few dealing with adult criminal law.[17] Mediation covers a broad scope in the system of juvenile justice sanctions and measures (entailed in the 1990 legal reform). In the early 1990s, in a nationwide survey (of the old Federal States) 224 institutions (juvenile welfare agencies and private organisations) indicated that they had already implemented or that they had concrete plans to implement mediation.[18] Among juvenile welfare departments, 60% subsequently to the law reform of 1990 implemented mediation. Eighty-five per cent of the institutions worked with juveniles or young adults. A growing range of projects catered to adults aged over 21. In a later poll concerning the year 1995 *Wandrey* and *Weitekamp* reported 368 mediation projects, i. e. an increase of 63% since 1992. The case numbers increased even more, from about 5,100 to 9,100 in 1995, i. e. by 78% within three years. On the other hand the authors comment that most projects practice mediation only

14 For an overview on the German juvenile justice system see *Dünkel* 2006; 2011.

15 *Bundesratsdrucksache* No. 464/89, p. 44.

16 The first four model projects for juveniles were established between 1985 and 1987 in the cities of Braunschweig, Reutlingen, Köln and München/Landshut.

17 *Bannenberg* 1993; *Hering* 1993; *Hering*/*Rössner* 1993; *Marks et al.* 1994; *Pfeiffer* 1997; *Dölling et al.* 1998.

18 *Schreckling et al.* 1991.

rarely and as an additional "ad-hoc-approach" to other educative measures, mostly in the field of juvenile justice.[19] The projects working with adults over 21 by 1995 increased to 28% of all mediation schemes.

Another poll conducted by the Department of Criminology at the University of Greifswald, commissioned by the Federal Ministry of Justice, revealed that mediation was available virtually everywhere in the old Federal States (and also in the new ones, since the reunification of Germany) during the period 1993/94. 70% of the youth welfare departments surveyed in the old Federal States and 88% in the new ones reported that either social workers at the juvenile welfare departments or private juvenile aid services offered mediation. This option is available in about three quarters of all youth welfare districts (74%) in the context of or rather as a strategy before criminal punishment (diversion). Nearly half of all juvenile welfare departments (48%) offered mediation by their own services. An additional 11% provided this service in conjunction with or alongside a private service, and in 14.5% of the cases mediation was implemented exclusively by a private service.[20] The numbers of mediation projects was on the rise throughout the 1990s. A survey in the new Federal States revealed 128 projects in 1997, whereas in 1994 there had "only" been 48.[21] So *Wandrey* and *Weitekamp* were right to state that mediation in Germany was "booming".[22] At the beginning of the 2000s, it was estimated that between 20,000 and 30,000 cases were mediated yearly within criminal proceedings. About two thirds of the annual cases were dealing with young offenders.[23] A nationwide survey on the practice of victim-offender mediation revealed that in 2010, at least 438 facilities offered victim-offender mediation in Germany.[24] 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.

On the other hand there is a danger that mediation will play more or less the role of an additional educative/rehabilitative sanction within the traditional juvenile or adult criminal justice system and will not be a step towards a fully-fledged restorative justice strategy.

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19 See *Wandrey*/W*eitekamp*, in *Dölling et al.* 1998, pp. 130 ff.

20 See for a regional comparison of the availability of mediation *Dünkel et al.* 1998; *Steffens* 1999; *Schwerin-Witkowski* 2003; *Kerner/Weitekamp* 2013.

21 See *Steffens* 1999.

22 *Wandrey*/*Weitekamp,* in *Dölling et al.* 1998, p. 130.

23 See *Bannenberg/Rössner* 2002, pp. 288 ff.; *Kilchling* 2005, p. 242; 2012, p. 181 with further references.

24 *Kerner/Weitekamp* 2013, p. 12.

Recently, a new development in the field of restorative justice can be seen in the implementation of conferencing (*'Gemeinschaftskonferenzen'*). Although the juvenile law does not explicitly refer to conferencing, it allows for a flexible approach to apply the scheme. A first conferencing pilot project was established in 2006 in Northern Germany in the community of Elmshorn.[25] This restorative justice scheme involves a wider circle of participants than mediation. Beside juvenile and young adult offenders, victims and community members as well as police officers are invited to participate. The conferencing concept is inspired by the New Zealand model of Family Group Conferencing and the Belgian Conferencing model Hergo. Wider aims of the project were to strengthen social relationships within the community and contribute to crime prevention. Compared to mediation, conferences are held in the case of more serious offences, such as assault, robbery, burglary and blackmail.

First results show a high potential for conflict resolution regarding offences with a medium degree of severity. All five conducted conferences resulted in consensual agreements.[26] Among the obstacles found were reluctance of the supporters to participate in a conference, and a lack of referrals by judicial authorities.[27] Strategies to extend the use of conferencing, which has been limited to a small number of cases so far, are currently being discussed.

Furthermore, a pilot project aiming at introducing peace-making circles in Germany, Belgium and Hungary is currently being conducted under the leadership of the University of Tübingen. In the frame of the EU funded project, peace-making circles will be implemented at an experimental stage and the restorative potential and impact will be assessed.[28]

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

Current German law – especially legislation relating to juvenile justice – offers many opportunities for arranging or considering damage restitution and mediation.

Restorative measures can be implemented at all stages of the criminal proceedings. Since the law reform of 1999, judges and prosecutors have to consider mediation at every stage of the criminal proceedings and, in appropriate cases, work towards mediation (§ 155a CCP). The law points out that an agreement may not be accepted against the expressed will of the injured person.

25 See *Hagemann* 2009, pp. 236 ff.

26 See *Hagemann* 2009; *Blaser et al.* 2008.

27 *Hagemann* 2009, p. 243.

28 For further information: http://foresee.hu/en/segedoldalak/news/592/; http://www.jura.uni-tuebingen.de/einrichtungen/ifk/forschung/implementing-peacemaking-circles-in-europe (accessed on 05.07.2013).

Moreover, at the first examination, the accused shall be informed about the possibility of victim-offender mediation in suitable cases (§ 136 I CCP).

The regulations within the criminal law contain referral conditions and legal consequences of mediation. In 2012, the general Law on Mediation (*Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung*)[29] came into effect and provides for a definition of mediation, principles, procedure and the role, responsibilities and training of mediators. The law was intended to implement the EU Mediation Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. The legislation amends certain laws such as the Code of Civil Procedure or the Code of Administrative Court Procedure (*Gerichtsverfassungsgesetz*). However, the law has no impact on criminal and criminal procedure law as a wide range of adequate regulations covering mediation and reparation already exists.[30]

2.1 Pre-court level

2.1.1 Adult criminal justice

Restitution and mediation orders as forms of diversion can be applied under the conditions that minor offences are invoked, there is no public interest in prosecuting and the culpability of the offender would be considered low (§§ 153, 153a CCP). In addition to the restitution measure (since 1975), in 1999 the legislator introduced the possibility of diversion in cases where "the offender makes serious efforts to reconcile with the injured person (victim-offender mediation) and thereby delivers partial or full reparation or seeks to do so" (§ 153a No. 5 CCP). The restitution order (§ 153a No. 1 CCP) provides that the accused needs to perform a specific service in order to repair the damage caused by the offence. The prosecutor sets a time limit of no more than six months within which the accused has to comply with the conditions.

29 Law on Mediation of 21.07.2012, entered into force on 26.07.2012.

30 Mediation according to the Law on Mediation might rather be of importance when handling civil damage claims resulting from an offence. Victim-offender mediation is characterized through a communicative process, in which the presence of a mediator is not mandatory. In contrast, mediation according to the new Mediation Law is a structured process, assisted by a mediator. Therefore, (general) mediation might be considered by the court as victim-offender mediation, but victim-offender mediation must not necessarily be equated with (general) mediation, see *Hartmann et al.* 2013a, pp. 10 f.

2.1.2 Juvenile Justice

Juvenile prosecutors may waive prosecution if educational measures have already been implemented or initiated (§ 45 II JJA). The 1990 reform act explicitly equates mediation with such reformatory measures. Significantly, as in adult law, the legislator already recognizes sincere efforts by juveniles to resolve conflicts or to provide restitution. This arrangement protects juvenile (14 to 17-year-olds) and young adult offenders (18 to 20-year-olds) if the victim of the crime refuses to cooperate. Successful damage restitution more frequently leads to a dismissal because of "reduced culpability" (pursuant to § 45 I JGG). Furthermore, as part of informal youth court proceedings, the public prosecutor shall propose the issuance of educational or disciplinary measures (including mediation) by the juvenile judge, if he/she considers that such a judicial measure is necessary, but bringing charges is not (§ 45 III JGG). However, this provision is more important in cases in which restitution is sought rather than mediation. It should be noted that in Germany, there is no possibility of police diversion, neither in adult nor in juvenile criminal law.

2.2 Court level

2.2.1 Adult criminal justice

In 1994, the legislator introduced a new section to the Criminal Code (§ 46a CC) providing for mediation and restitution at the court level. If the offender "through his efforts to reach a settlement with the injured party (mediation) has compensated entirely or partially or has genuinely tried to atone for his act, or if the restitution requires considerable individual service or sacrifice on his part to compensate the victim fully or mostly, the court may [...] reduce the punishment" or – in the event of acts incurring up to one year of imprisonment – waive punishment entirely.

There is no legal restriction on the type of offences – it is also possible to consider serious crimes. In practice, however, the majority of cases involve crimes of minor or medium severity, both regarding adults and juveniles. Entirely petty offences should not to be considered in order to prevent net-widening. According to the principle of proportionality, for such cases the law provides for the use of diversion without any intervention.

After charges have been laid (until the end of the main hearings), the court may also, with the consent of the public prosecutor and the accused, waive the proceedings and order a restitution or mediation measure (Art. 153a II CCP).

2.2.2 Juvenile justice

Under the same conditions that apply for juvenile prosecutors, juvenile court judges may waive prosecution to allow for mediation efforts by the young offenders to be subsequently taken into consideration (§ 47 I No. 2 JJA). The accused have to comply with the measures within a period of no more than six months. Peculiarities associated with German juvenile law concern the compensation of damages, as well as mediation and an apology. As an independent sanction mediation may be ordered as part of an educational measure (§ 10 I No. 7 JJA) or a disciplinary measure (§ 15 JJA). Again, the law provides that an effort by the juvenile offender to achieve reconciliation is considered sufficient. Regarding the disciplinary measure, any form of restitution or an apology by the offender can be recognized as mediation.

Providing mediation as a court sanction in juvenile justice was rightly criticized for being contrary to the principle of voluntary participation in mediation processes. In practice, mediation as an educational directive of the juvenile court is used only to a limited extent,[31] because suitable cases are dealt with in informal proceedings (diversion in the sense of § 45 II JJA, see above) before a court trial, and therefore do not usually reach the level of formal court proceedings.

The use in practice of restitution as a juvenile court sanction remains quite limited: In 2012 3.0% (2010: 3.2%; 1996: only 1.8%) of the sanctions imposed on convicted juveniles involved an order of restitution or apology to the victim.[32] If one takes community service orders into consideration as a symbolic form of restorative practice performed to the benefit of the wider society, no less than 40.9% of juvenile and young adult offenders sentenced in 2010 received such an order (in 2010 even 43.8%).[33]

2.3 Restorative Justice while serving sentence

Both juvenile and adult criminal justice provide for damage restitution in conjunction with a suspended term of detention in a remand home or imprisonment. The same applies for release on probation.[34] The preceding legal stipulations have been applied throughout Germany since the reunification in October 1990.

German laws on the execution of penalties (since the reform of legislative competences in the federal system of Germany in 2006, legislative competence

31 See *Rössner*/*Klaus* 1998, p. 115.

32 Calculated according to *Strafverfolgungsstatistik,* 2010, pp. 304 f.; 2012, p. 309.

33 Calculated according to *Strafverfolgungsstatistik,* 2010, pp. 304 f.; 2012, p. 309.

34 For a summary see *Dünkel*/*Rössner* 1989; *Rössner*/*Klaus* 1998.

for matters relating to the execution of penalties has been devolved to the Federal States) aim at re-integration and enhancing social skills of offenders as well as promoting reparation and victim compensation. Hence, in appropriate cases, mediation can be taken into consideration to further implement the objectives and principles of the laws. Victim-offender mediation promotes the aim of social re-integration and the offender's commitment to that process, as mediation requires that the offender faces up to the consequences of his/her behaviour and is actively involved in the conflict resolution process. Furthermore, measures aiming at compensation shall be promoted, which can be realized through mediation.[35] Since September 2006, 11 out of 16 Federal States (*Länder*) have replaced the Federal Prison Act of 1977 applying to adult prisoners by new legislation. While the Federal Prison Act did not mention explicitly restorative justice measures inside prisons, the new laws provide for such efforts in two aspects. On the one hand, the compensation of the victim and restoring damages caused to him or her are addressed in the basic principles for the execution of prison sentences. On the other hand, restorative conflict resolution is given priority over disciplinary measures in cases of intra-prison conflicts between prisoners and/or prisoners and staff members. So for example § 2 Prison Law vol. 3 of Baden-Württemberg stipulates that „in order to achieve the aim of resocialisation the offender's insight into the consequences of his crime for the victim should be promoted and appropriate means of reparation be developed" (see § 2 (5) BW JVollzG).[36] Explicit regulations that prioritize dispute resolution over disciplinary measures can be found in Brandenburg (§ 99 Prison Law) and Saarland (§ 89 (2) SLStVollzG).

In the area of juvenile imprisonment the Federal States' laws on the execution of juvenile prison sentences (which were introduced between 2007 and 2008) all provide regulations that promote the offender's efforts to compensate the victim and to deal with the crime and its consequences for the victim.[37] All Prison Laws and regulations for the execution of juvenile prison sentences also provide for restorative approaches to resolving intra-mural conflicts. Juvenile prison

35 See *Hartmann et al.* 2013, pp. 42 ff.

36 Similarly § 8 (1) of the Prison Act of Brandenburg (BbgJVollzG), § 4 phrase 3 of the Hamburg Prison Act (HmbStVollzG), § 5 (1) phrase 4 of the Prison Act of Hesse (HStVollzG), § 5 phrase 2 of the Prison Act of Mecklenburg-Western Pomerania (StVollzG M-V), § 3 (1) of the Prison Act in Saarland (SLStVollzG) and § 8 (1) Prison Act of Thüringen (ThürJVollzGB). There are only few Prison Laws which do not explicitly mention reparation to the victim as a basic principle for the execution of sentences, such as in Rhineland-Palatinate and Saxony.

37 See in summary *Kühl* 2012.

laws emphasize that "educational measures" (including victim-offender mediation) be prioritized over disciplinary punishments.[38]

Furthermore, the Criminal Code provides that efforts to make reparation to the victim should be favourably considered when making early-release decisions after half or two thirds of the sentence have been served (§§ 88 JJA, 57 CC). The court may also order the compensation of the victim when granting early release (see § 57b (2) Criminal Code).[39]

Mediation schemes at this level are still at an experimental stage and few projects have been implemented to date (*see 4.5 below*).[40]

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

3.1.1 Conceptual framework of mediation projects

Despite selective organizational differences, several points of common ground exist, especially regarding the goals and procedures in actual mediation sessions. All Federal German projects are based on the context of criminal justice and thus rarely involve neighbourhood disputes pertaining to civil law, which are the focus of the well-known Neighbourhood Justice Projects in the United States.[41] The projects focus on the conflict rather than on criminal justice. This perspective leads to subjective consideration of the party directly affected, instead of focussing on the conventional judicial criteria of offence seriousness, the offender's culpability, guilt, criminal history and the like.[42] Mediation highlights direct negotiation efforts between the offender and the victim (who has generally suffered personal injury). Although the meeting between the offender and the injured party and the reconciliation conversation mediated by an impartial third party are the main components of mediation, other indirect forms of conflict resolution are available (indirect mediation, especially if the victim does not desire a personal meeting but is interested in restitution). Mediation serves three *purposes*:

- Reconciliation between the offender and the victim regarding the conflict resulting from or manifested by the criminal offence;

38 See in summary *Kühl* 2012, pp. 67 ff., 255 f.

39 See in detail *Dünkel/Pruin* 2010, pp. 197 f.

40 For an overview, see *Hartmann et al.* 2012, pp. 219 f.; *Hartmann et al.* 2013.

41 See on this subject *Dünkel* 1990.

42 *Messmer* 1996.

- financial or symbolic restitution of material and immaterial harm (e. g. money for pain and suffering) by the offender;
- consideration of restitution services in the proceedings by waiving an official criminal trial or at least mitigating the judicial sanction.

The decisive moment of conflict resolution is not so much the outcome of corresponding restitution agreements than the mediation process that actively involves the offender and the victim, thereby restoring the autonomy and authority to act, that have disappeared in classical criminal proceedings.

Experience in the Federal Republic has shown that interaction between the offender and the victim (without actually culminating in reconciliation that settles the conflict) may virtually eliminate the victim's desire for the offender to be punished under criminal law. Even material restitution is less meaningful than symbolic acts, like an apology for example. The following forms of conflict mediation have also proven worthwhile:

- Joint conversations followed by an apology or payment of material losses (generally less than $ 150);[43]
- services rendered to the injured party to compensate for the harm done;
- community service rendered, to be paid through a fund: the offender passes the proceeds on to the victim;
- joint actions by victims and offenders;
- gifts as symbolic reconciliation gestures.[44]

Such services must relate exclusively to the acts and should not entail long-term socio-pedagogical intervention.[45] "Aside from active restitution, the offender should not become the object of socio-pedagogical care".[46] Nor does this method provide comprehensive care or therapy for the victim. The anticipated outcome is a long-term learning impact on the offender (clarifying the injustice of his behaviour, deterring him from further similar acts) and comfort for the victim to relieve the feeling of injury or trauma resulting from the offender's actions.

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43 In a nation-wide survey of about 1,700 cases the amount of payments in 54% of the cases did not surmount 250 DM (i. e. about 150 US-$), 73% accounted for less than 450 DM (i. e. about 270 US-$), see *Hartmann*/*Stroetzel*, in *Dölling et. al.* 1998, p. 187.

44 *Kuhn et al*. 1989.

45 See *Schreckling et al*. 1991, p. 20 on a 'brief socio-pedagogical intervention'; regarding the methodical and theoretical basis, see especially *Kawamura*/*Schreckling* 1990; *Messmer* 1996.

46 *Kuhn et al.* 1989.

3.1.2 Organization of mediation projects

Mediation in Germany is organized and put into practice in various ways. The relevant conceptual considerations stress greater independence from the courts for projects transferred to private services than is the case with the juvenile court aid (that is, social workers assigned to the juvenile public prosecutor), which is obviously more closely connected with the formal justice system. Moreover, the juvenile court aid has traditionally handled more offender-oriented assignments.[47] A third model of organization has been developed in the new Federal States of Brandenburg and Saxony-Anhalt since the reunification of Germany, where the Ministries of Justice have implemented a new social service especially for mediation.[48] For such independent public services, it can be easier to keep the balance between the interests of victim and offender than the social workers who traditionally work with an offender orientation. As they are state funded they do not share the problems of private organizations in terms of raising funds for their staff.

The mediation programmes of the juvenile court aid and the private services differ in other respects as well. Many projects run by the juvenile court aid arrange mediation through social workers who are also responsible for conventional assignments, like for instance organizing community service, offender supervision, social training courses for offenders etc. These social pedagogues or workers are often not specially qualified or trained in the field of mediation.[49] More and more projects, however, especially those run by private organizations or special social services dispose of well trained and specialized staff.[50] On the other hand not all of them work exclusively in the field of mediation. *Wandrey* and *Weitekamp* define their work as "partly specialised".[51] There is a growing awareness that the offender-oriented operating procedure, traditional to the juvenile court aid, cannot compare to the qualities expected from an impartial

47 § 38 II JGG: 'The representatives of juvenile court aid consider juvenile courts from a reformatory, social and caring perspective. They assist the authorities concerned by investigating the personality, development and surroundings of the accused and formulate measures to be taken. If no probation officer is assigned to the case, they ensure that the juvenile complies with instructions and orders [...].'

48 See *Steffens* 1999.

49 See *Dünkel et al.* 1998.

50 For a summary on the research concerning several pilot projects in the field of juvenile justice and adult criminal law see *Schreckling et al*. 1991; *Hering*/*Rössner* 1993; *Rössner*/ *Bannenberg* 1994; *Dölling*/*Henninger*, in *Dölling et al.* 1998.

51 *Wandrey*/*Weitekamp*, in *Dölling et al.* 1998, p. 121.

negotiator.[52] Accordingly, many projects on the level of juvenile court aid (local youth departments) now provide juvenile court aid associates with specialized training and concentrate exclusively on case work for mediation.[53] In recent years, the number of independent services has been on the rise. Nevertheless, the projects with private services proceed in close cooperation with the courts and generally involved suitable case selection and assignment by the public prosecutor or by juvenile court aid. This procedure was especially common with projects that emphasized the private, extra-judicial nature of conflict mediation.[54]

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.[55]

There are no uniform standards on mediation in penal matters in Germany. Several Federal States have elaborated their own standards. However, the "quality standards on victim-offender mediation" are of major importance. These standards were developed in the early 1990s by the Federal Working Group on Victim-Offender Mediation (*Bundesarbeitsgemeinschaft Täter-Opfer-Ausgleich e. V.*) and the Victim-Offender Mediation Service Office (*Servicebüro für Täter-Opfer-Ausgleich und Konfliktschlichtung*) in Cologne, a special agency run by the German Probation Aid Association (*Deutsche Bewährungshilfe*). The standards contain conceptual and organizational requirements, requirements on cooperation, public relations and the implementation of victim-offender mediation. A Federal award, the "victim-offender mediation seal for quality" is granted to mediation facilities complying with these quality standards. The Victim-Offender Mediation Service Office provides for specific mediation training, quality assurance and development of mediation in penal matters.

Mediators need to be certified or to possess a mediation degree in order to conduct the procedure. The Law on Mediation emphasizes the requirement of (ongoing) training (§ 5 Law on Mediation).

How can the costs in manpower and funds of a mediation project be assessed? The Federal German projects show that a social worker can handle about eighty to one-hundred cases a year, which involves meeting with about 150 offenders or victims. Mediation is thus fairly costly in terms of manpower and time. Of course, keeping the operation within the original court aid system

52 For instructive literature on the practical problems with case work in mediation, see *Hassemer*, in *Dölling et al.* 1998.

53 See *Hartmann* 1995; *Dölling et al.* 1998.

54 *Kuhn et al*. 1989.

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

does not entail any significant added costs. Considering the marked drop in juvenile court aid cases because of the declining birth rate and both the relative and the absolute decrease in juvenile delinquency since the 1980s, especially for serious offences (the area of emphasis in juvenile court aid), some additional manpower has become available for mediation. However, with increasing crime rates since the end of the 1980s[56] on the one hand, and the reduction of social budgets on the other hand, many problems for the court aid associates have emerged. Some structural changes in the local youth departments have led to shortcomings in the provision of mediation schemes, social training courses and other socio-pedagogical community sanctions provided by the Juvenile Justice Act. Funding is also a common problem with projects involving private services.[57] Generally, however, the municipalities or the courts (which allocate the proceeds of fines to similar non-profit institutions) or other private services (churches, private foundations, etc.) provide resources. Nevertheless, the lack of money has recently become more serious. The general recession has reduced the financial means of cities and communities, along with the resources of labour exchanges for employment programmes. Several projects have proved the value of setting up a fund for victims. Such funds are established from the proceeds of fines. Destitute offenders are remunerated for community service from this fund, and are thus able to settle material damage by passing the fee on to the victims. Juveniles (who are more likely to be penniless) are especially interested in work options to avoid being at a disadvantage with respect to their counterparts with access to such funds.

3.1.3 New cases and assignment criteria

As indicated above, all Federal German mediation projects – provided they do not operate within the court system (Juvenile Court Aid) – involve close cooperation with the (juvenile) public prosecutor or the (juvenile) courts. Accordingly, most cases are preselected by social workers employed by the Juvenile Court Aid or by the juvenile public prosecutor. Sometimes the police help select suitable cases. The public prosecutor for juveniles, however, bears chief responsibility for selection. In most Federal States, specific guidelines for public prosecutors provide criteria for case selection, referral conditions, etc.

56 The development of juvenile crime rates is, however not a problem since the mid-1990s, when registered youth crime levelled off and even dropped considerably the years after. This was not only the result of the demographic change, but a real decline in youth offending rates as can be shown by official crime statistics as well as by research on self-reported delinquency, see *Spieß* 2012; *Boers/Walburg/Reinecke* 2006; *Bundesministerium des Innereren, Bundesministerium der Justiz* 2006; *Baier* 2008; *Dünkel/Gebauer/Geng* 2008.

57 See *Dünkel et al*. 1998.

Some states have elaborated mediation guidelines targeting juvenile offenders.[58] Some projects, such as the ones in Cologne and Reutlingen, provide for mediation within the courts, albeit before or during the trial. In Cologne, even the juvenile court occasionally seeks a settlement (as part of the trial).[59] The following four criteria apply in Federal German practice:

- A confession by the offender or clarity about the circumstances is required. This information ensures that mediation does not prejudice the accused's right to a defence or the conventional principles of a fair trial (e. g. presumption of innocence).
- The "petty crimes clause": mediation is considered only in cases that will not be readily dismissed for lack of significance (§ 45 I JJA or § 153 CCP). This criterion precludes an extension or intensification (net widening) of social control in the (juvenile) justice system.
- A victim who has suffered personal harm is generally necessary. Mediation, which is primarily based on a personal meeting or an act-related confrontation between the juvenile and the victim, seems to rule out cases of shoplifting from department stores, fraud and traffic violations not involving any material damage or personal injury. Occasionally, small shop owners or institutions (kindergartens and other public facilities) may be involved in victim-offender exchange.
- Voluntariness of both offender and victim. The agreement of offender and victim to participate – without any outside pressure – is crucial. All the same, the concept of voluntariness is questionable if the offender's alternative to agreeing to mediation is a criminal trial. Rather than to focus on the term willingness the core element in this context is the absence of external pressure or coercion.

Federal German projects have also shown that more specific exclusion of offences from the scope of mediation is of little value. Restricting mediation to petty crimes or misdemeanours (thus excluding felonies) is especially inappropriate. For example, some crimes that are considered felonies, such as robbery and even serious sexual offences, are eligible for mediation. Such cases account for 5 to 10% of all settlements in the field of juvenile justice.[60] Mediation is also useful for repeat offenders. In September 1989 in Göttingen the 21st German Juvenile Court Assembly concluded that practical experience indicates progression from minor to serious offences (e. g. severe physical injury, aggravated

58 See *Kilchling* 2012, pp. 164 f.

59 See *Schreckling et al*. 1991.

60 See *Rössner*/*Bannenberg* 1994, p. 69; in the above mentioned nation-wide survey of more than 1,800 mediation cases of the year 1995, 9% accounted for robbery, one per cent for sexual offences, see *Hartmann*/*Stroetzel*, in *Dölling et al.* 1998, pp. 160-162.

theft, robbery, even sexual offences in exceptional cases). About 20 to 50% of the juveniles in mediation projects are repeat offenders. Some juveniles or young adults even participate in the projects more than once.

Experience has revealed the possibility of including a very broad range of offences. In addition to theft and property damage, physical injury, threats, insults, coercion, deceit, embezzlement and forgery are especially common. Statements by the project managers indicate that according to experiences in the juvenile justice system up to 10% of the incoming case load in juvenile public prosecution departments or 30% of the work load in juvenile court aid is eligible for mediation.[61] Including other types of compensation will considerably increase the potential for restitution in juvenile and adult criminal justice.

3.2 Procedure for conferencing

As mentioned above (under *Section 1.2*) up to now conferences have only been conducted in very few cases. The procedure of conferences has been described as follows[62]: After charges have been laid, with the consent of the public prosecutor juvenile judges refer cases to conferencing that they consider appropriate. Further, the mediators contact the accused and the victim and conduct preliminary discussions with them, and then with their supporters where appropriate. Police officers are also involved in the conferencing process. After the police officer presents the facts, the accused is given the possibility to make his/her statement on the offence, upon which the victim's perspective is then heard. Finally, every person involved in the conference may comment and state their expectations. The offender and his/her supporters are asked to prepare proposals for a solution, while the other participants take a break. The victim, supporters and other participants are invited to comment on the proposals. If all participants agree, a written conference agreement is formulated and signed by all. This protocol, which contains monitoring aspects concerning the progress of fulfilment, will be forwarded to the judge and the prosecutor. They will be informed about the fulfilment of the agreement by the mediators. Following compliance with the agreed decision, the case might either be dismissed or the sentence mitigated.

61 *Schreckling et al*. 1991, p. 33; *Hartmann* 1995, p. 211.

62 See *Hagemann* 2009, pp. 238-240; *Blaser et al.* 2008, pp. 27 ff.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

In Germany, only a few data sources on victim-offender mediation are available, these being primarily the Federal Statistics on Victim-Offender Mediation (*Bundesweite Täter-Opfer-Ausgleichsstatistik*) and data from the Federal Statistical Office (*Statistisches Bundesamt*). However, the statistical data from the Federal Statistical Office are incomplete as they do not cover diversionary mediation proceedings. Alike, the data offered by the Federal Statistics on Victim-Offender Mediation are incomplete, as they only include information provided by mediation facilities that voluntarily participate in the survey. Since 1993, the statistics have provided for data on mediation organizations, participants, categories of offences, referrals of cases, and outcomes.

According to the Statistics on Victim-Offender Mediation, from 2006 to 2009 about half of the offences related to bodily harm (fluctuating between 47% and 53%). Property related offences (between 12% and 15%), insult (between 11% and 14%), offences against personal freedom (between 9% and 13%), and to a smaller extent, theft and unlawful appropriation, robbery and extortion followed.[63] About two thirds of the accused knew the injured person well or a little.[64] Regarding the age structure of the accused, the share of juveniles and young adults aged 14 to 20 years decreased from 57% in 2006 to 34% in 2009, whereas the proportion of adults aged 21 to 40 years increased from 26% in 2006 to 39% in 2009, and the share of persons aged 41 to 60 years rose from 13% in 2006 to 21% in 2009.[65] In terms of the type of mediation organizations, the overwhelming share of mediations was conducted by independent facilities, while youth welfare departments and youth court services accounted for only a small proportion.[66] Most facilities delivering mediation were specialized on that kind of service (between 76% and 92% from 2006 to 2009). Few organizations were partly specialized, and very few had an "integrated" approach (covering also social work support) or were not specialized.[67] Regarding the Statistics on Victim-Offender Mediation for the years 2010, 2011 and 2012, findings were similar to previous years. Since 2009, the number of participating organisations almost doubled from 23 facilities in 2009 to 45 in 2012. Most of these 45

63 *Kerner et al.* 2011, p. 26.

64 *Kerner et al.* 2011, p. 29.

65 *Kerner et al.* 2011, p. 22.

66 *Kerner et al.* 2011, p. 6.

67 *Kerner et al.* 2011, p. 8.

facilities (82%) were specialized on mediation.[68] The majority of cases were referred during preliminary proceedings (2010: 82%, 2011: 85%, 2012: 81%). To a smaller percentage, cases were referred after indictment (2010: 10%, 2011: 7%, 2012: 13%) during trial (2010: 1.6%, 2011: 0.8%, 2012: 1.2%) and after trial (2010: 1.6%, 2011: 3.2%, 2012: 2.6%).[69] In terms of results, a large share of cases resulted in mediation agreements (2010: 91%, 2011: 84%, and 2012: 83%).[70] Agreements included apologies, accords referring to the behaviour of the offender, compensation for material or immaterial damage, service in favour of the victim, restitution, and so forth.[71] Agreements were completely or partly fulfilled to a large extent (2010: 91.5%, 2011: 86.6%, 2012: 88.3%).[72]

Regarding the publications of the Federal Statistical Office, they have provided data on victim-offender mediation in the statistics on the administration of justice (*Rechtspflegestatistik*) since the year 2005 (relating to the year 2004). The information relates to convicted adults and persons receiving educational or disciplinary measures under the Juvenile Justice Act (§§ 10 I No. 7, 15 JJA) that involve the use of victim-offender mediation. The statistics show an increase in court decisions to impose mediation up to 2010 (except for the years 2005 and 2009). In 2004, courts ordered VOM in 1,134 cases, of which 1,012 were under juvenile justice legislation.[73] In 2010, the number of decisions including mediation had risen to 3,594 cases, 2,688 of which under the Juvenile Justice Act.[74] In 2011, the number slightly decreased to 3,377 court decisions, including 2,469 under juvenile law.[75] However, these 3,377 cases would mean less than 1% of all sentenced offenders in relative terms. Concerning juveniles, the decisions taken under the JJA accounted for about 2% of all sentenced young offenders. Mediation was either ordered as an element of juvenile penalties, disciplinary measures or educational measures.

In terms of diversion at the prosecution level, in 2005 mediation was imposed by prosecutors in 4% of diverted cases involving adults. Furthermore, 5% of diverted cases included a compensation order. In comparison, judges

68 *Hartmann et al.* 2014, pp. 7 f.

69 *Kerner et al.* 2012, p. 12; *Hartmann et al.* 2014, p. 14.

70 *Kerner et al.* 2012, p. 36; *Hartmann et al.* 2014, p. 48.

71 *Kerner et al.* 2012, p. 38; *Hartmann et al.* 2014, p. 50.

72 *Kerner et al.* 2012, p. 39; *Hartmann et al.* 2014, p. 52. It has to be considered that there were still cases in which fulfilments were ongoing. Therefore *Hartmann et al.* assumed also for 2011 and 2012 that more than 90% of cases were successfully completed.

73 *Statistisches Bundesamt, Rechtspflege* 2005, p. 75.

74 *Statistisches Bundesamt, Rechtspflege* 2011, p. 89.

75 *Statistisches Bundesamt, Rechtspflege* 2012, p. 89.

applied restorative justice measures as part of diversion more often. Mediation orders accounted for 2% and compensation orders accounted for 11% in 2005.[76]

4.2 Findings from implementation research and evaluation

Empirical studies have repeatedly confirmed the widespread German acceptance of mediation (or the spirit of restitution).[77] This sentiment extends from rather conservative political factions (stressing the interests of the victims) to movements pursuing abolitionist trends (viewing mediation as an opportunity to re-privatize conflicts).[78]

The research reports about the pilot projects in Braunschweig, Cologne, Reutlingen, Munich and Landshut are primarily limited to statistical evaluation of cases handled in the projects (descriptive inventory research). The data tend to omit important selection issues and a comparison with other reactions or sanctions. Comparative research on sanctions[79] indicates that the specific and general preventive effect of mediation is at least as high as that of conventional sanctions.

Regarding later recidivism, there has as of yet been no systematic and nationwide evaluation in Germany. 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.[80] A comparative study concerning young offenders showed that successful cases of mediation had slightly lower re-offending rates than juveniles receiving traditional community sanctions. The incidence rate regarding cases with mediation was 1.4 versus 2.1 without mediation (r = 14).[81] Another evaluation study on the Lüneburg mediation scheme observed 151 young offenders three years after mediation or a formal sanction. The study, based on the control group design, revealed that

76 *Kilchling* 2012, pp. 169 f.

77 E. g. *Sessar et al*. 1986; *Voß* 1989, pp. 43 ff.; *Sessar* 1992; *Pfeiffer* 1994; *Kilchling* 1995; *Dölling*/*Henninger*, in *Dölling et al.* 1998, pp. 360 ff.

78 *Pfeiffer* 1992, pp. 338, 345.

79 For basic information on this subject, *Albrecht et al*. 1981; *Dünkel* 1990a, pp. 553 ff.; *Goldblatt*/*Lewis* 1998; *Sherman et. al*. 1998; in particular for restorative justice measures see *Shapland et al.* 2007; *Bonta/Jesseman/Rugge/Cornier* 2008; *Sherman/ Strang* 2008.

80 *Dünkel* 1990a; Anglo-American studies generally cover restitution as a sanction, although very little comparative evaluation research on mediation is available abroad; *Weigend* 1989; *Trenczek* 1996, on the system in the United States; for an international comparison of mediation projects and outcomes see *Dünkel* 1990; *Messmer*/*Otto* 1992 *Shapland et al.* 2007; *Bonta/Jesseman/Rugge/Cornier* 2008; *Sherman/Strang* 2008.

81 *Dölling/Hartmann/Traulsen* 2002, pp. 185 ff.

56% of cases of mediation in which offenders had committed bodily injury (n = 91) reoffended, compared to 86% among the control group (n = 60). There were 1.04 cases of recidivism with mediation versus 2.1 cases after formal sanctioning.[82] According to a study involving young and adult offenders in the Federal State of Schleswig-Holstein, only 26% of offenders who previously participated in mediation re-offended.[83] In terms of age groups, the study revealed the lowest recidivism rate among adult offenders (9%), followed by young adults (27%). Juveniles showed higher rates of recidivism (42%).[84] Given the preventive impact of mediation and its nature as a milder measure than formal sanctions, it is suggested that mediation should be preferred to other forms of sanctioning.[85]

In terms of internal project efficiency (that is, the predictability and acceptance of mediation), the German results were generally positive. First studies have shown that 80 to 90% of the offenders or victims approached by mediators agreed to mediation.[86] Settlements were reached in 67 to 81% of all cases, an average of 75%.[87] The same share of offenders fulfilled the commitments made.[88] As the current Federal Victim-Offender Mediation Statistics reveal, from 2006 to 2009 on average even in 89% of cases a settlement was reached.[89]

The offences committed by both juveniles and adults primarily involve physical injury, theft and property damage, as well as felonies such as robbery, in exceptional cases. The statistical data available for the year 1995 covering 42 mediation projects revealed that 64% of offenders had committed (serious) physical injury, 11% had committed criminal damage to property, and 9% had committed robbery.[90] The offenders tended to be first-time offenders. The share of recidivists varied from 21% in Landshut to 48% in Cologne[91] The 1995 survey showed that 30% of young and 44% of adult offenders (over 21 years of age) had previous criminal records. The 2005 Federal Statistics on victim-

82 *Busse* 2001, p. 138.

83 *Keudel* 2000, p. 110.

84 *Keude* 2000, pp. 121 ff.

85 See *Keudel* 2000; *Kempfer/Rössner* 2008.

86 *Hartmann* 1995, pp. 212-246; *Dölling*/*Henninger*, in *Dölling et al.* 1998, p. 369.

87 See *Rössner*/*Bannenberg* 1994, p. 69; *Schreckling et al*. 1991; *Pfeiffer* 1992.

88 See *Dünkel*/*Mérigeau* 1990; *Rössner*/*Bannenberg*, 1994; *Hartmann*/*Stroetzel*, in *Dölling et al.* 1998, pp. 188 f.

89 See *Hartmann et al.* 2011, p. 41.

90 See *Hartmann*/*Stroetzel*, in *Dölling et al.* 1998, p. 185.

91 *Schreckling et al*. 1991, p. 36.

offender mediation show that recidivists (juveniles and adults) accounted for 25%.[92] The first representative study concerning adults by *Bals, Hilgartner* and *Bannenberg* (2005), based on data in North Rhine-Westphalia, reveals a share of 19% of recidivists.[93]

The data (currently) available in Germany on the satisfaction of offenders and victims with mediation outcomes are, however, not always representative. For example, the finding that two thirds of those surveyed were satisfied reveals little about the selection method. Victims are interested in whether the mediators are offender-oriented or neutral.[94]

A survey on mediation with young offenders in Saxony revealed high levels of satisfaction with the mediation procedure, results and role of the mediator. 80% of injured persons and 74% of offenders reported they felt fairly treated by the mediator, the majority of offenders (63%) and victims (72%) stated they were satisfied with the overall mediation process, 72% of victims reported that they would participate in mediation again in another conflict.[95]

The survey by *Bals et al.* also showed high levels of satisfaction: more than 90% of the mediation parties stated they were satisfied with the overall mediation and felt to have been treated fairly. The overwhelming share of victims and offenders showed satisfaction with the mediation agreements.[96] Further research in the Federal States of Brandenburg and Saxony-Anhalt confirmed high satisfaction among victims and offenders with the mediation process and showed that in most cases the relationship significantly improved after a face-to face encounter.[97]

The results demonstrate the importance of linking the organization of mediation with juvenile court or offender aid on the one hand (danger of excessive offender orientation) and private services equipped exclusively for mediation on the other hand. The project is considered successful if an out-of-court settlement is achieved through the objectives of mediation; this occurs in 70 to 90% of all cases.[98] Where mediation outcomes were successful, the case was frequently dropped by the prosecutor or the judge: according to the 1995

92 *Kerner/Hartmann/Lenz* 2005, p. 56.

93 *Bals/Hilgartner/Bannenberg* 2005, pp. 55 ff.

94 *Schreckling et al*. 1991.

95 *Kunz* 2007, pp. 473 ff.

96 *Bals/Hilgartner/Bannenberg* 2005, pp. 427 ff.; see also *Bals* 2006.

97 See *Gutsche/Rössner* 2000.

98 *Schreckling et al*. 1991, p. 44; in the 1995 survey 88%; see *Hartmann*/*Stroetzel*, in *Dölling et al.* 1998, p. 185.

survey this was the case in 86% of all cases.[99] Where charges were not dropped (because of the severity of the crime), the sentence was as least reduced (e. g. probation or other less intrusive community sanctions).

Notwithstanding the favourable experiences and assessments, many methodological questions concerning empirical evaluation research remain unanswered. Given the considerable expenses associated with mediation and settlement, the options for expanding mediation are rather limited.[100] At any rate, restitution efforts frequently do not require the costly procedure of a personal meeting between the offender and the victim. Often, a simple written apology or payment of losses will suffice. Quantitatively, restitution may be more worthwhile as an independent sanction (§ 15 JJA) aside from mediation.

At present, most projects for mediation cover a maximum of 5-10% (often far less) of all (juvenile) criminal cases.[101] Substantiated estimates indicate that up to 25% of the indictable offences in the field of juvenile justice are intrinsically suitable for mediation,[102] thus leaving 'a vast reservoir' of opportunities. The study of *U. Hartmann* (1998) in the field of adult criminal law revealed a proportion of 16% of cases suitable for mediation (according to the criteria mentioned in *Section 3.1.3* above).

4.3 Results of a nationwide inventory

As stated in the introduction, the 1995 survey of juvenile welfare departments and private juvenile aid services revealed that mediation is available nearly everywhere in the old and especially in the new Federal States.[103] Only five years after the reunification of Germany, the juvenile aid systems had largely adjusted to the new situation. Nevertheless, selective regional differences remain. While in the Eastern Federal States at least three quarters of the juvenile welfare departments either practice exchange or arrange such cases through private services, the corresponding rates in the West are only 62% for North Rhine-Westphalia and 66% for Rhineland-Palatinate. In Saarland only one of the six juvenile welfare departments reported offering mediation. East and West

99 See *Hartmann*/*Stroetzel*, in *Dölling et. al.* 1998, p. 193.

100 *Dölling* 1992; *Kaiser* 1996, p. 1062.

101 See already *Dünkel*/*Mérigeau* 1990, p. 114; *Dünkel/Geng/Kirstein* 1998; for recent data *Pelikan/Trenczek* 2006; *Hartmann et al.* 2014.

102 See *Dünkel*/*Mérigeau* 1990, p. 114; *Schreckling et al*. 1991, p. 33; *Pfeiffer* 1992, p. 342; *Bannenberg* 1993, p. 158; *Wandrey*/*Weitekamp*, in *Dölling et al.* 1998, pp. 142 f.

103 For the efforts of a nationwide implementation, see *Kerner et al*. 1994; *Marks et al*. 1994; *Wandrey*/*Weitekamp*, in *Dölling et al.* 1998.

Germany also differ in the increased presence of private juvenile aid services offering mediation in addition to the juvenile departments (see *Table 1*).

Table 1: Mediation schemes provided by Local Youth Authorities and/or private organizations – comparison of „old“ and „new“ Federal States in Germany 1994

Federal State	Youth Depart-ments	Mediation by Local Youth Authorities		Mediation by private organiza-tions only		Mediation by private organiza-tions and LYA		Mediation available total	
	N = 100%	n	%	n	%	n	%	n	%
Baden-Württemberg	50	23	46	15	30	3	6	41	82
Bavaria	95	42	44	20	21	5	5	67	71
Bremen	5	0	0	3	60	1	20	4	80
Hamburg	7	7	100	0	0	0	0	7	100
Hessen	32	13	41	4	13	1	3	18	56
Lower Saxony	61	32	52	13	21	4	7	49	80
North Rhine-Westphalia	156	81	52	7	4	9	6	97	62
Rhineland-Palatinate	41	16	39	6	15	5	12	27	66
Saarland	6	1	17	0	0	0	0	1	17
Schleswig-Holstein	14	10	71	0	0	3	21	13	93
Berlin-West	12	5	42	2	17	5	42	12	100
Old Federal States total	**479**	**230**	**48**	**70**	**15**	**36**	**8**	**336**	**70**
Berlin-East	11	1	9	4	36	6	55	11	100
Brandenburg	18	9	50	2	11	6	33	17	94
Mecklenburg-Western-Pomerania	18	15	83	0	0	3	17	18	100
Saxony	34	15	44	6	18	5	15	26	77
Sachsen-Anhalt	24	15	63	2	8	4	17	21	88
Thuringia	22	8	36	4	18	7	32	19	86
New Federal States total	**127**	**63**	**49**	**18**	**14**	**31**	**24**	**112**	**88**
Germany total	**606**	**293**	**48**	**88**	**15**	**67**	**11**	**448**	**74**

Source: *Dünkel/Geng/Kirstein* 1998, p. 71.

The study by the University of Greifswald focused not primarily on mediation but rather on the new educational sanctions overall (e. g. social training courses, supervisory directives, community service and mediation) that became part of legislation following the 1990 reform of the JJA. This measure should considerably reduce custodial sanctions, like placement in a juvenile detention centre *(Jugendarrest)* or detention in a young offender institution *(Jugendstrafe).*[104] Considering the current trend in new educational sanctions, rather than the system of availability, conveys a far more modest impression. Most juvenile departments process only a few cases of mediation each year.[105] Like supervisory directives or social training courses, mediation is of a very minor quantitative significance in sanctioning practice. The approach is more based on ad-hoc measures than on deliberate areas of emphasis. Community service is a different matter, as this system has acquired considerable quantitative importance (probably because it requires relatively little investment in organization and time for the juvenile court aid). The case figures indicate that half the juvenile departments reporting mediation reached no more than eight settlements in the old, and seven settlements in the new Federal States in 1993. Seventy-five per cent of the juvenile welfare departments handled no more than fifteen or sixteen such cases per year, respectively (see *Table 2*).

104 The projects for new educational (community) sanctions operate within state working groups and one federal working group which enables regular exchange of experiences. For an inventory of individual projects including brief descriptions, see *Bundesarbeitsgemeinschaft für ambulante Maßnahmen nach dem Jugendrecht in der DVJJ* 1992.

105 A similar result was given by the study of *Wandrey*/*Weitekamp*, in *Dölling et al.* 1998, pp. 133 f.: 38% of the projects dealt with no more than 10 cases per year, whereas only 11% had more than 100 cases. Many of the youth departments that practice mediation only on an "ad-hoc" basis in few individual cases did not report their numbers.

Table 2: Participants in mediation 1991-1993 in comparison of mediation schemes in the "old" and "new" Federal States

	1991			1992			1993		
	25% n =	50% n =	75% n =	25% n =	50% n =	75% n =	25% n =	50% n =	75% n =
Old Federal States	**3**	**7**	**17**	**3**	**8**	**17**	**4**	**8**	**20**
Youth departments, n =	128			178			210		
mediation cases, n =	1,735			2,574			3,346		
New Federal States	**1**	**3**	**8**	**2**	**6**	**12**	**3**	**8**	**20**
Youth departments, n =	40			72			107		
mediation cases, n =	338			785			1.836		
Germany total	**2**	**5**	**14**	**3**	**7**	**15**	**4**	**8**	**20**
Youth departments, n =	168			250			317		
mediation cases, n =	2,073			3,359			5,182		

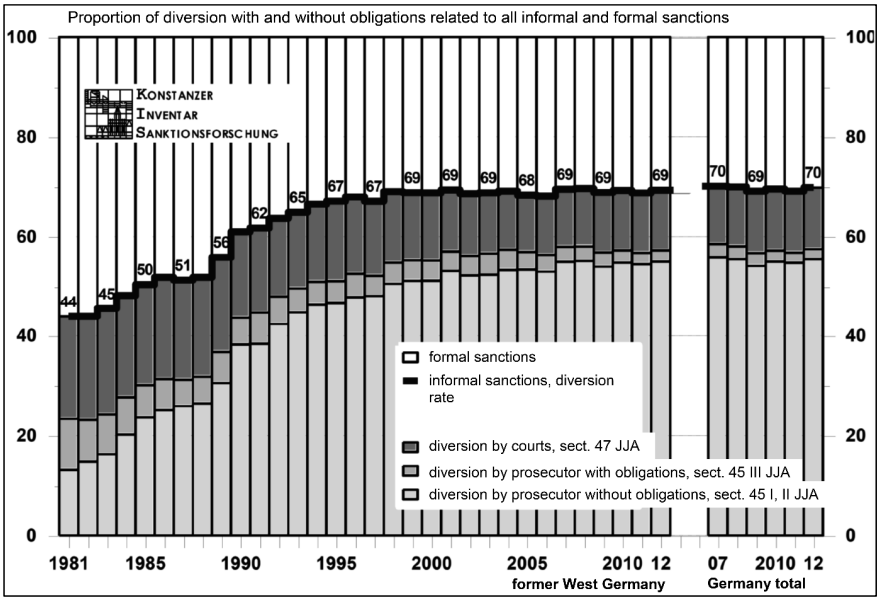
Source: *Dünkel/Geng/Kirstein* 1998, p. 172.

Accordingly, we investigated the number of juvenile welfare department districts providing mediation through either the juvenile welfare departments or private services. Of the questionnaires providing usable information from 531 districts (= 85% of all juvenile welfare department districts), 76% reported offering mediation. Only in 16% of the cases, however, did the departments focus on this option. The new Federal States, with an availability rate of 88% and an emphasis rate of 20%, compared favourably with the old Federal States (where the corresponding rates were 73% and 15%, respectively). A project was considered an area of emphasis if at least 30 such cases were handled annually or – in the event of fewer cases – if it was a social worker's area of specialization (e. g. training in conflict resolution by the German juvenile probation aid

association or the like) or if a fund for victims was established. The 61 "emphasis projects" in the old Federal States were mainly in Lower Saxony, Hamburg, Baden-Württemberg and Berlin. In East Germany, most were in East Berlin and Saxony. Examining the emphasis projects alone clearly revealed the emergence of specialization in mediation within the juvenile welfare departments in practically all Federal States.[106]

4.4 General statistical data on the role of restorative justice elements in sentencing according to the Juvenile Justice Act

Figure 1: Diversion rates (dismissals by the prosecutor or judge) in the German juvenile justice system, 1981-2012



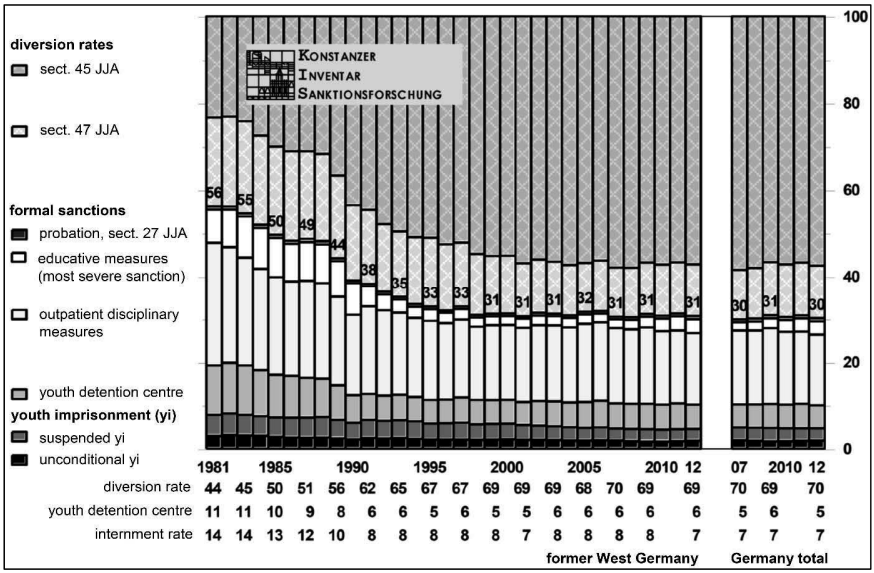
Source: *Heinz* 2014, p. 126.

In the past 30 years, sentencing practices in juvenile law have changed dramatically, especially regarding diversion and the new educational sanctions (including mediation). An increase in alternative measures (informal sanctions

106 For corresponding results from another nationwide poll, see *Hartmann*/*Stroetzel*, in *Dölling et al.* 1998, pp. 154 ff.

or diversion) from 44 to 70% of the indictable offences can be shown (see *Heinz*, 2014 and *Figure 1*).

Figure 2: Diversion and juvenile court sentences for juveniles (14-17) and young adults (18-20 years-old) 1981-2012



Source: *Heinz* 2014, p. 129.

Simultaneously, juvenile detention centre sentences (that is, detention for up to four weeks in a special institution) have decreased by more than 50% from 11.4 to 5%. Conversely, the share of unconditional detention in a juvenile prison has remained relatively stable or even decreased from 3-4% to 2%, which demonstrates that juvenile imprisonment is really a sanction of last resort. This is remarkable insofar as since the early 1990s the numbers of sentenced violent and drug offenders has considerably increased. Growth is apparent in juvenile court sanctions both with purely reformatory measures and with community service as a disciplinary measure. 41% of all convicted young offenders in 2012 received such a community service order. This information corresponds with the findings from our survey of juvenile departments indicating that community service is quantitatively the most significant among the new educational sanctions. Probation (suspended sentence of up to two years according to § 21 JJA) has also more than doubled since 1965. Unfortunately, the official statistics for criminal prosecution lack any data on the frequency of mediation, especially

regarding the role of public prosecutors in "informal" alternative sanctions. Clues are available, however, that hardly more than 5% of indictable offences are dealt with through mediation.

4.5 Restorative justice while serving a prison sentence

Projects including restorative justice elements have been developed only in a few prisons in Germany.

For instance, within the framework of the MEREPS-project, a pilot project on victim-offender mediation was set up in 2009 in a Bremen prison.[107] The project called "Mediation and Restorative Justice in Prison Settings" included research from Hungary, England, Germany and Belgium on the implementation of restorative justice in prisons. In addition to the establishment and evaluation of the model project in Bremen, a legal analysis regarding the implementation of restorative justice in prisons and a nationwide survey of the prison staff were conducted.

The survey aimed at assessing the opinions of prison staff towards restorative justice and revealed that interviewees had to large part (87%) knowledge of victim-offender mediation, whereas Family Group Conferences and Circles were rather unknown.[108] The majority of respondents (78%) principally supported the implementation of restorative justice in the penal system.[109] However, in terms of feasibility of mediation, more than half of staff members were rather sceptical about the realisation at their own prison.[110] Due to high levels of acceptance among prison staff, and a principally favourable legal framework, implementation of restorative justice, especially victim-offender mediation as model projects on a broad basis, was recommended at post-sentencing level.

The model project in a Bremen prison, established between 2009 and 2011 within the frame of the MEREPS-project, showed that successful implementation of victim-offender mediation at the prison level is possible. Hereby, it was pointed out that a flexible handling of the restorative justice measure in prison would be favourable, allowing the further involvement of third parties. Within the frame of the project, supporters of victims and offenders were also invited to take part in the mediation sessions. It was also stressed that indirect communication via shuttle mediation would be valuable and help offenders to assume

107 The project has been implemented and is being evaluated by the Institute of Policy and Security Research at the University of Applied Sciences in Public Administration Bremen and the NGO "Täter-Opfer-Ausgleich Bremen e. V.", see *Hartmann et al.* 2012, p. 207.

108 *Hartmann et al.* 2012, pp. 225 f.

109 *Hartmann et al.* 2012, pp. 226 f.

110 *Hartmann et al.* 2012, pp. 228 f.

responsibility.[111] Serious offences (however no sexual violence offences) were included in the project. Hence, special attention was given to extensive preparation of the meetings and preliminary talks.[112] During the project phase only a few offenders and victims could be approached for personal meetings or indirect mediation. However, more offenders agreed to restorative efforts such as compensation, apologies etc.[113]

Another pilot project aiming at introducing restorative practices at the post-sentencing level and seeking to support victims of crime is being carried out in the Federal State of Schleswig-Holstein. The project aims at establishing victim groups, victim-empathy-trainings with offenders as well as providing practices such as victim-offender mediation and restorative conferences.[114]

5. Summary and outlook

In Germany, mediation has become an increasingly widespread contemporary response. In the new Federal States, mediation features prominently in the new social services of the justice departments and private organizations for the resettlement of offenders. The role of the German probation association *(Bewährungshilfe),* which runs a specially equipped service agency for victim-offender exchange projects and has designed training courses for mediators, is especially significant. Finally, similar trends of expansion are emerging in adult criminal justice. The continued limitation of individual funds as a result of general socio-economic problems compromises the feasibility of widespread availability.

In general one may conclude: In Germany since 1986 the rights of victims in criminal procedures have been considerably improved. The sanctions systems in juvenile and adult criminal law have been changed as well and elements of restorative justice have been implemented successfully. Mediation nowadays is available in almost all jurisdictions: as a diversionary measure, but also during and even after criminal proceedings. The legislator has introduced regulations (§ 155a CCP) that force prosecutors and judges at all stages of criminal procedure to consider restorative efforts and to further mediation in penal matters.

Nevertheless Germany has been reluctant as concerns a more radical move towards restorative justice, for instance introducing forms of conferencing. Mediation and reparation remain on a low level scale, whereas community

111 *Hartmann et al*. 2012, p. 260; 2013, pp. 52 ff.

112 *Hartmann et al.* 2012, p. 243.

113 *Hartmann et al.* 2013, pp. 52 ff.

114 The EU-funded project is running from 01.01.2013-31.12.2014 and is coordinated by the Schleswig-Holstein Association for Social Responsibility in Criminal Justice, Victim and Offender Treatment. For further information on the project, see http:// www.rjustice.eu/ en/pilotrj2/schleswig-holstein.html.

service orders (in juvenile justice) are of major significance and one of the predominant sanctions under the Juvenile Justice Act, albeit while being at the margins of what can be deemed restorative practice. In general Penal Law regulations for mediation have been introduced, the practice remains reluctant as well.

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Greece

Sofia Giovanoglou

1. Origins, aims and theoretical background of restorative justice

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

The general concept of conciliation or reconciliation, central to restorative justice theory and practice, has been well known in the Greek Law since the ancient years.[1] Nowadays, the Greek justice system provides only a limited number of restorative interventions. These interventions can be found in many areas of Greek law. In particular, provisions for mediation exist in Civil, Commercial, Administrative and Criminal Law as well. As regards the Greek criminal justice system *per se*, on which this report focuses, the forms of restorative justice interventions, implemented within its framework, are either informal or formal.

1.1.1 Informal Restorative Justice interventions

Informal restorative practices can be found at all levels of the criminal procedure – the police level, the level of the prosecutor in pre-trial proceedings, and at the court level when trial has already commenced. By the term informal we mean practices that are either not provided by law or that are provided as non-typical by it *per se*.

1 Persons involved even in manslaughter could come to a settlement, which could discharge the offenders from the severe penalties of death or exile, and let them stay in the fatherland by paying an amount of money. *Bakatsoulas* 1986, p. 195.

First of all, at the police level we can find "*non-typical efforts to reach an extra-judicial settlement of the dispute*." The police officers, in the case of minor offences reported to the police stations, usually attempt to reconcile the disputant parties in order to avoid submitting the file of the case to the prosecutor.[2]

Secondly, within the framework Article 25 para. 4a of the Greek "Code for the Organization of the Courts and the Status of the Judicial Officials" (Act 1756/1988 which came into force on 16 September 1988), at the level of the public prosecutor we can encounter *"non-typical efforts by the prosecutor within the framework of his jurisdiction to recommend persons who are quarreling to avoid committing punishable acts and strive for a peaceful solution to their dispute*." These efforts of the public prosecutor are a form of conciliation that need not necessarily end in the fulfilment of an agreement or contract made with the offender. Nonetheless, according to a juvenile prosecutor, in some cases [3] a kind of informal written agreement may be signed.

Finally, at the court level, a wide range of *non-typical "extra-judicial" forms of victim-offender reconciliation* are implemented, even as late as in the court room just before the hearing of the case, although these practices have not been empirically researched yet.[4] In most of these cases, for example, the parties come to a kind of an oral agreement about how to restore the harm caused, upon which the court usually makes a formal decision to acquit the offender[5] that is founded on the reasoning that the act had been committed unintentionally.

1.1.2 Formal Restorative Justice interventions

Besides these informal manifestations of restorative practice in the context of the Greek criminal process, the Greek law also puts different forms of restorative practice on a statutory footing. On the one hand, provision is made for different restorative processes to be conducted, taking the form of victim-offender mediation and conciliation schemes. On the other hand, the law also provides for various form of "victim's satisfaction", implying the delivery of compensation, reparation or restitution to the victim by the offender.

Victim-Offender Mediation or Conciliation schemes

Firstly, Articles 11-14 of the Act 3500/2006 "Countering domestic violence and other provisions", which came into force on 25/11/2007, provide for "Penal

2 *Sakkali* 1994, pp. 223 ff.

3 Oral communication with a juvenile prosecutor.

4 *Livos* 2000, pp. 289 ff.; *Alexiadis* 2007, p. 948; *Pitsela* 1997, pp. 155 ff., 171.

5 *Livos* 2000, p. 289.

Mediation" in cases of domestic violence misdemeanours.[6] According to this procedure, the prosecutor of the misdemeanour court considers the possibility of carrying out mediation before the initiation of prosecution (or thereafter in some cases), if the suspect (or the accused) and the victim consent to undertake a mediation agreement. If the suspect (or the accused) complies with the conditions undertaken by them in the mediation agreement for a three year period, then the relevant procedure is deemed to have been successfully completed and the state's right to prosecute is extinguished. This procedure is only applicable to adult offenders. As regards minor offenders (8-18 years of age) who have committed domestic violence misdemeanours penal mediation is applied according to Article 45A of the Criminal Procedure Code.

For juvenile offenders aged between 8 and 18 years, Article 122 para. 1 of the Greek Criminal Code foresees "*victim-offender mediation for the expression of forgiveness and the extra-judicial arrangement of the consequences of the offence*." This is one out of twelve "educational measures" that are stated in this Article 122, that were introduced by Act 3189/2003 on the "Reformation of criminal legislation on juveniles and other provisions" that came into force on 21 October 2003.[7] It can be imposed either through diversion by the juvenile prosecutor in cases of violations or misdemeanours, or as a court order[8] by the juvenile judge through the intervention of Youth Court Aid. This educational measure aims to facilitate the offering of an apology by the minor to the victim and the repairing of the damage caused by the act. It can also be imposed by the prosecutor as a restrictive condition in place of pre-trial detention for juvenile offenders aged 15 and above, if the punishment provided in the law for the offence exceeds 10 years confinement in a penitentiary.

A third formal manifestation of restorative practice is so-called "*penal conciliation*". According to Article 308B of the Greek Criminal Procedure Code,[9] penal conciliation is applicable in significant cases of felonies[10] committed by adults against certain property and property rights.[11] This provision was introduced by Act 3904/2010 on the "rationalization and improvement of the administration of criminal justice and other provisions", which reformed the

6 A misdemeanour is any act punishable by imprisonment of 10 days to 5 years, or by pecuniary penalty, (or by detention in a Young Offenders' Institution), according to Articles 18 and 53-54 Criminal Code.

7 *Spinellis/Tsitsoura* 2006, pp. 309 ff.; *Pitsela* 2010, pp. 1,183 ff.; *Pitsela* 2011, pp. 623 ff.

8 *Papadopoulou* 2008, op. cit., pp. 19-22; *Giovanoglou* 2008, pp. 28 ff.

9 The Greek Criminal Procedure Code was ratified through the Act 1493/1950 on "Ratification of the Criminal Procedure Code", which came into force on 1/1/1951.

10 A felony is any act punishable by confinement in a penitentiary for life or for 5 to 20 years, according to Articles 18 and 52 Criminal Code.

11 Listed in Articles 374, 375, 386, 386A, 390 and 404 of the Criminal Code.

Greek Criminal Procedure Code and came into force on 23 December 2010.[12] If the prosecutor of the misdemeanor court has already initiated prosecution, the mediation process commences after a request made by the accused. The aim of the mediation process is to draft a mediation agreement with the injured person that aims to repair the harm caused and to facilitate the returning the property unlawfully taken by the offender. Then, if the parties come to an agreement through mediation before the formal apology of the accused persons, which typically closes the investigation process under the law (Article 270 of the Greek Criminal Procedure Code), the investigation process is considered to have come to its end. In the case that the mediation agreement is reached after the formal apology by the accused persons,[13] they are obligatorily discharged from any measure that has already been imposed on them.

Forms of "Victim's Satisfaction" (delivery of compensation, reparation or restitution to victims)

a) Articles 384 paras. 1-2 and 406A paras. 1-2 of the Criminal Code provide for "*satisfaction of the injured person*" at the pre-trial stage for certain crimes against property and property rights.[14] The relevant provisions of Articles 384 and 406A of the Criminal Code were introduced by the aforementioned Act 3904/2010 and they are applied only to adults. Victims' satisfaction in these cases implies that the offender returns the property that they have unlawfully taken from the victim, without harming any other person unlawfully, or that they fully repair the economic harm the victim has suffered, including any arising interest in arrears. If victim satisfaction is achieved before the authorities have commenced any form of examination of the the persons responsible for the offence, the punishability of the crime ceases and the sentence provided by law should not be imposed. Where satisfaction of the victim is achieved after investigations have begun but up until right before the case is referred to court for prosecution, the case will be filed into the archive via a reasoned order by the Prosecutor of the Misdemeanor Court and prosecution will not be initiated.[15]

12 The Act 3904/2010 widened former provisions, for which see *Alexiadis* 1996, p. 196.

13 The apology is meant here again as the procedural act that ends the investigation process, and not as a part of the mediation agreement.

14 Defined in Articles 372, 373, 374, 375, 377, 381 and 382 para.1, 2b and para. 3 and 386, 386A, 387, 388, 389, 390, 392, 394, 397, 399, 400, 403, 404, 405 and 406 of the Criminal Code. Not applicable in cases of "Damages to Property Held on Trust" committed against the State or legal entities governed by public law or regional and local authorities, according to Article 406A para. 5 of the Criminal Code.

15 See below, *Section 3.3*.

b) Articles 384 para. 3 and 406A para. 3 of the Criminal Code also provide for such "*satisfaction of the injured person*" until the end of the evidence-stage of proceedings at the court of first instance, a stage that commences with the examination of the first witness giving evidence in court during the hearings of the case. However, the application of this measure is limited to misdemeanours against property and property rights.[16] This form of satisfaction of the victim was introduced by the same Act 3904/2010, and also applies only to adult offenders. At this stage, before the evidence-stage of court proceedings ends, if the persons responsible for the relevant crimes satisfy the victims, they will be discharged from any penalty at first instance courts.[17]

c) Furthermore, the educational measures for juveniles aged 8 to 18 years that were introduced into the Criminal Code (Article 122 para. 1f) by the aforementioned Act 3189/2003 include *"compensation of the victim or in any other way restoration or mitigation of the consequences of the act by a juvenile offender."* On the one hand, this measure may be imposed either by the juvenile prosecutor via a prosecutorial diversion order which states the time needed for the minor's compliance with the conditions and the obligations provided in that order. On the other hand, in cases of juvenile offenders aged 15 and older, at the pre-trial stage said educational measure can be applied as a restrictive condition as an alternative to pre-trial detention, or via a ruling by the juvenile judge during the hearing of the case. Compensation implies the payment of reparation for to the victim by any means.

d) *"Compensation of victims"* by the Greek Compensation Authority under the Act 3811/2009 "Compensation of victims of violent deliberate crimes (Harmonization of the Greek Legislation with the Council of EU Directive of 29 April 2004) and other provisions", which came into force on 18/12/2009.

e) According to Article 84 para. 2d of the general part of the Criminal Code, when the court considers that *the offender exhibited genuine remorse and sought to nullify or mitigate the consequences of the offence*, it should take that into account as a mitigating circumstance in sentencing. This provision came into force on 1 January 1951 with the Greek Criminal Code through Act 1492/1950 on "Ratification of the Criminal Code". It does not concern juvenile offenders upon whom educational measures are to be imposed as the law refers to "punishment" and not to "measures". Only when the juvenile judge imposes detention in a Young Offenders' Institution can this provision be applied. It has to be mentioned that, in the Greek Criminal Law, when there is no special regulation for juveniles, the general provisions apply to them too, unless they

16 Provided in Articles 372, 374, 375, 377, 381 and 382 para. 1, 2b and para. 3 and 386, 386A, 387, 388, 389, 390, 392, 394, 397, 399, 400, 403, 404, 405 and 406 Criminal Code. The exception of "Damages to Property Held on Trust" as stated in the context of "satisfaction of the injured person" at the pre-trial stage also applies.

17 See below, *Section 3.3*.

are incompatible with the meaning and purpose of the juvenile criminal law provisions.

f) *"Offenders' regretting and willingness to make restitution for injuries occasioned by their offence"* is provided in Article 79 para. 3d of the General Part of the Criminal Code. It serves as an element of evaluating the offender's personality at the stage of the judicial determination of the sentence, in cases of crimes where restitution is unattainable, i. e. manslaughter.[18] It was also introduced on 1 January 1951, when the Act ratifying the Greek Criminal Code came into force, as mentioned above. Article 79 para. 3d does not provide for another mitigating circumstance as in Article 84 para. 2d described above. Instead, this simple "regretting and willingness" of Article 79 para. 3d only generally benefits the offender, while in the previous case of Article 84 para. 2d the degree of regretting is larger and leads the judge to construct a more lenient "framework for punishment" and then to reduce the sentence provided for the offender. This provision of the general Part of the Criminal Code does not concern juvenile offenders to the extent that educational measures have been imposed on them for the reason explained above as regards the provision of the Article 84 para. 2.

g) *"Restitution of the victims' injury caused by the punishable act"* (Article 100 paras. 1 and 3a of the Criminal Code) is a condition for granting "conditional suspension under supervision", which implies that the court sentences an offender to a term of imprisonment of more than three years, but suspends actual enforcement of the sentence on the condition that the offender fulfils certain obligations. This provision was reformed recently through Act 3904/2010.

1.2 Reform history

As regards the reform history hidden under the incorporation of the aforementioned forms of restorative justice interventions, it has to be mentioned that before the establishment of restorative measures through legislation, informal practices of dispute resolution had already been taking place in Greece without having any statutory basis at all.[19] As regards the legislated restorative interventions, most of which were introduced over the past decade, the relevant reforms were made top-down and no localised pilots were implemented at all. It has to be mentioned, though, that with regard to juvenile law a proposal for the implementation of a restorative programme was lodged to the Greek Ministry of Justice, Transparency and Human Rights by a juvenile prosecutor some years

18 *Alexiadis* 1992, pp. 312 ff.

19 *Papadopoulos/Papadopoulou* 2008, p. 10.

before the introduction of the new restorative measures in the Greek Juvenile Law (2001). This proposal has never been implemented.[20]

1.3 Contextual factors and aims of the reforms

The introduction of restorative measures in the Greek criminal justice system seems to be part of a wider strategy to present a more competent system, in part aiming to reduce court caseloads, as it was (and still is) a real fact that the legal system is overburdened. This effort benefited from the then-prevailing tendency towards the improvement of the position of the victim in the criminal procedure.[21] It has to be mentioned that awareness for victims' issues and implementation of victims' rights within public policies and services is relatively weak in Greece. There is no broad public demand for a more holistic approach towards victim satisfaction and no major pressures (in the form of social movements) are being exercised on the government in order to establish initiatives for the protection and support of victims. Only some non-governmental organisations may offer services (i. e. counselling or physical and psychological treatment) to victims in need. Victims' backing comes mainly from the family.

Additionally, there was no relevant political will for introducing restorative measures. Moreover, civic participation in introducing those interventions was low.[22] The adaptation of restorative measures in Greece has largely been mobilized by the involvement of the EU in criminal justice matters through its relevant Directives, as will be shown below.[23]

1.4 Influence of international standards

Only a few of the aforementioned restorative justice interventions in the Greek criminal justice system are linked to relevant international legal instruments. These shall be presented in the chronological order of their introduction.

a) *The Restorative Justice measures of the Greek juvenile criminal law* (mediation and compensation of the victim as educational measures). According to the Recommendatory Report of the Bill of Act 3189/2003 (which introduced them) this reform was influenced by legislative developments not only in Greece but in the international community as well. Specifically, the relevant Bill of the Act explicitly refers to UN "hard law" and "soft law" legal instruments and to

20 *Pantazi-Melista* 2003, p. 829.

21 *Psarouda-Benakis* 1982, pp. 11-12; *Spinellis* 1989, pp. 52 ff.; *Stamatis* 1989, pp. 71 ff.

22 *Papadopoulou/Papadopoulos* 2008, p. 86

23 *Papadopoulou/Papadopoulos* 2008, p. 13.

resolutions and recommendations of the Council of Europe.[24] Interestingly, however, no explicit mention is made though of Recommendation Rec (99) 19 on "Mediation in Penal Matters" or of the jurisdiction of the European Court of Human Rights.

b) *"Penal Mediation"* in cases of domestic violence misdemeanours. The introduction of this new institution by the Act 3500/2006 has followed the provision of Article 17 of the European Union's Framework Decision (15 March 2001) on "The standing of victims in criminal proceedings". In particular, Article 17 obliged each EU Member State to bring into force laws and regulations that introduce mediation in criminal proceedings before 22 March 2006 (Articles 10 and 17).[25] It seems that the Greek legislator, while trying to meet the deadline set in this EU Framework Decision, ignored other relevant soft law instruments[26] like the Council of Europe's Rec (99) 19 on "Mediation in Penal Matters", that has been so important for the promotion of restorative justice in Europe.

c) *"Penal conciliation"* and forms of *"Satisfaction of the victim"*, provided in Articles 308B, 384 and 406A of the Criminal Code and introduced by the Act 3904/2010, were influenced by Recommendations of the Council of Europe. However, the Recommendatory Report of the Bill of Act 3904/2010 refers to these recommendations only once generally, and not once is reference made to any single one of them in particular.

d) *"Compensation of victims of violent deliberate crimes"*, given statutory footing by Act 3811/2009, was introduced in an attempt to harmonize Greek legislation with the Council of Europe's Directive of 29 April 2004 related to the compensation to crime victims.[27]

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24 Some of these are: A/RES/40/33 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, ("The Beijing Rules"), A/RES/45/112 United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990, (The Riyadh Guidelines), Resolution (66) 25 Short-Term Treatment Of Young Offenders Of Less Than 21 Years, Resolution (78) 62 On Juvenile Delinquency And Social Change, Recommendation No. R (87) 20, Of The Committee Of Ministers To Member States On Social Reactions To Juvenile Delinquency, Rec 2000 (20) The Role Of Early Psychological Intervention In The Prevention Of Criminality, etc.

25 Member states should bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision. See also the White Paper to the relevant Draft Law, p. 9.

26 *Giovanoglou* 2011, p. 1037.

27 Council Directive 2004/80/EC (29 April 2004), relating to compensation to crime victims, Official Journal of the European Union, L 261/15 (6.8.2004).

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

2.1 Pre-court level

2.1.1 Adults

a) *Non-typical reconciliation efforts by prosecutors, within the framework of their right to recommend persons who are quarreling to avoid committing punishable acts and strive for a peaceful solution to their dispute*, take place according to Article 25 para. 4a of the "Code for the Organization of the Courts and the Status of Judicial Officials". The prosecutor is attributed the non-typical role of "reconciliator", but only for minor cases or petty-offences (i. e. quarrels between husbands and wives or children and parents, auto or motorcycle thefts, threats etc.).[28] In these cases the consent of the parties is required in order to reach a successful reconciliation outcome. If reconciliation succeeds the case is automatically dropped, and no reference is made in the offender's official record. There are no official data as regards any negative consequences of it later, i. e. in sentencing etc.

b) *"Penal mediation"* for domestic violence misdemeanours was introduced into the Greek Criminal Justice System under the provisions of Articles 11-14 of the Act 3500/2006. It was adopted in the form of a process carried out by the prosecutor under certain conditions. In particular, Article 11 para. 1 of Act 3500/2006 stipulates that the prosecutor of the misdemeanour court[29] considers the possibility of carrying out mediation:

- before the initiation of prosecution and during a preparatory stage of preliminary examination ("prokatarktiki exetasi"), a stage that is ordered by the prosecutor in order to decide whether to prosecute or not (Article 31 para. 1b Criminal Procedure Code), or
- after the initiation of prosecution in the case of an accelerated procedure for perpetrators who are apprehended at the time of committing the offence, or shortly after it, within a maximum 48 hours ("aftoforo") (Articles 417-424 Criminal Procedure Code).

The mediation process commences only if the suspect in the first case, or the accused in the second, submits the unconditional statement provided by the law (Article 11 para. 2 of Act 3500/2006). According to the law, with this

28 *Sakkali* 1994, p. 222.

29 In every misdemeanour court there is a Misdemeanour Prosecutor's Office, according to Article 16 of the Code for the Organization of the Courts and the Status of Judicial Officials.

unconditional statement, the suspect/accused persons should declare that they will:

- not commit any further acts of domestic violence in the future,
- participate in a special counselling-therapeutic programme, and
- restore the consequences/pay the damages of their act to the victim immediately, if this is possible (Section 11 para. 2). The results of the process are analysed below under *Section 3.1.1*.

c) *"Penal conciliation" in cases of felonies against property and property rights*, in particular "Theft", "Illicit Appropriation", "Fraud", "Fraud via Computers", "Damage to Property Held on Trust" and "Usury". This conciliation process commences, if the prosecutor of the misdemeanour court had already initiated prosecution and the accused submitted their request for conciliation before the judicial investigation proceedings were typically ended (Article 308B para. 1 of the Criminal Procedure Code). This procedure and its outcomes in case of success or failure, is thoroughly analyzed below, under *Section 3.2*.

d) *"Satisfaction of the injured person"* in crimes against property and property rights.[30] In this case the favorable results provided by law (that means either the erasure of the punishability of the act or the avoidance of the initiation of prosecution) take effect if:

- the persons responsible for the punishable act fully or partially satisfy the victim before their examination in any way by the authorities, without their admission of guilt being required (the victim's consent is not required by the law), and
- the persons responsible for the punishable act fully satisfy the victim before the initiation of prosecution under further conditions provided by law (Articles 384 paras. 1-2 and 406A paras. 1-2 Criminal Code). These provisions and the procedure in detail are presented below under *Section 3.3*.

2.1.2 Juveniles

For juveniles, the non-typical possibilities of the prosecutor as stated for adults above also apply. The rest of the procedures presented above, i. e. penal con-

30 In particular „Theft", „Special Cases of Theft", „Illicit Appropriation", „Theft or Illicit Appropriation of Low Value", „Damaging Property", „Special Cases of Damaging Property", and „Fraud", „Fraud via Computers", „Fraud Resulting in Slight Damage", „Insurance Fraud", „Damage to Property by Fraud", „Damage to Property Held on Trust", „Petty Fraud Concerning the Use of Food etc.", „Receiving the Proceeds of an Offence", „Defrauding Creditors", „Preventing the Right of Enjoyment to Beneficiary", „Unlawful Fishing", „Deceiving Minors in Debts", „Usury", „Avarice" and „Acts of Brokerage Deception", according to Articles 384 para. 1 and 406A para. 1 of the Criminal Code.

ciliation, satisfaction of the injured person in crimes against property and property rights, and penal mediation for domestic violence misdemeanours, are applied to adult offenders only.

Article 45A of the Criminal Procedure Code provides the possibility for the public prosecutor to abstain from prosecution if, after having heard the juvenile offender aged 8 to 18 years, he deems that prosecution would not be necessary to deter the offender from re-offending. Such diversion is possible in cases of violations[31] or misdemeanors (Articles 45A Criminal Procedure Code and 122 para. 1f Criminal Code). He can then apply one or more diversionary educational measures instead (Articles 45A Criminal Procedure Code and 122 para. 1f Criminal Code). An admission of guilt is not required and the victim's consent is not provided explicitly by the law.

The educational measures in the Greek Juvenile Criminal Law are not genuine criminal sanctions, since they may be ordered independently of guilt. They are intended to serve the purpose of education, resocialisation, caring for minors and re-integrating them into society. The educational measures as listed in Article 122 Criminal Code include:

a. reprimand;
b. placing the child in the responsible care of parents or guardians;
c. placing the child in the responsible care of a foster family;
d. placing the child in the care of Youth Protection Associations, Youth Centres or Juvenile Court Aid;
e. mediation between the young offender and the victim, for the offender to apologize, so that the consequences of the act can be settled out of court;
f. compensation to the victim, or by some other means, the removal or alleviation of the consequences of the act (reparation);
g. community work;
h. the participation in social and psychological programmes organized by public, municipal, local authorities or private institutions;
i. attending vocational schools or other training or vocational training facilities;
j. participation in special road safety training programmes;
k. placing the child under the intensive care and supervision of Youth Protection Associations or Juvenile Court Aid;
l. placing the child in an appropriate public, municipal, local authority or private educational institution.

This listing is not restrictive and, considering the lifestyle and education of the child, more than one or even additional educational measures may be

31 Any act punishable by jailing or by fine, according to Article 18 and 55 of the Criminal Code.

imposed simultaneously. The law does not foresee any form of sanction for failure on behalf of the offender to fulfill the obligations arising from educational measures. In such cases another educational measure may be imposed on juvenile offenders instead. If completion is successful then the public prosecutor at the Misdemeanour Court files the case and submits a copy to the public prosecutor at the Court of Appeal reporting the reasons that led him/her to abstain from prosecution (Articles 45A para. 2 and 43 para. 2 Criminal Procedure Code).

Among these educational measures two stand out that are of particular relevance in the context of this report. The first is "*victim-offender mediation for the expression of forgiveness and the extra-judicial arrangement of the consequences of the offence*"[32]. This procedure is presented below under *Section 3.1.2* in detail. The second is "*compensation of the victim or in any other way restoration or mitigation of the consequences of the act by a juvenile offender*", which is more closely described in *Section 3.3* below.

These educational measures can also come into play in the context of avoiding the use of pre-trial detention, in that they can be imposed as so-called "restrictive conditions". Such conditions can be imposed at the pre-trial stage if: a) there are serious indications of the guilt of a juvenile offender whose acts would have been felonies or misdemeanours punished by imprisonment for not less than three months if he were adults; and b) they are necessary in order to achieve the offenders' desistance from further crime and their presence at the pre-trial stage, the stage of the court hearing and the time of the execution of the sentence (Articles 282 para. 1 and 2 and 296 Criminal Procedure Code). The Examinator imposes the conditions in accordance with the prosecutor's consent. Such restrictive conditions can be imposed individually or in combination with each other according to Article 122 of the Criminal Code, with the exception of the measure of placing the child under the intensive care and supervision of youth protection associations/Juvenile Court Aid, and the measure of placing the child in an appropriate public, municipal, local authority or private educational institution. An admission of guilt is not a necessary requirement, nor is the victim's consent. As regards the criminal history of the juvenile offender, it comes out from the criminal record entailed in the file of the case which is in the availability of the Examinator. Pre-trial detention shall not be imposed solely on the grounds that mediation has been unsuccessful or that the offender has failed to make compensation (the two educational measures of relevance to RJ). This refers only to juveniles over 15 years of age who have committed an act (which would have been a felony if committed by an adult) punishable with confinement in a penitentiary for not less than 10 years (Articles 282 paras. 3 and 5 Criminal Procedure Code). Failed compliance should not have a negative effect on later sentencing.

32 *Papadopoulou* 2008, p. 19.

2.2 Court level

2.2.1 Adult Criminal Justice System

a) *"Satisfaction of the injured person"* by the accused until the end of the evidence collection process at the first instance court for misdemeanours against property and property rights (Articles 384 para. 1-3 and 406A paras. 1-3 and 5 Criminal Code).[33] The relevant provisions were introduced as mentioned above in *Section 1.1* by Act 3904/2010. Victims' satisfaction in this context means that the persons responsible for the punishable act should return the property they have unlawfully taken, without harming any other person unlawfully, or that they should fully repair the economic harm caused to the victim, including interest in arrears. At this stage, if the person responsible for the crime "satisfies the victim" before the evidence-stage of the court procedure ends, he/she will be discharged from any penalty at first instance courts.[34]

b) Article 84 para. 2d Criminal Code provides *"offenders' genuine attempts to nullify or mitigate the effects of their act"* as a mitigating circumstance in sentencing of all other cases not covered by "*Satisfaction of the Injured Person*" described previously.[35] This provision came into force on 1 January 1951 with the Greek Criminal Code through Act 1492/1950 on "Ratification of the Criminal Code".

c) *"Offenders' regretting and willingness to make restitution for injuries occasioned by their offence"* can be considered as a relevant factor when evaluating the offender's personality at the stage of the judicial determination of the sentence, if they do not manage to restore the victim absolutely (Article 79 para. 3d Criminal Code).[36] It serves as an element of evaluating the offender's personality at the stage of the judicial determination of the sentence, in cases of crimes where restitution is unattainable, i. e. manslaughter.[37] It was also introduced on 1 January 1951, when the Act ratifying the Greek Criminal Code came

33 In particular „Theft", „Illicit Appropriation", „Theft or Illicit Appropriation of Low Value", „Damaging Property", „Special Cases of Damaging Property", and „Fraud", „Fraud via Computers", „Fraud Resulting in Slight Damage", „Insurance Fraud", „Damage to Property by Fraud", „Damage to Property Held on Trust", „Petty Fraud Concerning the Use of Food etc.", „Receiving the Proceeds of an Offence", „Defrauding Creditors", „Preventing the Right of Enjoyment to Beneficiary", „Unlawful Fishing", „Deceiving Minors in Debts", „Usury", „Avarice" and „Acts of Brokerage Deception".

34 See below, *Section 3.3*.

35 *Manoledakis* 1981, p. 266.

36 *Alexiadis* 1992, p. 312.

37 *Alexiadis* 1992, pp. 312 ff.

into force, as mentioned above. This provision of Article 79 para. 3d does not provide for another mitigating circumstance as in Article 84 para. 2d. This simple "regretting and willingness" of Article 79 para. 3d only generally benefits the offender, while in the previous case of Article 84 para. 2d the degree of regretting is larger and leads the judge to construct a more lenient "framework for punishment" and then to reduce the sentence provided for the offender.

d) *"Offenders' demonstration of regret and willingness to nullify the effect of their act"* can be a condition for the conditional suspension of prison sentences ranging between two and three years. The suspension of the sentence may last from three to five years (Article 100 para. 1 of the Criminal Code).

e) *"Restitution of the victims' injury caused by the punishable act"* (Article 100 paras. 1 and 3a of the Criminal Code) is a condition for granting "conditional suspension under supervision", which implies that the court sentences an offender to a term of imprisonment of more than three years, but suspends actual enforcement of the sentence on the condition that the offender fulfils certain obligations. This provision was reformed recently through Act 3904/2010.

2.2.2 Juvenile Justice System

The educational measures described in *Section 2.1.2* above can also be applied by the court in cases of juvenile offenders[38] through the intervention of the Youth Court Aid,[39] the body that is also responsible for preparing social inquiry reports on minor suspects (Article122 para.1e Criminal Code). Accordingly, "*Victim-offender mediation for the expression of forgiveness and the extra-judicial arrangement of the consequences of the offence"* and "*the compensation of the victim or restoration in any other way or mitigation of the consequences of the act by a juvenile offender*" are both available at the court level as court orders. The juvenile judge can only impose educational measures on minors between 8 and 15 years of age who have committed a criminal act (as they are not considered to have criminal responsibility) if he/she considers it necessary. In the case of young offenders between 15 and 18 years of age, educational measures may be imposed unless detention in a young offenders' institution is

38 *Papadopoulou* 2008, pp. 19-22.

39 The Youth Court Aid is a Regional Department of the Greek Ministry of Justice, Transparency and Human Rights (Act 378/1976, Decree 49/1979) and its main mission is to prepare, during the stage of the juvenile's interrogation, a social inquiry report and to exercise and monitor the execution and progress of educational measures. It is equivalent to a juvenile Probation Office. See *Pitsela* 1998, pp. 1,085 ff., 1,097; 2011b, pp. 505 ff., 521 ff.

considered to be necessary.[40] The decisions of the juvenile court on educational measures can be appealed since the reformation of the relevant law in 2010. There is no special provision for juvenile offenders who violate or fail to abide by their educational measures. In this case the Juvenile Court may change the measure (or combination thereof) imposed. Since educational measures imposed at the court level are imposed on the basis of a court ruling, it is implied that the court deems that the offender committed the act(s) in question, and they are recorded in the offenders record.

2.3 After the court's decision

As it currently stands, mediation or other restorative practices are not used in the context of prisons or of offenders who are serving prison sentences (for instance in sentence and rehabilitation planning, as a means of conflict resolution in prisons etc.). Nor does the law allow for such initiatives to be taken locally. The only measure that should be mentioned in the post-sentencing context is *"compensation of the victims of violent deliberate crimes"* by the Greek Compensation Authority. Act 3811/2009 established the "Greek Compensation Authority" in Greek Ministry of Justice, Transparency and Human Rights which decides upon the requests of the victims of deliberate violent crimes for compensation (Article 1 of Act 3811/2009).

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

3.1.1 "Penal Mediation" in cases of domestic violence misdemeanours

"Penal Mediation" in cases of domestic violence misdemeanours as provided in Articles 11-14 of the Act 3500/2006 is a form of a process carried out by the prosecutor in the case of adult offenders only, as in the case of minor offenders of domestic violence misdemeanours (8-18 years of age) Article 45A of the Criminal Procedure Code is implemented (see *Section 3.1.2* below).

The provision of Article 11 para.1 of the Act 3500/2006 stipulates that the prosecutor of the misdemeanour court considers the possibility of carrying out mediation: i) before the initiation of prosecution and during a preparatory stage of preliminary examination, ordered by the prosecutor, or ii) after the initiation

40 From six months to five years or from two years to ten years, depending on the seriousness of the offence committed. In very exceptional cases the upper limit of 10 years can be extended to 15 years of detention

of prosecution in the case of an accelerated procedure[41] for perpetrators who are apprehended at the time of committing the offence, or shortly after it within a maximum of 48 hours.

The mediation process is commenced only if the offender submits the unconditional statement already described in *Section 2.1.1* above. If there is a refusal, the mediation process is not implemented. If the offender fails to submit the said statement by themselves or through their defence counsels, the prosecutor calls them for this reason and may impose a three-day deadline to decide whether they would make the aforementioned specific unconditional statement or not (Article 12 paras. 1-3 of Act 3500/2006).

If the offender provides a positive answer and deposits such a statement, the victims or their defence counsels is informed about this event and is also given a three-day deadline (if they so require) before expressing their consent or not. If there are more suspects (complicity) or more victims the agreement of all of them is needed for the commencement of the mediation process. The parties' agreements can be submitted by their defence counsels (Article 12 paras. 4, 6 and 7 of Act 3500/2006).

Where the victim agrees to the mediation process, the prosecutor shall order the case to be filed in the archive. This prosecutorial order is registered in a special part of the person's criminal record and it remains there until the period of limitation regarding the punishability of the act expires. In the case of misdemeanours this period of limitation is five years commencing after the day the offence was committed, and can be suspended for up to three years so long as criminal prosecution cannot commence and continue or has been put on formal hold (Articles 13 para. 1 of Act 3500/2006 and 111 para. 3, 112 and 113 paras. 1-3 of the Criminal Code).

If the offender complies with the conditions of the mediation agreement for a three year period, the relevant procedure is deemed completed and the State's right to prosecute is extinguished. Adversely, if the offender intentionally fails to comply with the aforementioned conditions, the mediation procedure is interrupted and the prosecutor reopens the case. In this case the criminal procedure is continued without a right to a second submission of a mediation request (Article 13 para. 2-3 of Act 3500/2006).

Until the mediation process has been completed the trial for the crime concerned is still pending. The initiation of prosecution is unacceptable in the case of an act that can no longer be punished because the offender has fulfilled the conditions of the mediation agreement. The period of limitation is suspended until the mediation process has been completed (Article 13 para. 4 of Act 3500/2006).

If any of the parties refuses to accept mediation or if mediation fails for any reason, it should not have any negative consequences provided by procedural or

41 A procedure provided in Articles 417-424 of the Criminal Procedure Code.

substantive criminal law at the trial that then follows as a consequence of said failure (Article 13 para. 5 of Act 3500/2006).

Penal mediation is implemented in favour of minor-victims of domestic violence misdemeanours too, but only in the presence of the Juvenile's Prosecutor and their parents or legal guardians. The provisions on penal mediation are not applied if the suspects are the minors' legal guardians or their foster parents (Article 11 para. 4 of Act 3500/2006).

As regards the way the mediation process is implemented, it has to be mentioned that it is conducted by the prosecutor, who orders the meetings with the offender and the victim, and asks for their consent on conditions already provided by the Law. Entrusting a prosecutor to act as a mediator while still being a "crime punisher"[42] clearly brings up a conflict of roles, but Greek law appears to place this burden on the prosecutor in those situations where mediation is legally permitted. There is a lack of provision in Act 3500/2006 for the involvement of a special body, service or persons (for instance social workers or other similar professional practitioners) who are educated and trained in carrying out mediation and, especially, in mediating domestic violence cases.[43] However, the Committee of Ministers of the Council of Europe in its Recommendation No. R (99) 19 on "Mediation in penal matters",[44] after leaving the decision of referring a criminal case to mediation and the assessment of the outcome of a mediation procedure to criminal justice authorities (IV. 9), recognises that this process requires specific skills, codes of practice and accredited training and makes clear that mediation services should have sufficient autonomy in performing their duties (V.1. 20).[45]

It has to be mentioned that counselling and therapeutic programmes are what the law envisions as further assistance to mediation in domestic violence cases, but these are extremely few in Greece and can be found mostly in the big cities like Athens and Thessaloniki.

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42 *Triantafyllou* 1995, p. 1067.

43 By intervening, supporting and making dispositions to solve the problem. See also *National Commission for Human Rights* 2006, p. 6. However, the Commission congratulated the Greek Police for editing a relevant handbook: *Greek Police Headquarters* 2005.

44 Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies.

45 Moreover, it recommends that the operation of these services (V.1. 19-21), the qualifications and training of mediators (V.2. 22-24), the handling of individual cases (V.3. 25-30) and the way the mediation outcome should be reached (V.4. 31-32) should be governed by special provisions. See also *United Nations Office On Drug Control And Crime Prevention* 1999, pp. 67-68, and UN Economic and Social Council's Resolution 2002/12 on "Basic principles on the use of restorative justice programmes in criminal matters".

Finally, there are also civil consequences arising from a mediation agreement. Particularly, a mediation agreement is considered to be a compromise as regards the pecuniary claims of the victim coming from the offence, but if the process fails the victim can bring a relevant action at the civil court. No barriers exist for submitting a divorce action by the victim at the civil court because of the mediation agreement. If the mediation process is completed the agreement is not overthrown and any pecuniary satisfaction is returned. The same results may arise from the dissolution of the marriage within three years (Article 14 Act 3500/2006).

3.1.2 Victim-Offender Mediation for Juveniles for the expression of forgiveness and the extra-judicial arrangement of the consequences of the offence

Victim-offender mediation can be applied as a form of prosecutorial diversion for juvenile offenders between 8 and 18 years of age who have committed a violation or a misdemeanour. Diversion is ordered by the juvenile prosecutor if he/she considers that it is not necessary to press charges in order to prevent reoffending, having taken into account the circumstances of the act and the minor's personality. In any case the minor should be heard by the court (Article 45A para. 1 Criminal Procedure Code). Diversion from prosecution may be combined with the imposition of one or more non-custodial educational measures, to which victim-offender mediation belongs. Therefore, the law offers the choice of implementing victim-offender mediation through extra-court settlements (Articles 45A Criminal Procedure Code and 122 para. 1e Criminal Code). The prosecutorial order about diversion on the condition of mediation states the time needed for the minor's compliance with the conditions and the obligations provided in the decree. The order of the juvenile prosecutor is not included in the minor's criminal record in absence of a relevant legal provision in this case. If the minor complies with them the juvenile prosecutor files the case and submits a copy to the Prosecutors of the Court of Appeal reporting to them the reasons that led to diversion. Adversely, the Prosecutor presses charges (Articles 45A para. 2 and 43 paras. 1-2 Criminal Procedure Code). No agreement is signed is such case and we have no data as regards what happens in reality as diversion is still rarely applied.

"*Victim-offender mediation for the expression of forgiveness and the extra-judicial arrangement of the consequences of the offence*" can also be imposed as a restrictive condition as an alternative to pre-trial detention for juvenile offenders (see *Section 2.1.2* above).

Finally, "*victim-offender mediation for the expression of forgiveness and the extra-judicial arrangement of the consequences of the offence*" is also possible

for juvenile offenders as a court order (see *Section 2.2.2* above).[46] In this context, it takes place through the intervention of the Youth Court Aid and aims at the minor offering an apology to the victim or repairing the damage caused by the act (Article 122 para. 1e Criminal Code). The juvenile judge decides (including the reparative requirement) upon careful examination of the facts of the case and after acknowledging that the minor has committed the offence. There are cases where the prosecutor is mandated to proceed with pressing charges. In these cases the will of the victim to settle and (therefore) revoke the complaint would not be enough for the termination or the conclusion of prosecution. The existence of victim-offender mediation as a court order, therefore, leaves room for imposing victim-offender mediation where diversion from prosecution is not possible. Moreover, the new practice recognizes the victim's right to receive an apology and/or reparation within the framework of the penal process (action civil). However, the process still labels and stigmatizes the offender and the victim, as the relevant decision is included in the minor's criminal record. If a party refuses to reconcile, it is possible to substitute mediation by other educational measures so long as the Youth Court Aid so proposes. In such cases, the juvenile prosecutor's office brings the case to court again, and the measure is replaced usually with a "heavier" one. The intention is to help the offender to accept responsibility and repair the harm done to the victim and to refrain from committing further offences in the future.

The coerciveness of this practice is considered as a central paradox of Act 3189/2003. It is suggested, instead, that the case should be referred by the judge to the Youth Court Aid or to a social service where the outcome of mediation could affect the decision of the court (as it is done in most European states), or victim-offender mediation could even take place before the case reaches court.[47]

As regards the issue of specialized mediators, the mediating process in these cases is conducted by the Youth Court Aid. Persons that work in this service at the juvenile court have to date not received satisfactory education and training in mediation, except from some seminars (i. e. in the relevant service of Thessaloniki the seminar consisted of 20 hours and it was delivered by a psychiatrist specialized in the issue). Moreover, there are no written guidelines or a code of conduct in relation to the process of mediation, but still the efforts made by the Youth Court Aid in order to accomplish their duty in an effective and satisfactory manner are worth mentioning.

46 *Papadopoulou* 2008, pp. 19-22; *Giovanoglou* 2008, pp. 28 ff.

47 Ibid.

3.2 Penal Conciliation or Reconciliation Schemes

a) *Non-typical efforts at the police level to reach an extra-judicial settlement* of the dispute. After a person's complaint at the Hearing Prosecutor's Office for a petty-offence or a dispute, the prosecutor sends an order to the police officer in charge to call the persons involved in the dispute to the police station of their place of residence. At this informal meeting, the police officer informs the disputant parts about the legal consequences of initiating prosecution and recommends that they avoid taking such a course of action.[48]

b) The prosecutor's right to recommend persons who are quarreling to avoid committing punishable acts and strive for a peaceful solution to their dispute, according to Article 25 para. 4a of the Greek "Code for the Organization of the Courts and the Status of the Judicial Officials". This reconciliation process occurs before the initiation of prosecution at the prosecutor's office either for adults or for juveniles. The prosecutor in this case: a) either sends the aforementioned written order to the police officer in charge (with regard to the place the disputant parts reside) and asks him to recommend that the disputant parties avoid prosecution by settling their dispute by themselves, b) or in more "serious" cases, calls the parties to the prosecutor's office in order to settle their differences there.[49]

c) *A wide range of non-typical "extra-judicial" forms of victim-offender reconciliation*, not empirically researched yet, is implemented at the corridors of the court during the pre-trial stage or even during the hearing of the case. These reconciliation processes occur before the initiation of prosecution or/and before the hearing of the case in the courtroom. In some cases, for example when a complaint has already been lodged with the prosecutor's office, the complainant may recall it, if a settlement of the parties' dispute takes place in the presence of the prosecutor. Furthermore, even after the initiation of prosecution and during the hearing of the case the judges may ascertain that reconciliation has taken place between the parties. In these cases the court interrupts the trial for "a few minutes" to give the parties the chance to complete the outcome of their settlement. Where this is successful, the accused can be discharged from any penalty for any lawful reason that does not really exist (i. e. because of ambiguities of the victim about the identity of the offender etc.).[50]

48 *Sakkali* 1994, pp. 229-231.

49 *Sakkali* 1994, pp. 221-222.

50 *Alexiadis* 2007, p. 948; *Livos* 2000, p. 289; *Sakkali* 1994, p. 221.

d) "*Penal conciliation*" in cases of felony-acts of "Theft", "Illicit Appropriation", "Fraud", "Fraud via Computers", "Damage to Property Held on Trust" and "Usury". According to Article 308B para. 1 of the Criminal Procedure Code the mediation process commences only if the prosecutor of the misdemeanour court has already initiated prosecution and the accused has submitted a request for mediation before the judicial investigating process is typically ended. In this case the prosecutor calls the accused and the victim to appear before them for mediation, alone or by their defence counsels. Should one of the parties not have legal counsel, the prosecutors should appoint such representation for them from the relevant list of the local Bar Association. A 15 day deadline is imposed on the defense counsels in order to construct a *mediation agreement* about returning the property unlawfully taken by the injured person or fully repairing the harm caused (Article 308B para. 2 Criminal Procedure Code). If the mediation agreement is constructed before the formal apology of the accused, the investigation process is considered to have come to its end with regard to the person concerned and to others who have been principals or accessories to the crime, in the case that they accepted this agreement. If the mediation agreement is constructed after the formal apology of the accused persons, they are obligatorily discharged from any measure that has been imposed on them, according to Article 282 Criminal Procedure Code via an order by the prosecutor of the Misdemeanour Court, i. e. pre-trial detention (Article 308B para. 3a-b Criminal Procedure Code). If the mediation process fails, the relevant request is considered as never to have been submitted, and it is destroyed with the relevant material. No copies of it are taken into consideration at any later stage of the trial (Article 308B para. 4 Criminal Procedure Code).

In the case of an attempt to commit the aforementioned crimes the relevant agreement concerns the pecuniary satisfaction of the victims because of the suffered moral or emotional harm. In cases of complicity, the payment of the agreed amount by any participant is in favour of all the rest. If anyone of the persons involved in the commitment of the offence (complicity) does not agree with the penal mediation process, their case is detached and follows the normal procedure. In the case of a concurrence of offences the procedure of mediation does not apply to offences that are not mentioned above (Article 308B para. 5 Criminal Procedure Code).

Five days after the construction of the relevant agreement the Misdemeanour Court Prosecutor transmits the file to the prosecutor of the Court of Appeals, who initiates the relevant process at this court and summons the accused (Article 308B para. 6 Criminal Procedure Code). The court, after taking into consideration the mediation agreement, declares the accused guilty and imposes on them a penalty which does not exceed three years, unless it considers that the accused should not be punished, estimating the relevant circumstances. The decision of the court is irrevocable in this case (Articles 308B paras. 7-8 Criminal Procedure Code).

It has been stated for all the practices described above that, if they were officially recorded, Greece would be very highly ranked in the relevant list of the countries implementing restorative justice interventions.[51] However, it needs to be borne in mind that no impartial, specially trained mediators or facilitators are involved in these processes, which serves to put such a perception into perspective. Indeed, opportunities are informally present for victims to be involved and to have a say in the resolution of the case, however certain key safeguards and notions of what constitutes restorative justice can be seen to be compromised by the lack of impartiality on behalf of the "facilitator" (prosecutors, police, judges).

3.3 Satisfaction of the victim

a) "Compensation of the victim or in any other way restoration or mitigation of the consequences of the act by a juvenile offender" can be ordered by the juvenile prosecutors through diversion, if they consider, in taking into account the circumstances of the act and the minor's personality, that initiation of prosecution is not necessary in order to keep the minor away from further offending. In any case the minor should be heard by the court (Articles 45A para. 1 Criminal Procedure Code and 122 para. 1f Criminal Code). There is an informal agreement that takes place in this case regarding the obligations tob e undertaken by the parties.

The prosecutorial order about diversion along with compensation or reparation also states the time frame with which the minor has to comply with the conditions and obligations of the order. If the minor complies with them, the prosecutor files the case and submits a copy to the Prosecutor of the Court of Appeal reporting the reasons that led them to divert the case. Otherwise, the Prosecutor shall initiate prosecution (Articles 45A para. 2 and 43 paras. 1-2 Criminal Procedure Code).

Finally, it has to be mentioned in this regard that diversion, along with victim's compensation or reparation, does not label and stigmatize offenders, as the relevant prosecutorial order to which they are subjected is not listed in their criminal record.

b) "*Compensation of the victim or in any other way restoration or mitigation of the consequences of the act by a juvenile offender*" can also be imposed on juveniles aged 15 and older at the pre-trial stage as a restrictive condition as an alternative to pre-trial detention, either alone or in combination with other non-custodial educational measures. This is possible when the offence in question is punishable with more than 10 years confinement in a

51 Included in restorative interventions by *Artinopoulou* 2010, p. 108.

penitentiary. Article 282 para. 2 of the Criminal Procedure Code, which govern restrictive conditions for of juvenile offenders, was reformed via the Act 3860/2010, now stating that this measure may be imposed either alone or in combination with other non-custodial measures. Violation of the condition does not necessarily result in the offender being placed in pre-trial detention (Article 282 para. 5 of the Criminal Procedure Code).

c) As already described in numerous preceding sections of this article, "*Satisfaction of the injured person*" can play a role at the pre-trial stage in crimes against property and property rights.[52] Satisfaction of the injured person should be realized in different ways in order to have the desirable results provided by law. These results depend on the stage that the pre-trial phase of the case is in. Specifically: if the harm caused is monetary, then so is the compensation, and upon payment an official receipt is edited. If the harm caused takes the form of a material thing, then it is given *per se*. If said thing does not exist anymore, monetary compensation takes place which is ratified through a private agreement between the parties or an official receipt.

The aforementioned property crimes shall be barred from being prosecuted and the sentence provided by law shall not be imposed if the person responsible for the offence, *before being examined in any way by the authorities*: a) willingly returns (fully or partially) the property unlawfully taken from the victim, without harming any other person unlawfully, or b) (fully or partially) makes reparation to the victim. The exact amount that the person responsible gives is determined by the injured persons along with their legal representatives. If the offender gives his consent a non-typical agreement is signed by the parties or a receipt is given by the injured persons to the offender that officially certifies the date of the payment. Partial satisfaction of or reparation to the victim is a mitigating circumstance in determining sentence, in that the severity of any sanction imposed shall be based on the degree of harm that has not been repaired or compensated.(Articles 384 para. 1 and 406A para. 1 Criminal Code).

The case will be filed into the archive via a reasoned order by the Prosecutor of the Misdemeanor Court and prosecution will not be initiated if the persons responsible for the aforementioned acts, *until the initiation of the prosecution*: a) return the property they have unlawfully taken from the victim, without harming any other person unlawfully, or b) fully repair the harm incurred by the victim,

52 „Theft", „Special Cases of Theft", „Illicit Appropriation", „Theft or Illicit Appropriation of Low Value", „Damaging Property", „Special Cases of Damaging Property", „Fraud", „Fraud via Computers", „Fraud Resulting in Slight Damage", „Insurance Fraud", „Damage to Property by Fraud", „Damage to Property Held on Trust", „Petty Fraud Concerning the Use of Food etc.", „Receiving the Proceeds of an Offence", „Defrauding Creditors", „Preventing the Right of Enjoyment to Beneficiary", „Unlawful Fishing", „Deceiving Minors in Debts", „Usury", „Avarice" and „Acts of Brokerage Deception".

by paying principal and interest in arrears either evidently or according to the victims or their heirs' declaration. In cases where there was only an attempt to commit a crime the declaration of the victims or their heirs is enough. Moreover, in cases of complicity, if the victims or their heirs declare that they have been fully satisfied, their declaration is valid only for the participants that accepted it and not for the rest (Articles 384 paras. 2, 4 and 5 and 406A paras. 2 and 4 Criminal Code).

The injured persons are involved in the process with their legal representatives by certifying that the property was returned to them or by agreeing with the offender about the amount that shall be given to them and by making the declaration mentioned above. Their legal representatives play a crucial role in any case. A mediator's presence is not provided in these "non-typical" agreements.

d) The next provision to be mentioned is "*full satisfaction of the injured person*" by the accused at the court stage, until the end of the evidence collection process at the first instance court, for misdemeanours against property and property rights.[53] Eligible offenders are discharged from any penalty at first instance courts, if, before the evidence collection process ends, they: i) return the unlawfully taken property to the victims and the victims or their heirs declare that they do not have any other claim, or ii) fully repair the harm incurred by the victim by paying principal and interest in arrears (Articles 384 para. 3 and 406A para. 3 Criminal Code).

The exact amount that the accused pays is determined together with the victim with the aid of their legal representatives. If the offender gives his/her consent, a document is signed (ratified by the competent authorities or a notary public) by the injured person which officially certifies that payment has been made. The victims or their heirs are involved in the process with their legal representatives by certifying that the property has been returned to them or by making the declaration mentioned above. Their legal representatives play a crucial role again, and a mediator's presence is not provided in this case either.

In cases where there was only an attempt to commit a crime, a declaration by the victims or their heirs as described above is enough (Articles 384 para. 4 and 406A para. 4 of the Criminal Code). Moreover, in cases of complicity, if the victims or their heirs declare that they have been fully satisfied, their declaration is valid only for the participants that accepted it and not for the rest (Articles 384 para. 5 and 406A para. 4 Criminal Code).

e) An "*offenders' genuine attempts to nullify or mitigate the effects of his/her act*", provided in Article 84 para. 2d Criminal Code, serve as a mitigating factor in the sentencing of cases for which none of the other routes to

53 For a listing of the offences, see previous footnote.

non-punishability apply, and there is no public interest in prosecution.[54] Particularly, apart from the aforementioned significant crimes, which are held no more punishable when the offenders "*regret in deed*", in the rest of the cases an "*offender's genuine attempts to nullify or mitigate the effects of his/her act*"can be taken into account at the stage of judicial determination of the sentence.

f) "*Offenders' regretting and willingness to make restitution for injuries occasioned by the offence*", provided in Article 79 para. 3d Criminal Code, is also taken into account by the judge in sentencing (see *Section 2.2.1* above). In the previous case of Article 84 para. 2d, the degree of regret is greater than in Article 79 para. 3d of the Criminal Code ("genuine" and "seeking" in the first case, simple "regretting" and "willingness" in the second case). The provision of Article 84 para. 2d of the Criminal Code, as mentioned above, leads the judge to construct a more lenient "framework for punishment" and then to reduce the sentence provided for the offender. In the provision of Article 79 para. 3d simple "regretting and willingness" generally benefits the offender.[55]

3.4 Reparation, restitution orders etc.

a) "*Compensation of the victim or in any other way restoration or mitigation of the consequences of the act by a juvenile offender*", provided in Article 122 para. 1f of the Criminal Code as mentioned above, can also be imposed through a court's decision. The juvenile judge makes this decision during the hearing of the case and after the careful examination of the facts and upon an admission of guilt by the offender.[56] Compensation consists of a payment made to the victim or of reparation of damages by any means. As regards the sum of compensation, it is determined by the court after it takes into consideration what the victim claimed during the hearing of the case and also the economic situation of the juvenile offender. The offender, the victim and the public officer of the Youth Court Aid sign a document certifying that the exact amount has been given by the offender to the victim. Before the meeting at the court the victim does not usually meet the offender, as the court caseload does not allow time for this to be done. According to the limited data from its implementation, this measure is usually imposed in combination with other measures, especially mediation. It has to be mentioned though that the process labels and stigmatizes the offenders

54 *Manoledakis* 1981, p. 266.

55 *Androulakis* 2005, pp. 1029 ff., 1048.

56 See *Pitsela* 2008, p. 194; *Giovanoglou* 2008, p. 29; *Papadopoulos*/*Papadopoulou* 2008, p. 10.

to the extent that the relevant decision is included into their criminal record until they complete their 17th year of age, at which point the entry is erased.

b) *"Restitution of the victims' injury caused by the punishable act"* (see *Sections 1.1* and *2.2.1*) is as a condition for granting "conditional suspension under supervision" in sentences of 3 to 5 years of imprisonment, according to Article 100 paras. 1 and 3a of the Criminal Code. After the last reform of Article 100 through Act 3904/2010, the imposition of suspension in this case is combined with supervision. The court can order the offender to effectuate *restitution of the injury caused to the victim* as a condition for suspending sentence. The condition can be implemented either alone or in combination with other conditions. Meetings with the victim in this case are not provided by the law. Non-typical negotiations between legal representatives of the parties (again, as in other cases mentioned above) usually take place. If the restitution is an amount of money, its payment is certified by a document (a receipt), which has to be ratified officially for the authenticity of the signature by a competent authority or a notary public. The suspension of the sentence, according to the court's order, may last for a definitive term of not less than 3 and not more than 5 years, unless it considers the execution of the sentence necessary for avoiding recidivism (Article 100 paras. 1 and 3a Criminal Code).

The court may also revoke the suspension granted to the offenders if he/she violates his/her conditions in such a serious and repeated manner that the execution of sentence is the only way recidivism can be avoided. The court may also decide to change the conditions imposed to the offender or may alter the length of the suspension period, or even abolish supervision entirely, if it considers that this is in accordance with the offenders' behaviour during suspension (Article 100 paras. 4-5 Criminal Code).

c) *"Compensation of victims of violent deliberate crimes by the Greek Compensation Authority"* was introduced in the Greek Ministry of Justice, Transparency and Human Rights, via Act 3811/2009. The Greek Compensation Authority decides upon the requests for compensation of victims of deliberate violent crimes (Article 1 of Act 3811/2009). The relevant EU Directive 2004/80/E urged Member States to create a system of cooperation between their authorities in order to facilitate victims' access to compensation in cases where the crime was committed in a Member State other than that in which the victim resides. This system aims at anticipating the inability of crime victims to obtain compensation from offenders who lack the necessary means to satisfy a judgment on damages or who cannot be identified or prosecuted.

The procedure for the compensation of the victim by the Greek Compensation Authority, according to Article 3 of the Act 3811/2009, is the following: In cases in which a deliberate violent crime was committed in Greece, the victims have the right to reasonable and appropriate compensation by the Greek

State, either if they live or reside in Greece or in another Member State of the EU and file a respective request (Article 3 para. 1 of the Act 3811/2009).

A crime is considered to be violent under this Act if: a) it is committed by physical force or threat of corporal force and resulted in the victim's death or in serious physical or mental injury, b) it is committed by physical force or under the threat of physical force and is an imprisonable offence, either confinement for 5 to 20 years, or a life sentence, according to Articles 18 and 52 Criminal Code. (Article 3 para. 4 of Act 3811/2009).

The Prosecutor's Office and the investigation authorities should inform victims about their right to compensation. Victims have the right to submit a respective application to the Greek Compensation Authority within one year of their victimisation. In particular, the victim's claim for compensation is eligible:

- after the irrevocable decision of the second instance court, if the offender does not have the means to pay the victim,
- once a case has been filed in the special archive for unknown offenders, when the offender's identity cannot be verified,
- once the prosecutor has filed the case into the archive, or after the Judicial Council's "exculpatory decree", or after the court's irrevocable acquittal, or after any other closure of the case at court (Article 3 para. 2 of the Act 3811/2009). In cases (i) and (iii) the presupposition for submitting the compensation's request is the victim's inability to obtain any satisfaction from the offender, although the court's final decision has already provided for it (Article 3 para. 3 of the Act 3811/2009).

If the victim of a deliberate violent crime committed in Greece lives or resides in another Member State of the EU, he/she must submit his/her application to the relevant authority of their State of residence, which will in turn transmit the case to the Greek Authority (Article 4 para.2-3 of the Act 3811/2009). Finally, the victims and/or the Greek State have the right to file a complaint against the decision of the Greek Compensation Authority at the administrative first instance court (Article 12 of Act 3811/2009).

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

As regards the informal practices that take place at the police station, the Prosecutor's Office and in the corridors of the courtroom, as could be expected, no official data have been published. There are only some data stemming from a limited (data coming only from one interview of a Police Officer in one Police Station in Athens) research study that was conducted in 1993 that is discussed below under *Section 4.2.1*.

In relation to the statutory field and the restorative justice interventions provided by the law and described above in this report, no officially published statistical data are available. The only data available that give an insight into the use of restorative justice in practice stem from limited research studies (as their samples or the data coming out from them are limited) that have been conducted sporadically in the last five years and are presented below under *Section 4.2.2*.

4.2 Findings from implementation research and evaluation

4.2.1 Informal practices

As regards the informal practices that take place at the police level, a limited research study was conducted in 1993 at the 18th Police Station of Athens. According to an interviewed police officer, virtually all of the cases that reached this police station during the three years[57] of his service were dissolved through informal conciliation efforts by police officers; only 10 cases in these three years reached the stage of reporting the complaint to the Prosecutor's Office. Moreover, according to the same police officer's interview, between January and April of 1993 only one case reached the stage of a complaint being lodged with the Prosecutor's Office.[58]

As regards the prosecutorial level, according to the same research study, 100 to 150 cases reached the Department of Hearings of the Prosecutor's Office in Athens every day.[59] Moreover, only 20% of these cases reached the Public Prosecutor's Office through the lodging of a complaint. The remaining 80% of the complainant cases were settled either at the police station or at the Prosecutor's Office through the prosecutor's jurisdiction to act as an advisor to those in conflict and urge them to seek a peaceful solution to their dispute.[60]

4.2.2 Formal practices

Regarding formal restorative interventions, some data can be drawn from a small handful of limited research studies that refer specifically to the implementation of restorative educational measures for minors, and to mediation in cases of domestic violence misdemeanours.

As regards restorative educational measures for minors (mediation and compensation of the victim) research studies have been carried out at specific

57 These years are not specified by the author of the relevant article. See *Sakkali* 1994, p. 224.

58 Ibid.

59 There are no more details on the years or the time frame in the article; Ibid.

60 *Sakkali* 1994, pp. 222 ff.

courts and Youth Court Aid services in Greece. They took place a few years after the restorative measures for minors were introduced and brought a very poor rate of implementation to light. Specifically, according to information provided by the Youth Court Aid of Athens,[61] the new restorative justice measures were applied in very few cases during the first year after their introduction (judicial year 2003-2004). Out of 1,288 educational measures imposed on minors by the juvenile courts of Athens, mediation was applied in only six cases (four of which were connected to additional measures) and compensation in only one case (connected to further measures). During the same year, diversion from prosecution was only applied in 15 cases. The figures regarding the judicial year 2005/2006 are even more discouraging. Mediation and compensation were not imposed at all. The limited number of mediated cases does not allow for general comments to be made on the potential and impact of the specific schemes. However, the personnel of the Youth Court Aid appear to be positive.

The very limited use of the restorative measures by the juvenile judges was also highlighted by another research study conducted in the Juvenile Courts of Thessaloniki and Athens between March and May 2006.[62] The outcome of this limited research study, which was conducted through structured personal interviews, confirmed in particular the very limited use of mediation as an educational measure. The research took place in the Juvenile Court, the Prosecutor's Office and the Youth Court Aid of Athens and Thessaloniki, three years after the introduction of the measure. Totally, 12 interviews were conducted with: one juvenile judge in Thessaloniki, two juvenile prosecutors of Athens and nine persons working in the Youth Court Aid (two in Athens and seven in Thessaloniki). According to the findings from this study, between 2003 and 2006: a) mediation through diversion was not once applied in either of the two courts under investigation, and b) mediation as a court imposed educational measure was applied in two cases in Thessaloniki and not a single case in Athens.

As regards the part of the interviews that related to the provision of mediation *per se* and the problems it might cause, the absence of a judicial framework for the implementation of the measure was emphatically stressed. Moreover, among the general problems concerning the implementation of the measure, the lack of an adequate infrastructure and the need for educating judges, prosecutors and public officials of the Youth Court Aid in mediation with seminars were mentioned. The attitude of the public officials in the Youth Court Aid towards the effectiveness of the measure was positive in general, but most of them stressed that some conditions needed to be taken into account.[63]

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61 *Papadopoulos*/*Papadopoulou* 2008, p. 12.

62 *Giovanoglou* 2007, pp. 412-415.

63 *Giovanoglou* 2007, pp. 413 f.

Some more data regarding the implementation of educational measures in general were gathered through a study conducted for the needs of a new institution founded in the Greek Ministry of Justice, Transparency and Human Rights – the "Central Scientific Council for a Response to Victimization and Criminality of Minors" ("KESATHEA"). According to these unpublished data that cover 26 different Youth Court Aid Services in Greece, in the years 2009 and 2010 the measure of mediation was implemented in only a 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.

As regards diversion in general, as there are no specific data regarding the decision for diversion along with educational measures, it was implemented between one and ten times in the same period of two years in three Youth Court Aid services in Patras, Orestiada and Chania, and 233 times in the relevant service in Rhodes (which includes four more islands: Symi, Karpathos, Chalki and Kassos). There is no information explaining this "over-use" of the measure in the island of Rhodes. It might have been only a result of a certain juvenile prosecutor's personal choice and tendency to promote the implementation of the new measures.

Among the reasons explaining the under-implementation of the alternative educational measures, respondents stated the following: i) the absence of a judicial framework (14/26), ii) the lack of specialised personnel (10/26), iii) the reluctance of juvenile judges to impose them (8/26), iv) reluctance on behalf of the public officials of the Youth Court Aid to propose them (1/26), and v) all of the aforementioned reasons (9/26).

With regard to mediation in cases of domestic violence misdemeanours, the process seems to be implemented very rarely in practice. According to a comparative research study between the United Kingdom and Greece, in Greece only a very few cases of mediation are completed either with a negative or with a positive outcome. The Greek agent to which the relevant cases are referred for mediation is the National Centre for Social Solidarity ("EKKA"), which can act only as a counselling agent and not as a mediator. The relevant process at the "EKKA" can take up to six months to be completed. Only two of the cases examined in the context of this study had been completed – one positively, by improving the offender-victim's relationship, and the other negatively, in that it lead to a divorce. All the other cases were stopped because of the offender's reluctance to appear at the planned conferences.[64]

64 *Artinopoulou* 2010, pp. 113 f.

5. Summary and outlook

Non-typical restorative practices (those without a statutory basis) had been known in Greece a long time before the establishment of restorative justice measures through the law. Either at the police and the prosecutorial level or at the court-stage a wide range of non-typical efforts have been (and still are) being made. However, it was not until the beginning of the 21st century that Restorative Justice practices were given a statutory footing in the Greek legal system. Factors that led to this legislative introduction of restorative justice interventions were mainly a wider strategy to provide a more competent system (reducing court caseloads), the need to improve victims' rights within the context of the criminal procedure, and the respective EU Directives provided for them.

These new restorative interventions are still very rarely implemented in practice. Barriers to their successful implementation are mainly raised by: a) the absence of pilot-programmes implemented before the enactment of the relevant laws, b) the non-systematical incorporation of these interventions into the Greek Criminal Justice System, c) the non-adaptation of by-laws and circulars giving instructions about their precise implementation, and d) the lack of funding, human resources (i. e. specialised and trained staff) and an organisational infrastructure.

As regards the attitude of the criminal justice practitioners etc. towards the new measures, a part of them from 1980 onwards showed a positive attitude towards the implementation of alternative measures, and in particular diversion within the framework of juvenile justice *per se*. In particular, in 1993 a study was conducted in the context of which all juvenile Prosecutors and Judges in the country were contacted through a posted questionnaire (100). Among those who received the questionnaire only 11 (11/100) answered, and all of them favoured the introduction and implementation of alternative measure.[65] Moreover, a number of academics have shown a positive attitude before and after the beginning of the introduction of these restorative measures,[66] although the court-based schemes were criticized for their coercive nature.

However, it has to be mentioned that another section of criminal justice practitioners has exhibited negative attitudes and reluctance towards implementing the new restorative justice interventions. This has been linked to a lack of information concerning the concept of restorative justice in Greece,[67] the lack of training or educational programmes suitable for legal practitioners within

65 *Kormikiari* 1994, pp. 295 ff.

66 *Spinellis* 2002, pp. 589 ff.; *Courakis* 2005, pp. 401 ff.

67 *Papadopoulos*/*Papadopoulou* 2008, pp. 14 f.

the Greek Criminal Justice System,[68] and the absence of bylaws or circulars clarifying the aims and objectives of the new schemes and processes. All these deficiencies caused "a sense of distrust and resistance".[69]

As a final general assessment it can be stressed that the introduction of restorative justice interventions in the last decade in Greece was of a limited and non-systematic nature. In particular, as regards the statutory level, the practices presented in this report (i. e. mediation in the juvenile criminal law as a court order or through diversion, mediation in adult criminal law for certain categories of crimes, and the forms of satisfaction/compensation of the victim for certain categories of crimes), are not considered to cover the full potential of restorative justice. Moreover, in the Recommendatory Reports of the relevant Bills of Acts, no links were made to the conceptual and theoretical background of restorative justice.

This does not mean, of course, that there are no potentials and possibilities for the application of these interventions in practice to be expanded in Greece in the future. Adversely, the relevant possibilities are many, particularly in the juvenile criminal justice system. As it has already been stressed, what is most needed is a central mechanism that will provide information and guidelines, ensure the best use of restorative justice practices, and monitor and evaluate the effectiveness of this new approach within the specific social and cultural context of Greece. By monitoring and evaluating them the use of the new restorative justice initiatives can be increased and successfully implemented.

Finally, as regards the discourse on theoretical restorative justice issues, this is being developed in the academic field. The relevant exchange takes place either within academic writings and scientific conferences or within university courses, which deal with the wider context of new criminological approaches. It is worth mentioning that nowadays, the relevant discourse concerns the introduction of mediation in schools[70] as a means of confronting the phenomenon of school violence (bullying etc.).[71] Scientific publications on restorative justice have been increasing in numbers. Moreover, participation in international projects or initiatives has provided the opportunity to exchange and learn from others' experiences. For example Greece had the opportunity to be the project

68 Although there is a relevant effort as regards civil and commercial law (i. e. education of lawyers in mediation is provided under the Act 3904/2010 through Bar Associations or other centres).

69 *Papadopoulos*/*Papadopoulou* 2008, pp. 14 f.

70 *Panoussis* 2006, pp. 75 ff.; *Artinopoulou* 2010, pp. 103 ff.

71 The Circular of the Ministry of Education, Lifelong Learning and Religious Affairs Nr. 18890/G2 of 14/02/2011 "Imprinting good practices for preventing and responding to violence and aggressiveness among pupils in secondary schools" was disseminated last year in the schools of secondary education, which included mediation among other means for controlling school violence.

leader in the "The 3E Model for a Restorative Justice Strategy in Europe (3E – RJ Model)" which was implemented under the EC Specific Programme "Criminal Justice" and was funded by the European Commission between the years 2011-2013. This was a valuable source for our knowledge as it involved 11 countries from North to West Central, East Central and South Europe.[72]

The section of practitioners with a positive attitude towards restorative justice, as described above, participates in this discourse too, in an attempt to find better ways of implementing the new measures. An informal network is also being established, 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 has shown a positive attitude. There is no information at the time of writing about reforms that are in planning. However, proposals about educating legal practitioners in mediation or introducing restorative justice courses in the Greek Universities are currently being discussed.[73]

Last but not least, it could be stressed that apart from any reservations mentioned above, restorative justice can have an impact on Greece. In other words, as regards the future of this concept in Greece, there are good prospects that the new measures can be successfully implemented and enhanced. Moreover, what is needed the most – apart from confronting the lack of political will and financial support – is to raise public awareness, improve the development of policies on victims' rights, and convince policy-makers of the meaning and the value of restorative justice. All these steps can be a good start for the incorporation of adequate and useful restorative justice interventions in the Greek criminal justice system.

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72 *Pitsela/Symeonidou-Kastanidou* 2013, pp. 10 ff.

73 *Artinopoulou* 2010, op. cit., p. 98.

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Hungary

András Csúri

1. Origins, aims and theoretical backgrounds of restorative justice

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

Alternative dispute resolution (ADR) measures appeared in the Hungarian justice system in 2002 with the introduction of mediation in civil and commercial law cases.[1] Additionally, victim-offender mediation (mediation) and active repentance were introduced in 2007, which remain the only codified forms of ADR in penal matters to date.[2] The Criminal Code and the Criminal Procedure Code provide for further regulations with restorative or diversionary characteristics such as "restorative work", "community service" or "the postponement of the indictment". However, these measures either lack or contradict important features of ADR such as voluntariness or the focus on restitution. By way of example, restorative work does not require the defendant's consent; the postponement of the indictment does not necessarily comprise the compensation of the victim, and community service is even classified as punishment.

The main ideas of the Hungarian concept of mediation in penal matters are as follows. At the pre-trial stage, its use is based on prosecutorial discretion (*ex*

1 2002. évi LV. törvény a közvetítői tevékenységről (Act on Mediation in Civil Matters). *Fellegi* 2005, p. 29.

2 Act LI of 2006 (2006. évi LI. törvény a büntetőeljárásról szóló 1998. évi XIX. törvény módosításáról) amended the Criminal Procedure Code of 1998. Additionally, the Parliament passed the Act on Mediation in Penal Matters (2006. évi CXXIII. törvény a büntető ügyekben alkalmazható közvetítői tevékenységről). The implementation rules of mediation were set in the Minister of Justice Decrees 1/2007 (I.25) and 58/2207.

officio or upon the request of the parties or their defence), while at the trial stage mediation requires court authorisation (upon the request of the parties or their defence). All persons (natural or not) can participate in mediation as victims.[3] There are no restrictions as to what the parties can agree on as forms of reparation/compensation through mediation, so long as the obligations are reasonable, proportionate and permitted by law.[4] In general, successful mediation is regarded as successful "active repentance", which in turn results in the case being closed (impunity) or the sentence being mitigated.

1.2 Reform history

The introduction of ADR measures in the criminal justice system happened in a top-down manner as central institutional reforms were needed beforehand. Mediation in penal matters was first identified as an issue to be addressed in legislation in the National Crime Prevention Strategy of 2003, which attributed a key role to restorative practices.[5] In order to reduce the high incarceration rates of the time[6] it encouraged alternatives to imprisonment and the diversion of specific cases from trial.[7] Next up, in line with the Council framework decision on the standing of victims in criminal proceedings,[8] "active repentance" *(Tevékeny megbánás)* was introduced into the Criminal Code and the general criteria of mediation *(Közvetítői eljárás)* were laid down in the Criminal Procedure Code. The special rules of mediation as well as the mediators' status were defined in the separate Act on Mediation in Penal Matters.[9]

3 Supreme Court Opinion 3/2007, Section III. (A Legfelsőbb Bíróság Büntető Kollégiumának 3/2007. BK véleménye az 1978. évi IV. törvény (Btk.) és az 1998. évi XIX. törvény (Be.) közvetítői eljárásra vonatkozó egyes rendelkezései értelmezéséről).

4 Explanatory note to the 2012 Criminal Code.

5 Section III/A/3 of the 115/2003. (X.28) Parliament Decree on a National Crime Prevention Strategy (115/2003. (X.28) OGY határozat a társadalmi bűnmegelőzés nemzeti stratégiájáról).

6 The prison population rate has not decreased since then. See the website of the Hungarian Prison Service at http://www.bvop.hu/?mid=77&lang=hu.

7 *Fellegi* 2010, p. 52.

8 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

9 2006. évi CXXIII. törvény a büntető ügyekben alkalmazható közvetítői tevékenységről [Bktv.] (Act on Mediation in Penal Matters).

Most recently, the Criminal Code of 2012 amended the rules on active repentance.[10] Amongst other changes, the new rules enable mediation even if the victim has already been compensated prior to the case being referred to mediation (Btk. 29.§ and Be. 221/A (2)). This allows for compensation to be rendered more expediently, as it should not be necessary for the victim to wait until an agreement has formally been reached. Additionally, the new code enables mediation in cases of multiple crimes, if the ones eligible for mediation are the decisive ones (Btk. 29.§ and Be. 221/A.§) Further, the new regulation also allows mediation in cases involving unidentified victims.[11]

As of 1 January 2014, mediation shall also be practicable in *administrative cases*. While the methods will correspond with those in penal matters, the deadlines for mediation to take place are much shorter (30 days from the day of the decision to refer the case to mediation) and there are also specific grounds for exclusion of the mediator. Additionally – and contrary to mediation in penal matters – the law will *not* provide for a catalogue of cases that are eligible for mediation.[12]

1.3 Contextual factors and aims of the reforms

The integration of elements of "restorative justice" into criminal law and the criminal procedure aimed to reduce high incarceration rates and the high number of pending cases at the courts.[13] The aforementioned 2003 Crime Prevention Strategy focused on alternatives to imprisonment, on the interests of the community at large and on the better representation and compensation of victims of crimes.[14]

The introduction of ADR measures required prior *institutional reforms*. The Probation Service (*Pártfogó Felügyelői Szolgálat*) was reorganised to ensure that the nationwide probation work is carried out upon unified objectives. In 2003, juvenile and adult probation activities were integrated into a single system, currently under the control of the Office of Justice (*Közigazgatási és Igazságügyi Hivatal*).[15] The Office of Justice is subordinated to the Ministry of

10 The new code addressed several shortcomings that resulted assessment of the first experiences with mediation. See *Section 4.2*.

11 Explanatory note to the 2012 Criminal Code.

12 As the report at hand was finalized prior to this very recent change in the law, only the main characteristics of mediation in administrative cases are listed here.

13 In 2013, the prison population was still at 18,042, with an occupancy level of 143%. See the data from the Hungarian Prison Service at http://www.bvop.hu/?mid=77&lang=hu.

14 *Fellegi* 2005; 2010; *Hatvani* 2010, pp. 217-224.

15 These probation activities had been carried out separately from the 1970s onwards.

Justice with nationwide competence and a separate budget. It consists of twenty county offices, which all have their own probation units with separate departments for adult and juvenile offenders.[16] The 2003 reform extended the tasks of the probation service to include the compilation of social inquiry reports and pre-sentence investigation reports (Be. 114/A. §). The social inquiry reports are a means of evidence in criminal proceedings on the character and socioeconomic circumstances of a person. They are issued mandatorily in cases of juveniles and optionally in cases involving adults (Be. 459.§ (2) and 224. § (1)). Pre-sentence reports may suggest individual behaviour rules for the defendant, which may be taken into account by the prosecutor when postponing the indictment or by the courts when imposing sentences (Be. 224 and 225.§).[17] Pre-sentence reports also have to estimate the prospects for a successful mediation, i. e. whether the defendant would consent to compensation and whether the victim would accept it.[18] In 2012, around 3,000 pre-sentence reports were issued by probation officers.[19]

Additionally, the institutional framework of the Victim Support Service was codified in Act CXXXV of 2005.

In 2007, following the institutional reforms, victim-offender-mediation was introduced simultaneously for adult and juvenile offenders into the Criminal Procedure Code. At the pre-trial stage it is based on prosecutorial discretion (*ex officio* or upon request), while at the trial stage it is requested by the parties or their defence and authorised by the court. The last-minute drafting of the relevant provisions (under deadline pressure to implement EU standards) resulted in a lack of consistent terminology, among other deficiencies *(*see *Section 4.2)*.

1.4 Influence of international standards

By March 2006, Hungary implemented the Council Framework Decision (FD) on the standing of victims in criminal proceedings.[20] Art. 10 FD promoted me-

16 See the report on Hungary on the website of the European Organisation for Probation, at http://www.cepprobation.org/uploaded_files/Summary%20information%20on%20 Hungary.pdf.; see also *Kerezsi et. al.* 2008.

17 2012 Report of the Probation Service (KIH Pártfogó Felügyelői Osztály Beszámoló).

18 17/2003. (VI.24.) IM rendelet a Pártfogó Felügyelői Szolgálat tevékenységéről, valamint ehhez kapcsolódóan egyes igazságügyminiszteri rendeletek módosításáról. II. Fejezet 6.§. (Minister of Justice Decree No. 17/2003 (VI.24.)). See also *Hatvani* 2010, p. 222.

19 2012 Report of the Probation Service.

20 The framework decision was implemented by an amendment of the 1998 Criminal Procedure Code (2006. évi LI. törvény a büntetőeljárásról szóló 1998. évi XIX. törvény módosításáról).

diation in criminal cases and the consideration of *any* agreement reached by the victim and the offender in the course of such mediation. Several non-binding recommendations of the Council of Europe were taken into account as well.[21] Additionally, the relevant Czech, Belgian, French, German, Austrian and Canadian laws were analysed and compared.[22] These analyses shaped the catalogue of offences eligible for mediation and led to a concept which applies mediation with the simultaneous discontinuance of prosecution/trial.[23] Contrary to the solution found in the majority of the analysed national laws, the special rules of mediation were laid down in the separate Act on Mediation in Penal Matters.

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

The rules on ADR are primarily set in the Criminal Code (Hungarian abbreviation: Btk.), in the Criminal Procedure Code (Be.) and in the Act on Mediation in Penal Matters (Bktv.). According to the explanatory notes of both the Criminal Code and the Act on Mediation in Penal Matters, ADR measures are eligible for cases where compensation is more important than retribution.[24]
The Criminal Code lays down the rules of "active repentance" in strict connection to mediation. Active repentance is also described as the substantive requirement of mediation.[25] The general rules of mediation are regulated in the Criminal Procedure Code, while the special rules as well as the status of mediators are laid down in the Act on Mediation in Penal Matters.

Mediation is only practicable for offences of a specific type and gravity, such as crimes against the person, traffic crimes, property crimes and copyright infringements. With regard to this catalogue of crimes, successful mediation results in impunity for all misdemeanours and all felonies punishable with up to three years of imprisonment (Btk. 29.§ (1)). For felonies punishable with up to

21 Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters; Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure; Recommendation No. R (87) 18 concerning the simplification of criminal justice; Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation; Recommendation No. R (87) 20 on social reactions to juvenile delinquency; and Recommendation No. R (92) 16 on the European Rules on community sanctions and measures.

22 Explanatory note of the Act on Mediation in Penal Matters.

23 *Lajtár* 2007, p. 6.

24 See also *Lajtár* 2007, p. 7.

25 Explanatory note of the Act on Mediation in Penal Matters (2.§.) and Supreme Court Opinion 3/2007 Section IV.

five years of imprisonment, mediation can only result in a mitigation of sentence (Btk. 29.§ (2)).

Further statutory requirements of active repentance are that the defendant *confesses to the act* before a formal indictment has been made, that the parties consent to mediation and the prosecutorial estimation of the prospects of mediation in the respective case are in favour of mediation[26] (thus, whether it would lead to the termination of the case or to a more lenient sentence, whether the defendant will be willing to compensate the victim and whether the characteristics of the case make a trial evitable). According to the opinion of the Supreme Court, the readiness of the defendant to compensate the victim cannot be assessed solely on the basis of the defendants' personal abilities, but needs to take them into account nonetheless. By way of example, mediation cannot be excluded solely upon the grounds that the victim will need special care that goes beyond the defendants' abilities. A professional can look after the victim as well (whose work will be paid by the offender).[27]

Active repentance (and thus mediation) is not eligible for special groups of repeat offenders (such as habitual offenders, who frequently commit the same or similar crimes within a certain period of time), nor if the crime was committed by a member of a criminal organisation or if it resulted in death. Cases are also ineligible for mediation if the act was committed during the postponement of the indictment, whilst on probation or between conviction by the court and the beginning of the enforcement of a custodial sentence. Finally, mediation is excluded if someone intentionally commits a crime within two years of previous successful mediation (Btk. 29.§ (3)).

Legal entities may participate in mediation through their legal representatives. Active repentance (and mediation) is also realizable if the victim cannot be identified, with the prosecution service negotiating as a representative for the victims and the community at large at the same time. Prior to the introduction of this provision into the legislation in 2013, this had the consequence that mediation in traffic crime cases was only possible if the crime had grave consequences. By way of example, mediation was not possible in a case of drunk driving (with no parties injured), but was indeed possible for cases where a drunken driver caused serious injuries to a person (who was identified).[28]

Depending on the gravity of the crimes and on the outcome of mediation, active repentance results either in impunity or in a more lenient sentence.

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26 The inconsistent interpretation of the meaning of the offenders' "confession" is elaborated below in *Section 4.2*.

27 Supreme Court Opinion 2008.67. Section VII. (BKv 2008.67 a közvetítői eljárás gyakorlati tapasztalatai alapján felmerült egyes jogértelmezést igénylő kérdésekről).

28 Supreme Court Opinion 2008.67. Section II.

There are different views regarding when mediation should be deemed as having been *successful*. The probation service considers mediation successful if any consensual agreement is reached. The Criminal Procedure Code additionally requires that, for mediation to be successful, the implementation of the agreement must have begun – i. e. the offender has begun to put the agreement into practice.

For offences punishable with up to three years of imprisonment, the prosecutor can extend the period for which the indictment is to be postponed by a further one to two years, if due to its amount or nature the agreed compensation cannot be implemented on time (Be. 221/A.§ (7)). There is, however, no such possibility in the trial phase. The same case can only be referred once to mediation.[29]

The *legal consequences* of mediation depend on the statutory punishment of the respective offence and on the outcome of the mediation process.

a) For all misdemeanours and all felonies punishable with up to three years of imprisonment, the consequence of successful mediation is *impunity* (Btk. 29.§ (1)). In this case the prosecutor/court closes the case.
b) The prosecutor may *extend the period for which the indictment is postponed* if the offence in question is punishable with a maximum of three years, and the agreement otherwise could not be fulfilled on time (Be. 221/A.§ (7)).[30]
c) In case of offences punishable with a maximum of five years the court continues with the case and considers the agreement and its implementation when imposing sentence. Thus, the defendant is criminally liable but the sentence may be reduced without restrictions (Btk. 29.§ (2)). When imposing punishment, solely the fact that an agreement was reached is relevant, however not the amount of restitution agreed upon.[31]
d) Any failure of mediation (in that an agreement was not reached or implemented) shall have no effect on the procedure.

2.1 Pre-court level (police and prosecution service)

2.1.1 Adult criminal justice

Based on his own decision or upon the request of the parties, it is the public prosecutor who refers the case to mediation and concurrently postpones the indictment for up to six months ("discontinuance of prosecution"). This decision

29 Supreme Court Opinion 2008.67. Section VIII.

30 Explanatory note to the Criminal Procedure Code.

31 Supreme Court Opinion 3/2007, Section X.

requires the parties' free consent (Be. 221/A. (1) §) and is not subject to appeal (Be. 221/A.§ (4)). As mediation in penal matters is set within the framework of the criminal procedure, all safeguards of the pre-trial stage apply.[32]

2.1.2 Juvenile justice

In the Hungarian criminal justice system, alterations with regard to specific groups of offenders (like juveniles, members of armed forces) are laid down in separate chapters of the various codes. Consequently, the chapter on juveniles in the Criminal Code regulates solely those provisions that differ from the rules applicable for adult offenders.

Since alternatives to traditional criminal law concepts are considered to particularly important for young offenders, the legislation also allows mediation with regard to graver, more serious crimes.[33] Accordingly, the major differences with regard to ADR measures are that "active repentance" (and thus mediation) is eligible for all offences committed by juveniles punishable with a maximum of five years of imprisonment, and that successful mediation always results in *impunity* (Btk. 107.§ and Be. 459.§ (4)). Additionally, the legal guardian of the juvenile always has to participate in the mediation sessions (Be. 459.§ (3)).

2.2 Court level

2.2.1 Adult criminal justice

According to the explanatory notes to the Act on Mediation in Penal Matters, mediation is envisaged primarily for the pre-trial stage.[34] Nevertheless, if the prosecutor does not refer the case to mediation, the court of first instance can still do so upon the request of one of the parties or their defence.

The requirements for referrals to mediation at the trial stage correspond to those at the pre-trial phase. There are two important differences though. The court cannot refer the case to mediation *ex officio*,[35] and its decision on referral is subject to appeal both by the prosecutor and by the parties.[36] If the court

32 Explanatory note to the Criminal Procedure Code.

33 2986/2012 Report of the Commissioner for Fundamental Rights (Az alapvető jogok biztosának jelentése az AJB-2986/2012. számú ügyben).

34 *Lajtár* 2007, p. 6.

35 Supreme Court Opinion 2008.67. Section VIII.

36 The veto right of the prosecution service was recently confirmed in the court decision BH 2013.9.

refers the case to mediation, all further court proceedings are postponed concurrently for a maximum of six months.

2.2.2 Juvenile justice

Mediation for juveniles at the trial stage is applicable under the same conditions and subject to the same alterations as pointed out in *Section 2.2.1* (pre-conditions) and *Section 2.1.2* (catalogue of eligible offences and consequences of mediation).

2.3 Restorative justice in prisons

Currently there is no legal basis for restorative procedures in prisons and so there is no legally defined possibility for the offender to meet the victim in the prison. Nevertheless, local prisons try to incorporate restorative schemes, primarily with the focus on restorative work towards the community at large. For instance, the "prison for the city" project encourages prisoners to take care of cemeteries and playgrounds.[37] Additionally, a pilot project was carried out between November 2010 and November 2011 as part of the MEREPS project.[38] The project aimed to test the possibility of restorative methods in prisons in three areas: cell conflicts between inmates, the restoration of family relations, and victim reparations. The results showed that restorative methods in prison settings depend on the following central factors: on the offenders' empathetic ability, on the extent to which he relates to the community and the values represented by it, on his mental state and level of intelligence.

Juvenile offenders were found to be less suited for restorative methods in prison as they generally spend shorter terms there. As an education plan is prepared in case of all new admissions, the study recommended to include a plan for each offender on how to improve the skills necessary for restorative methods. Nevertheless, the study underlined that the budget of the prisons does not allow for the employment of a sufficient number of instructors and psychologists.[39]

According to Article 171 of the new Act CCXL on the Execution of Sentences, mediation in prisons will be conducted in future by prison officials. This leaves some doubts as to whether these persons will be able to carry out their duties impartially.[40] The new code will enter into force on 1 January 2015.

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37 2986/2012 Report of the Commissioner for Fundamental Rights.

38 The MEREPS project (Mediation and Restorative Justice in Prison Settings) ran between 2009 and 2012. See *Barabás* 2012.

39 *Szegő/Fellegi* 2012.

40 As the new Act enters into force in 2015, currently there is not possible to envisage how mediation in prisons will work.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

3.1.1 Definitions of mediation in penal matters

There is no uniform definition of mediation in penal matters in the Hungarian criminal justice system. The Criminal Procedure Code defines mediation in connection with active repentance, with its main goals being restitution and future lawful behaviour (Be. 221/A.§ (1.)). The Act on Mediation in Penal Matters describes mediation as a form of conflict management between the offender and the victims of crime, with the goal of reaching a written agreement that settles the conflict, compensates the victim and facilitates future lawful behaviour (Bktv. 2.§ (1)).

3.1.2 The mediator (legal status, qualifications, training)

As the term victim-offender-mediation already suggests, the main *participants* of the mediation process are the victim, the offender and the mediator. The law allows for further participants as well (see below).

As mediation is an alternative to the traditional criminal proceedings, it is given sufficient autonomy within the criminal justice system. It is performed by specially trained probation officers – appointed by the probation service – who perform their duties independently from the parties and from the representatives of the courts and of the prosecution service (Bktv. 2.§ (1)). Since 2008 the probation service may appoint specially trained lawyers as well to carry out mediation (Bktv. 3.§ (1)).[41] Since 2012, however, due to the lack of financial resources, these lawyers are not remunerated for their work as mediators. In the event of highly complex cases or if the parties reside far from each other, more than one mediator can participate in the sessions, with one of them acting as the chief mediator (Bktv. 3.§ (2)). Mediators receive initial training and are required to attend at least two courses on mediation (30 hours each), which include both theoretical and practical training. Mediators need to attend a course on ADR as well (90 hours). The mediators are assisted and supervised by experienced mentors. They regularly meet their supervisors (mentors) and carry out case

41 See also Ministry of Justice Decree on the remuneration and qualification of lawyers performing mediation. (58/2007. (XII. 23.) IRM rendelet a büntető ügyekben közvetítői tevékenységet végző ügyvéd képesítési követelményeiről, díjazásáról és iratkezeléséről. 1.§ a)-b)).

analyses. In 2012 there were 83 specially trained mediators, with 53 of them actually carrying out mediations in practice.[42]

Mediators perform their duties in an impartial, conscientious and professional manner. They have the right and obligation to inform themselves about the case and shall be provided with the necessary documents.[43] They also monitor the implementation of the agreement. All information received in connection with the case is confidential (Bktv.3.§ (2) – (5)).

With regard to the other key actors of mediation, the following can be said. The definition of the *victim* is set broader in the Criminal Procedure Code than required by the Council framework decision on the standing of victims in criminal proceedings. According to the Criminal Procedure Code, victims are persons whose rights or rightful interests have been harmed or endangered by crime (Be. 51.§ (1)). At the other end of the scale, *offenders* are persons who have criminal proceedings instituted against them (Be. 43.§ (1)). Consequently, this concept comprises non-natural persons (legal entities or other) as well, who may participate in mediation through their representatives.[44]

The parties are entitled to *legal assistance* throughout the mediation process.[45] They may appoint two further persons (e. g. family members) to support them in the course of the proceedings. Incapacitated persons are represented by their *guardians*, while the legal guardians of juveniles are obliged to participate in mediation. The participation of an *interpreter* is obligatory if one of the parties is deaf or does not speak Hungarian. Finally, the mediator can appoint *experts* (e. g. psychologists, teachers) to assist with their competence.

Additionally, mediation-related trainings are organized for judges and police officers. A 2012 report of the Commissioner for Fundamental Rights recommended introducing 'mediation' into the educational plan of law students.[46]

3.1.3 The restorative process

The mediator sets the date of the first session, which has to take place no later than fifteen days after the mediator has received the decision on the referral of the case from the referring body (Bktv.9.§ (1)). The mediator summons the parties and informs them about their rights, the nature of mediation and the possible legal consequences of their decision (Bktv. 9.§ (3)). *Excuses* for non-attendance are legitimate as long as the mediator accepts them. Decisions by the

42 2012 Report of the Probation Service.

43 Supreme Court Opinion 2008.67. Section X.

44 *Lajtár* 2007, pp. 7-8.

45 Explanatory note to the Act on Mediation in Penal Matters (7.§.).

46 2986/2012 Report of the Commissioner for Fundamental Rights.

mediator resulting from unjustified failures to attend are subject to appeal (Bktv. 10.§ (1) and (4)). If one of the parties fails to show up repeatedly without a reasonable excuse,[47] the consent of this party is considered to have been withdrawn (Bktv. 10. § (2)).

At the *first session*, the mediator, if necessary, informs the parties once again about their rights, the nature of mediation and the possible legal consequences of their decision (Bktv. 11.§ (1)). The victim describes the effects of the crime, while the offender has the chance to take responsibility for his wrongdoing by giving reasons and apologizing for his actions.[48] The hearings of the parties may take place separately (Bktv. 11.§ (1)), but the agreement needs to be signed with both parties present at the same time (Bktv. 11.§ (6)).

The *agreement* serves as a public file and needs to be mutual, lawful, reasonable and ethical. No further details are given in the law about the kind or level of compensation. The agreement needs to set the deadlines for its implementation and whether it should be performed as a whole or in instalments. The agreement shall also regulate the costs of mediation. No files other than the mediation report and the agreement itself may be used later as evidence before the court (Bktv. 13.§). Beside the possibility to assert civil claims, the agreement has no further legal effects beyond the specific case (Bktv. 14.§ (1) and (2)).

Mediation shall be *completed* within three months of the first session. The mediator shall report to the authority that referred the case to mediation, about the proceedings and the outcome of mediation before the period for which indictment has been postponed expires (Bktv. 9.§ (4) and 12.§). Mediation is considered *completed* once the agreement has been implemented. The prosecutor can extend the deadline for the postponement of the indictment by one to two years, if the first instalment has been delivered, but due to its nature or amount the remaining obligations cannot be fulfilled on time (Be. 221/A § (7)).

Mediation *terminates* if one of the parties dies, requests that mediation be terminated, withdraws his/her consent, repeatedly fails to attend without reasonable excuse or has no known residence. Additionally, if three months into the mediation no agreement has been reached, or it becomes apparent that no agreement will be reached, VOM is deemed to have failed and the case is returned to the body that made the referral.

The focal *deadlines* of the mediation process are as follows. Once the case has been referred to mediation, the indictment/the court proceedings are postponed for up to six months. The extension of this deadline is only possible at the pre-trial stage. The first session takes place within 15 days of case referral to the mediator (Bktv. 9.§ (1)). An agreement has to be reached no later than three

47 The absence must be excused at the latest when its grounds have ceased (Bktv. 10. § (2)).

48 *Törzs* 2010, p. 132.

months after mediation started. The authority that referred the case to mediation shall receive the outcome of and the report on mediation before the finishing date of the postponement of indictment (court proceedings) (Bktv. 9.§ (4) and 12.§).

The *costs* of mediation are not considered as procedural costs. If the agreement does not state otherwise, usually the offender pays the costs of mediation, while the parties each pay their own expenses (like travel costs) that arose in the context of mediation (Bktv. 17.§ (1)). The Act on Mediation in Penal Matters generally waives the fees for interpretation. Additionally, offenders whose court costs have been waived before the case is referred to mediation remain free from the mediation costs as well (Bktv. 17.§ (2)).

3.2 Group conferencing

Group conferencing in prisons takes place at the local level and without any legal basis. It involves family members and friends, chosen by the prisoner with the consent of the prison administration. It prepares for family and community life after release. The implementation of the decisions made in the context of the group conference may be supervised later by a probation officer.[49]

4. Research, evaluation and experiences with restorative justice

4.1 Statistical data on the use of restorative justice measures

In the following you find selected tables regarding the use of mediation since its introduction. The figures and tables are available in Hungarian on the webpage of the Justice Service of the Ministry of Public Administration and Justice.[50]

49 2986/2012 Report of the Commissioner for Fundamental Rights. III.1.

50 Http://kih.gov.hu/nyitolap.

Table 1: Cases referred to mediation 2007-2012

Mediation in penal matters	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
All cases referred to mediation	**2,451**	**2,976**	**3,158**	**3,532**	**4,794**	**6,410**
Referral by the ***Courts***	922	540	453	375	382	457
Referral by the ***Prosecution Service***	1,529	2,436	2,705	3,157	4,412	5,983
Referral in cases of ***juvenile*** offenders	299	355	360	398	550	617

Table 2: Mediation Figures in 2011

	Adults	**Juveniles**	**Total**
Referral by the Prosecution Service	3,874 (87.8)	538 (12.2%)	4,412
Referral by the Courts	370 (96.9%)	12 (3.1%)	382
Total	**4,244**	**550**	**4,794**

Table 3: Cases referred to mediation in 2011 per month

	Adults	**Juvenile**	**Total**
January	245	21	266
February	269	38	307
March	398	54	452
April	348	35	383
May	322	58	380
June	344	45	389
July	359	45	404
August	296	40	336
September	350	60	410
October	419	46	465
November	408	54	462
December	486	54	540
Total	**4,244**	**550**	**4,794**

Table 4: Completed mediations in 2011 and 2012

	2011		2012	
Total	**3,950**	**100%**	**4,660**	**100%**
With agreement	3,235	82%	3,623	78%
Without agreement	715	18%	1,037	22%

Table 5: Implementation of agreements in 2011

Agreements in total	**3,235**	**100%**
Implemented on schedule	2,875	89%
Implemented with extended postponement of the indictment	52	1.5%
Not implemented	308	9.5%

Table 6: Implementation of agreements in 2012 (only percentage available)

Agreements in total	**100%**
Implemented on schedule	92%
Implemented with extended postponement of the indictment	3%
Not implemented	5%

Table 7: The geographical diversity of the application of mediation in 2011 and 2012

County	**Number of cases referred to mediation in 2011**	**Number of cases referred to mediation in 2012**
Baranya	345	318
Bács-Kiskun	352	334
Békés	***164***	***209***
Borsod-Abaúj-Zemplén	310	398
Csongrád	357	354

County	Number of cases referred to mediation in 2011	Number of cases referred to mediation in 2012
Fejér	240	207
Budapest (capital)	***698***	***1094***
Győr	244	293
Hajdú-Bihar	271	323
Heves	157	230
Jász-Nagykun-Szolnok	134	127
Komárom-Esztergom	143	147
Nógrád	118	146
Pest (county)	***422***	***551***
Somogy	103	160
Szabolcs-Szatmár-Bereg	284	345
Tolna	130	170
Vas	99	97
Zemplén	164	207
Zala	***59***	***81***

Until the end of 2011, 13,000 cases were referred to mediation, primarily at the pre-trial stage. Though the number of referrals increased continuously (in 2012 the Prosecution Services had nearly 6,400 mediation cases), it still remains on a relatively low level. Additionally, there are immense geographical differences in the use of mediation (*Table 7*). Academic studies explain this restricted and geographically diverse use of mediation by pointing to: the prosecutors' and courts' negative attitude to mediation; the catalogue of crimes eligible for mediation; the alternatives to mediation in case of juvenile offenders, and; the differing interpretations by the courts and by the prosecution service (see *Section 4.2* below).

Despite being considered an important alternative to traditional criminal proceedings, only around twelve percent of all mediation cases involve juvenile offenders[51] (*Table 1*). The main reason for this lies in the widely applicable possibility to order "probation supervision" against juvenile offenders at the pre-trial stage (with the concurrent postponement of the indictment, as also is the

51 2986/2012 Report of the Commissioner for Fundamental Rights.

case for mediation). The aim of "probation supervision" is to reduce the risk of recidivism by controlling and supporting the offender. Altogether nearly 40,700 probation supervision orders were under implementation in 2012.[52] For juvenile offenders, the indictment can be postponed for all offences of the Criminal Code. Concurrently, the juvenile is supervised by a probation officer for a minimum of one year. Mediation, on the other hand, is not eligible for all offences and is not connected with long term supervision of the juvenile (as it would contradict voluntariness as one of the main characteristics of mediation). For these reasons, both the prosecution service and the courts consider conditioning the postponement of indictment on probation supervision, rather than on mediation, as more beneficial for juveniles.

Mediation is used mostly with regard to property crimes. Compensation usually takes the form of an apology or financial reparation. In practice, in most cases the amount paid to the victim is equal to the actual loss caused by the crime. The concrete amount of financial reparation has increased in recent years in practice. Other types of restitution include the repainting of damaged school walls, taking care of children or carrying out housework while the victim recovers from his/her injuries as well as attending addiction therapies.[53]

4.2 Findings from implementation research and evaluation

As elaborated above, opinions are divided on when mediation should be considered "successful". The Probation Service deems the process successful if a mutual agreement has been reached. The courts, on the other hand, require the implementation of the agreement (or at least its first instalment) before the period for which indictment has been postponed has expired. The court's interpretation though may not truly comply with one of the important tasks of mediation: to provide for more flexibility by paying attention to the offenders individual circumstances.

Mediation takes place on a voluntary basis with the chance to personally affect the outcome of the process. The process is speedy as it has to be completed within three months. It leads to quicker and easier compensation and helps the victim to come to terms with the trauma caused by the crime and to understand the underlying reasons. The offender avoids a criminal record (in case of impunity) or receives a more lenient sentence.[54]

The legal framework provides, however, for a number of shortcomings. The courts cannot refer a case to mediation *ex officio* and their decision is subject to

52 2012 Report of the Probation Service (KIH Pártfogó Felügyelői Osztály Beszámoló).

53 *Kertész* 2008. See also 2986/2012 Report of the Commissioner for Fundamental Rights.

54 Http://www.kimisz.gov.hu/alaptev/partfogo/mediacio.

appeal both by the prosecutor and by the parties.[55] However, if the prosecutor did not refer the case to mediation – even though the statutory conditions were given – one can reasonably assume that he will veto the court's decision, which automatically delays the proceedings. Furthermore, the Criminal Code, the Criminal Procedure Code and the Act on Mediation in Penal Matters adopted different terminologies and definitions for the mediation process. Consequently, practice is divided over several mediation-related issues, some of which were taken into consideration in the 2012 Criminal Code – in particular, when to consider mediation "successful" (see *Section 2*) and whether "confession" should consider guilt or solely the facts of the crime. Currently, the prosecution service requires only a confession of the facts of the case. The Supreme Court, however, argues that only a comprehensive confession of both facts and guilt lead to "sincere regret", while anything else results merely in the formal compensation of the victim.[56] This viewpoint was adopted by all courts, as "uniformity decisions" of the Supreme Court are binding to them.

Prior to the entry into force of the 2012 Criminal Code there had been a lack of consensus between academics and practitioners as to whether and how to refer cases to mediation that involve multiple offenders or crimes. The prosecution service referred such cases to mediation if the statutory requirements were present for all offenders and crimes respectively.[57] The Supreme Court allows mediation if the multiple offences concern the same victim, who in turn consented to mediation with regard to all of these offences. Further still, if the offences concerned several victims, mediation was eligible with regard to those offences where the respective victim consented. By contrast, the Supreme Court has also not allowed mediation if the victim consented only with regard to some of the offences committed against him or if mediation was only applicable to some of the offences committed by the defendant.[58] Academics stressed, however, that the Criminal Code did not provide for such restrictions. The Criminal Code of 2012 implemented some of these ideas and enables mediation if the most significant offences of a multiple crime are eligible for mediation.

Finally, there are different views on how to interpret the "damage" of a crime. According to the viewpoint of the Supreme Court – contrary to that of the prosecution service – damage in mediation cases is not necessarily identical with the criminal law definition of damage (Btk. 137.§.(5) and Be.54.§(2)).[59] The

55 Supreme Court Opinion 2008.67. Section I.

56 Supreme Court Opinion 3/2007, Section V.

57 This is emphasised in Sections 420/b; 539a of a 2007 "Reminder note" of the Attorney General's Office (Legfőbb Ügyészség 99/2007, A Be. Alkalmazásának egyes kérdéseiről kiadott Emlékeztető).

58 Supreme Court Opinion 3/2007, Section VI.

59 *Lajtár* 2007, p. 10. See also Supreme Court Opinion 3/2007, Section X.

cornerstone of the damage concept in mediation is restitution, which often focuses on mental and emotional aspects as well. Thus, the amount and nature of the compensation does not have to be equal with the amount of money indicated in the charges. It may be even less or a completely different form of compensation. Therefore, mediation should be allowed for cases that do not involve damage or loss in the criminal law sense (e. g. for preparation or attempts, or when no loss occurred because the defendant was caught in the act).[60]

Several *studies* were carried out prior the introduction of mediation, between the passing and the entry into force of the relevant regulations and following the first experiences.

A study carried out *prior* the introduction of mediation focused on the estimation among citizens and legal professionals of criminality and of the efficiency of the criminal justice system. The majority of the sample supported the introduction of alternative measures and thought that mediation may foster the support of victims of crimes. Crime rates – especially for violent crimes – were estimated to be higher, and the efficiency of criminal justice was generally estimated to be lower than the actual figures at the time.[61]

Another survey interviewed juvenile and young adult detainees about the damages caused by crimes.[62] Most of them could not define what "damage" consists of. Consequently, they estimated the outcome of their own criminal actions either lower or higher than what they actually resulted in. Most of them supported the general idea of compensating victims of crime, but did not feel the need to do so with regard of their individual cases.

A sample of 46 prosecutors and judges was surveyed between the passing and the entry into force of the new regulations. The results portrayed the judges as executors, rather than framers of law (in the respective field). The majority generally supported the use of mediation, but was uncertain about the deterrent effects of punishments. The primary aim of the criminal procedure was identified as delivering a response to crimes. The majority of the sample looked at victims first and foremost as witnesses of crime, whose main role in the proceedings is to assist the revelation of the defendants' guilt. Additionally, the study concluded that the majority of the survey had a more technical and practical attitude to punishments, while neglecting its moral aspects.[63]

Follow up surveys focused on the first *experiences* with mediation in penal matters.[64] These studies tried to explain the generally restricted and geographi-

60 Supreme Court Opinion 2008.67. Section V.2.

61 *Barabás* 2007.

62 The results of the survey are summarised in *Barabás/Windt* 2004, pp. 295-315.

63 *Kerezsi* 2006, p. 18.

64 *Barabás* 2010.

cally varying use of mediation. A set of reasons were identified. These included the prosecutors' and courts' generally negative attitude towards mediation, the limited list of offences eligible for mediation, the alternatives to mediation for juvenile offenders as well as the differing interpretations by the courts and by the prosecution service. Correspondingly, mediation is used less frequently, if the prosecutor or judge considers retaliation and deterrence as the main goals of criminal proceedings. The Criminal Code already limits the use of mediation to a catalogue of offences. Within this catalogue of offences practitioners often exclude mediation for domestic or traffic crimes which involve family members as victims and offenders as they doubt the voluntariness and seriousness of the victim's consent in such cases.

As elaborated above, in the case of juvenile offenders, the possibility to postpone the indictment with obligatory supervision by a probation officer is available for all offences of the Criminal Code. Mediation, on the other hand, is limited to specific offences and entails no obligation to supervise the juvenile. Therefore, both prosecutors and courts prefer to postpone the indictment with probation supervision over mediation in juvenile cases *(See also Section 4.1)*. Additionally, certain procedural rules further restrict the use of mediation in juvenile related cases. According to the viewpoint of the prosecution service, juveniles always need to be heard in person by a specially trained prosecutor before the case is referred to mediation. However, if the juvenile resides far away from the office of such a specially trained prosecutor, a hearing may not take place and the prosecutor automatically brings the case to trial because of such technical reasons.[65]

Finally, the last-minute drafting of the Act on Mediation in Penal matters resulted in a lack of detailed regulations and consistent terminology (see above). Different interpretations by the prosecution service and by the courts led to completely different outcomes (like with regard to the defendants "confession"), which further restricted the use of mediation.

In line with the results of the studies following, the recommendations were made.[66]

a) In accordance with the viewpoint of the Supreme Court, *damage* needs to be interpreted in a broader sense than defined in the Criminal Code. Additionally, mediation should be allowed for cases in which the offender has compensated the victim before the case is referred to mediation. The former definition of "active repentance" did not allow mediation in

65 *Barabás/Windt* 2008, pp. 19-20.

66 *Barabás* 2010.

such cases.[67] The legislator took this recommendation into account and the new Criminal Code of 2012 now provides for this possibility.

b) Prosecutors should refer the case to mediation whenever the statutory requirements are present, without any prior estimation as to whether the defendant is ready to compensate the victim *(See Section 2.1.1)*.[68]

c) Prosecutors should be able to decide *without prior hearing* whether the case of a juvenile offender should be referred to mediation. The current statutory safeguard has the unintended side-effect that mediation may be ruled out because of technical reasons.[69]

d) Academics in the past emphasised that the practice of the prosecution service (not referring certain cases involving *multiple crimes or offenders* to mediation)[70] was contrary to the Criminal Code, which did not provide for such restriction. This practice is also unfavourable for those victims who would be ready to reconcile with the offender(s).[71] The Criminal Code of 2012 took this idea into account and enables mediation in such cases as well.

e) The regulation of active repentance should take into account *confessions* of the defendant that were made after the indictment has been issued (Be. 221/A (3)).

f) Finally, probation officers who perform the mediation sessions should get *feedback* about the outcome of the case. As it is not the current state of affairs, they cannot assess the effectiveness of their own work and that of the process as a whole.

5. Summary and outlook

Active repentance and mediation are currently the only ADR measures with regard to penal matters. They are applied at the pre-trial stage and by the court of first instance. Mediation is based on voluntary participation, while all persons (natural or not) may take part in the process. However, mediation is still used restrictively, especially in the case of juvenile offenders. There are also substantial geographical differences in numbers of mediation cases.[72]

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67 Legfőbb Ügyészség 99/2007, A Be. Alkalmazásának egyes kérdéseiről kiadott Emlékeztető 420/e) and f). See also *Barabás/Windt* 2008, p. 18; *Lajtár* 2007, p. 9.

68 *Barabás* 2010, p. 6.

69 *Barabás/Windt* 2008, p. 19.

70 Legfőbb Ügyészség 99/2007, A Be. Alkalmazásának egyes kérdéseiről kiadott Emlékeztető 420/b) and c).

71 *Barabás/Windt* 2008, p. 22.

72 *Törzs* 2010, p. 133.

There is not much to present on future tendencies, as the most recent amendments outlined in this study date back to July 2013 when the new Criminal Code entered into force. The new code amended the rules on active repentance and improved some of the shortcomings elucidated above. First and foremost, as of July 2013, compensation performed prior to a case being referred to mediation can be taken into account in the final agreement (Btk. 29.§ and Be. 221/A (2)). Thus, offenders may compensate the victim prior before an agreement has been reached and enable prompt reparation. Additionally, the new code allows mediation for cases of multiple offences if the ones eligible for mediation are the most significant ones (Btk. 29.§ and Be. 221/A.§). Finally, the new Criminal Code provides the possibility of active repentance even if the victim remains unidentified. This enables the prosecution to guard the interests of the community at large and also allows the offender to avoid a trial even in the absence of an identified victim.[73]

Finally, as elaborated above, the new Act on the Execution of Sentences will enter into force in January 2015 and enables – without detailed regulations – mediation in prison settings as well.

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Ireland

Kerry Clamp

1. Origins, aims and theoretical background of restorative justice

The emergence of restorative justice in Ireland can be traced back to the mid-1990s, although a number of authors cite a linkage between restorative justice and Brehon Law.[1] This Celtic form of justice emphasised restoration and reparation that was negotiated between victim and offender rather than merely seeking retribution for criminal wrongdoing through a neutral third party.[2] In the mid-twelfth century, this 'indigenous' response to offending was replaced by the British adversarial system of justice.[3] A strong orientation towards custody among Irish judges has created a steady increase in custodial sentences with a corresponding increase in temporary release to cope with a lack of prison spaces to accommodate new inmates over the years.[4]

This has resulted in increased calls for the reform of the entire criminal justice system, particularly in relation to the availability of alternative community sanctions.[5] A significant investment has been made in looking at the feasibility of restorative justice for the Irish context over the last fourteen years; however, the limited extent of statutory provision for restorative justice means that it remains on the periphery of the criminal justice system. While restitution had

1 See for example, *Consedine* 1999.

2 *Leonard/Kenny* 2011.

3 *O'Donnell* 2005, p. 103.

4 *DJE* 2011.

5 *McCarthy* 2011.

been a feature of the old Irish Brehon legal system, subsequent legal developments in Ireland have paid little attention to this aspect of criminal justice.[6]

This chapter provides an overview of the adoption and integration of restorative justice within the criminal justice process within the Republic of Ireland. Those familiar with the restorative justice literature will know that this is a difficult exercise due to a lack of agreement about what should and what should not fall within the parameters of restorative justice. Given that this project is guided by the ECOSOC definition of restorative justice processes and outcomes which emphasises victim-offender interaction, any reference to community service or court-ordered compensation or reparation has been omitted. 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.

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

The Children Act 2001 established an overall statutory framework for dealing with troubled children and children in trouble with the law. The Act seeks to hold young people to account for their behaviour and to protect the public while operating on the basis that most young people will 'grow out' of offending as they reach adulthood.[7] 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. 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.

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 not be in

6 *O'Dwyer* 2005.

7 *Redmond* 2010.

the best interests of the conference.[8] Despite the enabling basis of the Children Act 2001, it does not make explicit reference to restorative justice, *per se*.

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. The first is 'Restorative Justice Services' which operates in Tallaght and the second is the 'Nenagh Community Reparation Scheme'. Both schemes are financed by the Department of Justice, Equality and Law Reform, through the Probation Service. Given a lack of legislation which puts these schemes on a statutory footing, they rest on the initiative and discretion of a judge to make referrals at the pre-sentencing stage.[9]

1.2 Reform history

There have been a number of notable top-down mechanisms that have promoted the use of restorative justice in relation to criminal offences. The first worth mentioning is the 'National Crime Forum' which was designed to facilitate public consultation on crime and crime-related issues. The Forum heard a number of presentations on restorative justice from both statutory and non-statutory providers and subsequently referred to it favourably in its report.[10]

At parliamentary level the concept of restorative justice gained momentum in January 2007 when the Joint Oireachtas Committee on Justice, Equality, Defence, and Women's Rights issued a report with twelve recommendations for strengthening restorative justice in Ireland.[11] This report received cross-party support and the recommendation by the Committee that a National Commission on Restorative Justice be established was endorsed.[12]

The National Commission on Restorative Justice was tasked with devising a national strategy for restorative justice adoption and implementation informed by international best practice. While the Commission has supported the adoption of restorative justice at a national level with a call for accompanying legislative provision by 2013, the full extent of actual reform that will occur remains unclear at this time. Apart from the Children Act 2001, there is no legislation on the statute books that provides specifically for restorative practice, for either juveniles or adults, and there is no draft legislation currently before Parliament.

8 *O'Dwyer* 2005.

9 *Haverty* 2009.

10 *O'Donovan* 2011.

11 *Haverty* 2009.

12 *O'Donovan* 2011.

1.3 Contextual factors and aims of the reforms

Prior to the Children Act 2001, there had been no legislative change to juvenile justice in Ireland since 1908. As such, independent and non-statutory organisations, lobbying groups and members of the academic community played a vital role in the move for change by highlighting the inadequacies in the system. The impetus for legislative change in Ireland only began in the early 1990s; with a report by the Government Select Committee (1992) entitled *Juvenile Crime – Its Causes and its Remedies*. Many of the recommendations emerging from this report formed the basis of the Children Bill (1999), which subsequently became the Children Act of 2001.

Pressure from the international community in respect of the government's approach to young people in conflict with the law was also a significant factor driving forward change. The Irish government ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1992 but was later criticised by the United Nations Committee who expressed concern about the treatment of children deprived of their liberty which transgressed the principles of the UNCRC and other international standards.[13] Furthermore, as recently as May 2002, the European Court of Human Rights ruled against the Irish Government in the case of *D. G. v. Ireland* (2002) for being in violation of the right to liberty guaranteed under Article 5 of the European Convention on Human Rights by detaining a 16-year-old with serious behavioural problems in St. Patrick's Institution.[14]

Other developments such as the publication of the National Children's Strategy[15] and the introduction of an Ombudsman for Children within the Ombudsman for Children Act of 2002[16] have raised the status and profile of preventative work with children. Such developments coupled with the necessity of updating outdated legislation and international pressure on the government has created the context in which change has begun. Nevertheless, attempts have been criticised for occurring in a 'research vacuum'[17] due to a lack of a strong, objective evidence base on juvenile justice issues within Ireland.[18] This is perceived as hindering the effective development of the system and further inhibiting debate about the issues, influences and direction of the system. As such, this context has placed few demands on the political system to reform.[19]

13 *Children's Right Alliance* 1998.

14 *Seymour* 2006.

15 *Government of Ireland* 2000.

16 *Government of Ireland* 2002.

17 *O'Sullivan* 1996, p. 5.

18 *Burke et al* 1981; *O'Sullivan* 1996; *O'Mahony* 2000.

19 *Seymour* 2006.

1.4 Influence of international standards

The international experiment with restorative justice, particularly in neighbouring Northern Ireland and England and Wales has undoubtedly had a significant impact on the adoption of restorative justice within the Republic of Ireland. While there is no explicit reference to any international instruments in the literature on restorative justice within Ireland, the NCRJ report has highlighted the following legal principles and operational guidelines that have influenced its recommendations:

- Council Framework Decision on the standing of victims in criminal proceedings, especially section 10;[20]
- Economic and Social Council Resolutions 2000/14 and 2002/12;[21]
- Handbook on Restorative Justice Programmes;[22]
- Recommendation No. R (99) 19, Mediation in Penal Matters.[23]

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

Despite the extensive exploration of restorative justice in both domestic and international contexts as outlined in the previous section, there is yet to be a corresponding commitment to restorative justice in the form of legislation. As such, the application of restorative justice in terms of statutory provision is limited to offenders under the age of 18 which is housed within the Children Act 2001. However, there is scope for both the police and the courts to divert cases committed by adults to restorative justice pilot schemes under existing general powers.[24]

2.1 Pre-court level

2.1.1 Adult criminal justice

The Garda Adult Cautioning Scheme is a non-statutory diversion programme for adults, where prosecution of an offence is not considered necessary in the public interest and the offender admits guilt and gives consent to participate in the

20 *European Union* 2001.

21 *United Nations* 2000; 2002.

22 *United Nations* 2006.

23 *Council of Europe* 1999.

24 *O'Dwyer* 2005.

process. While there is no provision for negotiation, reparation or compensation in the adult cautioning scheme, the views of the victim are sought in terms of the impact of the offence and their perception as to the appropriateness of the caution as a disposal.

While the views of the victim are perceived as important, the caution may still be deemed suitable for the particular offender and proceed even where the victim is opposed to it. It has been recommended that the restorative dimension of this caution be expanded,[25] however, there are concerns that such a move would make the programme susceptible to net widening, and the targeting of individuals who would ordinarily not have come within the criminal justice system.[26]

2.1.2 Juvenile justice

Under the Children Act 2001, every offender under17 years[27] of age should be diverted from prosecution to the Garda Juvenile Diversion Programme, provided that the juvenile accepts responsibility for the offending behaviour, consents to participation and is not in conflict with the interests of the public. In 2006, the Criminal Justice Act raised the age of criminal responsibility to 12 (although it continued to allow offenders of 10 to be included in the scheme) and expanded the remit of the programme to include anti-social behaviour. The programme allows for young people who commit criminal offences to be dealt with by means of a *caution* instead of the formal process of charge and prosecution. Such cautions are not recorded as a criminal conviction and, as stated previously, may be issued on a formal or informal basis. The diversion programme may not be considered as a suitable response to an offence, if:

- there is no acceptance by the offender of responsibility,
- the juvenile is a habitual repeat offender,
- the offence is very serious, or
- it is not in the public interest.

In these instances, cases are returned to the local Garda Superintendent for prosecution. Where offences are of a serious nature, the Director of Public Prosecutions is responsible for making a decision on whether to divert or prosecute the young person.

The Director of the National Juvenile Office decides whether or not an offender is ultimately admitted to the programme once the preconditions have been met. The programme creates two diversionary opportunities that are restorative in nature on the basis of victim participation – the restorative caution and

25 *DJELR* 2009, p. 10.

26 *Haverty* 2009.

27 In exceptional circumstances, this may be extended to those under 18 years of age.

the restorative conference. The diversion programme is national in coverage and restorative interventions take place in all 25 Garda Divisions. While the Act provides no indication of the circumstances in which a restorative caution or conference will be deemed appropriate, it is generally perceived that an informal caution would be used for minor, first-time offences and a formal caution in instances of serious and more persistent offending.[28]

Guidance for the programme states that each case should be assessed on its own merits; as such no offence is explicitly excluded for inclusion in the programme. However, priority is always given to those cases which have a readily identifiable victim who has suffered harm or loss and who needs or wants to engage in the process. Restorative events (cautions and conferences) have been held for very serious offences such as robbery, burglary, criminal damage, arson, sexual assault, assault causing serious harm and possession of drugs with intent to supply.[29] The process has also been used for less serious offences, where it is considered that the restorative process would be of particular benefit to the victim, the offender or the community. Any professionals – lawyers and investigating officers – who attend conferences play a restricted role (they have no automatic entitlement to speak) and observe the same ground rules as other participants.[30]

An offender has to consent to participation in the process, as does the victim, and both are able to cease their participation at any point. Should the young person fail to participate in a restorative caution, the fallback position is the traditional, non-restorative formal caution. In respect of the restorative conference, if an offender fails to participate or reneges on any agreement reached, the only sanction is to reconvene the group and explore the reasons for non-compliance. The police have no formal role in pursuing implementation and there is no formal sanction for non-compliance,[31] or any limit as to how many times a conference may be reconvened within the Act. Justification for this approach rests on the fact that referral to the programme has been deemed the appropriate sanction, therefore, any subsequent action is voluntary and as a result non-compliance cannot be punished.[32]

Confidentiality is a legal requirement under the Children Act and is sometimes written into agreements, usually where one of the parties requests it. Section 32(7) makes it illegal to disclose confidential information obtained while participating at a conference (but not a caution) and that anything said at

28 *Kilkelly* 2011.

29 *Kelly* 2010; *Miers/Willemsens* 2008.

30 *O'Dwyer* 2002.

31 *O'Dwyer* 2005.

32 *Seymour* 2006.

the event could not be used subsequently as evidence in legal proceedings, whether civil or criminal. However, under Section 126 of the Criminal Justice Act 2006, such evidence can be put before the court by the Prosecution where a court is considering the sentence (if any) to be imposed in respect of an offence committed by a offender after the offender's admission to the Programme. While this amendment will only impact on those who go on to reoffend, it does change the advice that the offender's legal representative must give to those considering diversion as an alternative to prosecution.[33]

More fundamental safeguards arise from the character of the programme and its place in the criminal justice system. Voluntary participation and the absence of any sanction for non-participation or non-compliance is said to ensure that the police facilitator has no over-riding incentive to achieve any particular type of result at the expense of the offender. Article 40(3)(b) of the UNCRC provides that the child's human rights and legal safeguards must be fully respected during non-judicial measures for dealing with children who are accused of having committed a crime or who have done so. However, some commentators question whether the same due process rights apply in the context of the diversion programme as they do in judicial proceedings, given that the outcome of the programme does not have the capacity to restrict so acutely the rights of the child.[34] At the same time, the requirement that the child must plead guilty as a condition of entry to the diversion programme brings into question the voluntariness of the process as the alternative is to face the possibility of prosecution through the courts. As a result, it may be argued that in consenting to the cautioning programme "the offender relinquishes the rights implicit in the formal criminal justice system".[35]

2.2 Court level

2.2.1 Adult criminal justice

There are two notable restorative pilot projects that allow prosecution authorities to divert adults' cases from court in a limited number of circumstances and on a discretionary basis. First, the Tallaght Restorative Justice Services was formally launched in February 2000. It offers two restorative justice programmes: offender reparation and victim/offender mediation. The offender must be formerly charged, appear in court and plead guilty or be found guilty. All cases are court-referred at the pre-sentencing stage at the discretion of the Judge, and the Court remains in charge of the process at all times. The Probation Service, An Garda Síochána,

33 *Kilkelly* 2011.

34 See *Campbell* 2005.

35 *Griffin* 2004, p. 5.

Welfare Services, legal representatives and victim support may also request that referral be considered by the court.

The majority of referrals are for first-time offenders, for offences which would not normally attract a custodial sentence but which could result in a conviction and/or a referral to the Probation Service. The cases most commonly dealt with by way of victim-offender mediation (VOM) include relatively serious offences in the areas of criminal damage, theft, assault and minor sexual assault, and public order. Certain offences are unlikely to be accepted by the service, such as: child abuse cases, serious sex assault or domestic violence.

When the mediation or reparation process is completed, a written report is made to the court. At the resumed court hearing, the judge decides on the appropriate disposition. In the case of mediation, if an agreement is reached and the offender fulfils its requirements, the judge may decide that no further sanction is required or may impose a nominal sanction. It is not unusual, however, for the offender to be made subject to a probation order, be bound over to keep the peace or be fined.

The second pilot, the Nenagh Community Reparation Scheme, is a relatively small project which has been running since June 1999. The focus of the scheme is primarily on community reparation as opposed to mediation. Offenders are referred to the Project by the Local District Court, following establishment of their guilt. The majority of referrals are first time offenders with offences which would not normally attract a custodial sentence but would result in a conviction and/or referral to the Probation Service. The types of offences dealt with include those of public order, assaults, criminal damage, theft, possession of drugs and possession of an offensive weapon.

The project allows offenders to address their particular behavioural problem and avoid a criminal conviction which may impact on their future career prospects. With regard to those who fail the very strict criteria for a successful contract (namely a genuine expression of remorse and commitment to addressing the issue which contributed to the offence) the Court is notified.[36] If the Panel feels that the offender is not suitable or has not completed the contract this is also reported to the court. In the event of the latter normal criminal proceedings may be reinstated.

The operation of both projects takes cognisance of the fundamental rights of both victim and offender and closely follows the recommendations of the draft report of the United Nations commission on Crime Prevention and Criminal Justice, Section 111 Operation of Restorative Justice Programmes, as well as the Handbook on Restorative Justice Programmes, prepared by the United Nations Commission on Crime Prevention and Criminal Justice.

36 *Gleeson* 2007.

2.2.2 Juvenile justice

Under Part 8 of 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. Similar to the Garda Juvenile Diversion Programme, the Court-Referred Family Conference may only take place under the following circumstances:

- where there are criminal charges against the offender,
- where the offender accepts responsibility for his or her criminal behaviour, and
- the court considers it desirable that an action plan is formulated in the case.

Case selection is thus determined on the suitability of offenders and their potential for assistance and not by type of offence committed.[37] Where a case is deemed suitable, the court hearing is adjourned for 28 days to allow the conference take place.

A key feature that distinguishes the court-referred family conference from the Garda conference is the court's powers of compulsion. The probation and welfare officer dealing with the case must report back to the court. Any action plan devised during the conference is submitted to the court, which has the power to approve or amend it and order compliance. Where an action plan is not agreed, the court may formulate one and order compliance or decide to resume normal criminal proceedings against the offender. The court can also grant an extension of time to hold a conference, subject to a maximum of another 28 days. Where the court is satisfied with compliance, it can dismiss the charge on its merits. Where the offender fails to comply, without reasonable cause, the court may resume the original proceedings.[38]

2.3 Restorative justice elements while serving sentences

There are currently no formal measures for either adults or juveniles that provide for the use of restorative justice while serving sentences. Nor is there any formal means by which an offender's participation in such a programme counts as a potential ground for early release. However, McCarthy (2011) draws attention to a radio programme broadcast from Mountjoy prison which brought six prisoners and victims together to talk about crime. The experiment was considered a success as offenders were able to see the harm that they had caused and victims were able to differentiate between the behaviour and the offender as an indivi-

37 *O'Dwyer* 2005.

38 *Children Act*, Sections 81-84.

dual. Despite the positive impact of the process, no further experiments of this kind have been reported on.

3. Organisational structures, restorative procedures and delivery

3.1 Garda Juvenile Diversion Programme

The Garda Youth Diversion Projects are funded by the Irish Youth Justice Service and administered through the 'Community Relations Section' of An Garda Síochána.[39] Before the young person is considered for admission, a Juvenile Liaison Officer is assigned to assess the suitability of the young person for inclusion in the programme. In carrying out an assessment, the Juvenile Liaison Officer consults with the young person's parents or guardians and may also consult with the victim. While the consent of the victim is not required for a caution to be made, the consent of the parent or guardian is required. As such, participation is voluntary.

The Juvenile Liaison Officer has the option of recommending prosecution (in which case a file is sent to the Director of Public Prosecutions), a formal caution, an informal caution or no further action. The final decision as to whether or not a young person is cautioned lies not with the Garda Síochána, but with the Director of the National Juvenile Office who by statute must be a police officer above Superintendent rank. Neither the legislation nor the Director provides transparent criteria that are used to base the decision to apply one disposition as opposed to another in any individual case.[40]

In deciding to authorise that a conference to take place the Director is required to give due regard to the following:[41]

- The report and recommendation from the Juvenile Liaison Officer;
- Whether, in the Director's opinion, a conference will assist in the prevention of the commission of further offences;
- The role and responsibilities of the parents or guardians;
- The views of the victim;
- Whether the victim would attend the conference/caution and where the victim is an offender whether such attendance would be in his or her best interests;
- The interests of the community;
- Any other relevant matter.

39 *Redmond* 2009.

40 *Smyth* 2011.

41 *O'Dwyer* 2002.

Both restorative cautions and conferences are facilitated by experienced police officers who have opted to become Garda Juvenile Liaison Officers.[42] They receive two weeks of formal training in mediation and facilitation skills at the Garda College. They specialise in working with young people and their families and the principles of restorative justice are close to the principles that govern their non-restorative work.

There is no specific format for administering the caution although some literature refers to the use of the scripted model as developed by *Terry O'Connell* in Australian police-led conferences. The informal caution, given for less serious criminal behaviour, may be given at the offender's home, in a Garda station or some other suitable venue. The only individuals obliged to attend while the caution is being given are the parents or guardian of the offender. The officer, who gives the caution, normally discusses the criminal behaviour and highlights to the offender the seriousness of his/her actions. When the victim attends, there must be a general discussion among those present about the offender's criminal behaviour and the Garda administering the caution may invite the offender to apologise and offer some form of financial or other reparation to the victim.[43]

The formal caution normally takes place in a Garda Station to highlight the seriousness of the situation to the offender. Participants at the conference may include the facilitator (a member of the Garda Siochana), the offender, the parent/guardian, representatives from agencies that have contact with the offender, or any others perceived to be of benefit to the conference and requested by the offender or the offender's family. The victim is invited to the conference and any family or friends of the victim that the victim requests, unless the facilitator believes their attendance would not contribute to the success of the conference.

Where a conference is held it is tasked with discussing the welfare of the offender, mediating between the offender and the victim where appropriate[44] and formulating an action plan for the offender[45] which must uphold the concerns of the victim and have due regard to his or her interests.[46] Section 39 of the Act states that an action plan may include provision for any one or more of the following elements:

a) an apology, whether orally or in writing or both, by the offender to any victim,
b) financial or other reparation to any victim,

42 As a general rule, the people who conducted the assessment and recommendation should be different from the one who facilitates the restorative processes.

43 *Kilkelly* 2011.

44 Section 29(b).

45 Section 29(c).

46 Section 29(d).

c) participation by the offender in an appropriate sporting or recreational activity,
d) attendance of the offender at a school or place of work,
e) participation by the offender in an appropriate training or educational course or a programme that does not interfere with any work or school schedule of the offender,
f) the offender being at home at specified times,
g) the offender staying away from specified places or a specified person or both,
h) taking initiatives within the offender's family and community that might help to prevent the commission by the offender of further offences, and
i) any other matter that in the opinion of those present at the conference would be in the offender's best interests or would make the offender more aware of the consequences of his or her criminal behaviour.

Once an action plan is agreed, the plan comes into operation on the date on which it is signed by the Garda facilitator, the offender (if possible) and one other person present. The action plan is reviewed at any time within six months from the date the plan is signed. The details of the conference and any action plan must be reported to the Director of the National Juvenile Office.

Every offender who receives a formal caution through the diversion programme is placed under the supervision of a JLO for twelve months. The level of supervision is normally a matter decided by the JLO. Section 28(2) of the Children Act 2001 sets out the elements that must be taken into consideration in deciding the appropriate level of supervision, these include the:

- Seriousness of the offender's behavior;
- Level of support given to, and the level of control of, the offender by the parents or guardian;
- Likelihood of the offender committing further offences;
- Directions from the Director regarding the appropriate level of supervision.

Supervision normally involves the JLO being pro-active in relation to the offender's behaviour. It will not normally involve the offender reporting to the JLO at specified times which allows the offender the opportunity to return to his/ her normal routine, without the intrusion of being forced to attend meetings on a regular basis. It is important, however, for the offender to realise his/her behaviour is being monitored for the period of supervision. Supervision does not normally result from an informal caution. Only in exceptional circumstances does a supervision period of six months apply after an informal caution.

3.2 Court-Referred Family Conference

Family conferences are funded from within the Probation and Welfare Service's budget. In preparation for the implementation of family conferencing nationally, an internal steering group was put in place in April 2003 and trainers from the New Zealand Department of Child, Youth and Family Services were enlisted to train staff as facilitators for the family conferences to be convened under the Act.[47] This has been followed up with internal training for professional staff nominated to convene family conferences. Probation officers already have academic qualifications and professional training relevant to working with offenders.

The conference involves the young person and members of his or her family, the victim and other relevant participants to discuss the impact of the offending behaviour and to formulate an agreed plan which will help the young offender to desist from offending. The victim and support persons must be invited to attend unless their participation is not considered to be in the best interests of the conference. If they are invited to attend but are unable or unwilling, all reasonable steps must be taken to ascertain their views and make them known at the conference (section 85, invoking sections 32(4) and section 36).

Offenders are encouraged to take responsibility for his or her behaviour and its consequences and, where possible, make amends to the victim. Victims often play an influential part in determining the objectives and content of the action plan.[48] Any action plan formulated can include elements relevant to the victim (an oral or written apology or both, and financial or other reparation) as well as elements specific to the offender (for example, participation in training or education).

3.3 Restorative Justice Services

The Tallaght Restorative Justice Services is a voluntary not-for-profit organisation managed by a partnership of stakeholders within the criminal justice system, including Tallaght District Court, the Probation Service, An Garda Síochána, Victim Support and community sector volunteers. While based in a suburban setting, the scheme has been made available to other District Court areas in and around Dublin.[49] The programme is funded by the Probation and Welfare Service which covers the salary costs of a director, case manager and part-time administrator, office rental and running costs, travel, training and payment of an honorarium to facilitators.

47 *O'Dwyer* 2005.

48 *Kelly* 2010.

49 *Miers/Willemsens* 2008.

Facilitators are selected on the basis of experience in a relevant professional discipline (such as teaching, social work, counselling), previous practical facilitation experience, life experiences generally and aptitude. There is no requirement for a formal educational qualification, although many would have a third-level qualification of some kind given their professions. Training is provided internally, having been initially provided by a Scottish based Reparation and Mediation Service. No specific code of ethics applies but careful screening of applicants, training, supervision and overall guidelines adopted from other services help ensure appropriate standards are met.

Initially launched in 2000 as a VOM service, it expanded in 2004 to include an offender reparation programme. This has allowed it to offer services where the victim does not wish to participate in direct or indirect mediation, where the case is deemed not suitable for mediation or where no direct victim is involved.[50] Under the programme offenders are able to demonstrate to victims, their families and their community that they have gained an understanding as to the implications and consequences of their offending behaviour and that they have learned how to avoid situations that could lead to further offences in the future. Typical commitments as part of a plan generally have included verbal and written apologies, agreement to enter addiction treatment, compensation, agreement to re-locate, and agreement to behave in a civil way to each other. As mentioned previously, the judge may impose a probation order in which case the assigned probation officers have an opportunity to support the offender over a longer period and to monitor compliance.[51]

Mediation, which can be direct or indirect, generally takes place at the organisation's offices. Two facilitators always work together, even with indirect mediation. The intended outcome is that the offender apologises, makes reparation and agrees to take steps to help avoid further offending. Types of agreements or outcomes achieved using VOM included a written or verbal apology, financial compensation or donations to charity. The experience in this pilot has been that more cases have been referred under the Offender Reparation Panel model and those offences of a slightly more serious nature, which are appropriate for VOM, have not been referred as frequently.

If the judge considers mediation or reparation an appropriate option, the case is adjourned to allow assessment by the probation officer and Restorative Justice Services. Generally this occurs within 2-4 weeks. If the assessment is positive, the mediation or reparation hearing process commences, including contact with the victim. If the assessment is negative, the court hearing continues.

50 *O'Dwyer* 2005.

51 *O'Dwyer* 2005.

3.4 Nenagh Community Reparation Project

The Nenagh Community Reparation Project was set up in June 1999 and emerged from the work of a Government expert group on the Probation and Welfare Service. The project was inspired by a similar project in Timaru, New Zealand, and promoted by a District Court judge and by the head of the Probation and Welfare Service. Like the Tallaght project outlined above, this scheme is funded by the probation services. However, the project differs from the previous scheme in its reliance on volunteers from the community and its focus on community reparation as opposed to mediation. The aims of the project are to:

- provide community reparation for adult offenders;
- minimise repeat offending by confronting the offender with the impact of the crime on others;
- provide the community with an input into ways of dealing with offenders;
- ensure that offenders accept responsibility for their actions and that they make reparation to their victims;
- reduce crime and minimise repeat offending.

The offender is referred to the project by the courts and they meet with a panel of people made up of representatives from the community, local Gardai and the project co-ordinator. Volunteers who sit on the panel are recruited locally by word of mouth. While they are not paid for their time, they are reimbursed for certain out-of-pocket expenses such as travel.[52]

Panel meetings with offenders generally take place in the project office, at various times of the day or evening and are chaired by the project co-ordinator, who is a probation officer. The victim and their supporters may be present at the meeting; however, the panel does not have prior contact with any of the stakeholders prior to the meeting. The primary purpose of the meeting is confined to hearing the offender's and victim's story, discussing the offender's behaviour[53] and drawing up a contract or agreement in which the offender agrees to any changes that he or she needs to make to their life. All must agree on the contents of the contract before it is returned to the court. The panels have no follow-up role in terms of monitoring compliance.

52 *O'Dwyer* 2005.

53 *Kenny* 2008.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

4.1.1 Garda Juvenile Diversion Programme

Every year, around 5 percent of the population aged 12-17 (around 18,500-20,000 young people) engage in criminal activity. Those who come to the attention of the authorities are considered for admission to the Diversion Programme administered by An Garda Síochána.[54] Despite the large numbers that the scheme deals with, funding to both Garda Youth Diversion Projects and Young Persons' Probation (YPP) Projects was reduced by 6% from 2009 levels to reflect the reduced Community Programmes allocation of € 17.3m in 2010.[55]

The only statistical data available on a regular basis is compiled by the Garda Siochana in their 'Annual Reports of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme'. The most recent statistics suggest that the total number of referrals made to the Garda Juvenile Diversion Programme during 2010 was 27,257, an increase of 3,305 or 13.8% on 2009. The total number of individual offenders referred to the programme was 17,986 which is a decrease of 533 or 2.9% from the 2009 total. Of those referred 12,899 (72%) were admitted to the Diversion Programme.[56]

Restorative justice provision has continued to develop since first being offered, from 307 referrals in 2006, to 378 referrals in 2007, to 422 referrals in 2008, to 416 referrals in 2009, and finally, to 792 referrals in 2010. Many of the cases in which restorative interventions were used were serious cases of assault, assault on Gardaí, robbery, arson, burglary, harassment and public order. Unfortunately, there is no information published on recidivism rates, although recommendations have been put forward by the Committee that the Garda Analysis begins researching this.[57]

4.1.2 Court-Referred Family Conferences

Between October 2004 and January 2009, 173 Family Conferences were referred by the court. In 145 of these referrals, conferences took place.[58] Ninety-

54 *Redmond/Dack* 2010.

55 *IYJS* 2010.

56 *Garda Síochána* 2011.

57 *Garda Síochána* 2011.

58 *Kelly* 2010.

seven of these conferences were successful, leading to the completion of 86 action plans and the disposal of the cases concerned.[59] The remaining 11 action plans were in the course of being implemented. In the 48 unsuccessful cases, the criminal proceedings in court were re-activated. However, statistics demonstrate that since 2008, Court-Referred Family Conferences have been reducing from 35 referrals in 2008, to 32 in 2009,[60] to 28 referrals in 2010.[61]

4.1.3 Restorative Justice Services, Tallaght

To date, referrals to Restorative Justice Services for victim-offender mediation have been received from a number of different courts. Up to the end of May 2004, the service received 61 referrals for mediation of which 40 cases ultimately resulted in a mediation process. Between 2004 and 2007, the victim-offender mediation programme received slightly more cases with a total of 51 referrals, arising from 55 offences. Of those 51 referrals, two-thirds materialised with an agreed outcome requiring written or verbal apologies, financial reparation or charitable donations from the offender.[62]

According to its 2007 Annual Report, Restorative Justice Services dealt with 81 referrals to the Offender Reparation Programme and 75 offenders successfully completed their contracts. Some 66% of offenders were between 18 and 25 years of age. Alcohol consumption was a notable factor in many cases and 85% of offenders undertook some form of alcohol awareness programme arising from the intervention. Over 95% of those referred to the Offender Reparation Programme were male.

4.1.4 Nenagh Community Reparation Project

Statistics obtained by the National Commission on Restorative Justice from the Nenagh project in their interim report indicate that, of 116 referrals between 1999 and 2008, contracts of reparation were completed in 77% of cases, with a re-offending rate of 21%.[63]

In their final report, The National Commission on Restorative Justice provides additional statistics for the project as follows: between 1999 and 2007 105 referrals were received by the scheme. Contracts of reparation were

59 *DJELR* 2009.

60 *Redmond/Dack* 2010.

61 *Garda Síochána* 2011.

62 *DJELR* 2010, p. 10

63 *DJELR* 2007.

completed in 86% of cases, and only one in four offenders was found to have re-offended in a review of PULSE records by An Garda Síochána in 2009.[64]

4.2 Findings from implementation research and evaluation

There is a general absence of research-based evidence on the outcomes of restorative justice in the Republic of Ireland. Where research does exist it is generally highly localised with small case numbers. Nevertheless, the findings from evaluations conducted on the pilot projects may be useful in assessing baseline data for the schemes.

4.2.1 Garda Juvenile Diversion Programme

Prior to the commencement of Part 4 of the Children Act in May 2002, an evaluation of the pilot programme of cautions and conferences for juvenile offenders was carried out by the Garda Research Unit.[65] The selection of cases under the programme was non-random so it was not possible to draw firm conclusions about success, including impact on recidivism.[66] The study examined 68 cases involving 96 offenders using observations by independent observers (12 cases) or the JLO dealing with the case (42 cases), with summary information available in respect of 14 older cases.[67]

The evaluation reported positively on observed[68] levels of participant satisfaction, high rates of victim participation (only fourteen out of sixty-eight did not attend)[69] and changes in the offenders' demeanour – verbal apologies were given in the majority of cases (written apologies furnished in 24 percent of cases) and attempts to repair harm were offered[70] in the form of a gift in 26 percent of cases, unpaid work for the victim in four cases or a simple repayment of money stolen or damage caused. The few exceptions under the pilot programme that were considered less successful tended to be "victimless" crimes (such as underage drinking and public order offences) and one case that ended without agreement. Twelve cases involved restrictions on liberty, usually home curfews and avoiding certain locations and people. Other agreements included

64 *DJELR* 2009.

65 See *O'Dwyer* 2001.

66 *O'Dwyer* 2005.

67 *O'Dwyer* 2002.

68 Participants' views were gathered using observation sheets and there was no direct victim participant involvement in the research.

69 *Seymour* 2006.

70 *Campbell* 2005.

elements such as commitments to education and training, rehabilitative programmes and joining groups.

A second evaluation covered the 147 more recent cases. The original evaluation instruments were refined to include, for example, direct feedback from victims and other participants. Victims, offenders and offender supporters all gave high scores as regards satisfaction, ranging from 4.49 to 4.65 on a scale of 1-5 (provisional figures). The vast majority gave scores of 4 or 5 – 93% of victims and 94% of offenders and their supporters.

4.2.2 Court-Referred Family Conferences

There have been no evaluations undertaken of this project.

4.2.3 Restorative Justice Services, Tallaght

There have been no evaluations undertaken of this project.

4.2.4 Nenagh Community Reparation Project

The findings of a baseline study of the Nenagh project, undertaken in 2002, showed that 75% of all contracts were completed. Of the 20 offenders in the study, 15 completed their contracts, 4 contracts were on-going and one offender re-offended and the contract was withdrawn. Each contract included at least one of the following: attend addiction counselling, make financial repayment, become involved in sports activities, visit schools to highlight drink/drug problems, offer apology to victim, monitor and assess their own social behaviour and miscellaneous other provisions. The study also showed that the most common offences were public order offences (45%), possession of drugs (35%), assault (10%), criminal damage (5%) and possession of an offensive weapon (5%).[71] Only four victims were involved and all offenders were first-time offenders, aged between 17 and 40, mostly male (90%).

A further independent evaluation was carried out in 2004.[72] Fieldwork was carried out between September 2003 and September 2004 during which time twenty-one offenders had been referred to the Project. Nineteen of these offenders completed their contract successfully; one did not progress while another was on-going. Offenders ages ranged between nineteen and thirty, with the majority between nineteen and twenty. Most of the offenders had second-level education and were employed in either skilled or semi-skilled jobs. The main types of crimes committed included public order and possession of drugs

71 *DJELR* 2009.

72 *Cunneen* 2004.

and the contract options involved counselling, financial restitution and community voluntary activity. The report suggests that the recidivism rate at that time was sixteen percent; however, caution is needed in applying data from the Irish experience of restorative justice, as the case volumes are not sufficiently large for robust statistical analysis and comparison.[73] Further caution is related to the lack of an evaluative comparative control group in a non-restorative setting.[74]

4.2.5 Other developments

An additional scheme was announced on the 25th November 2010 by the Minister for Justice, Equality and Law Reform, Dermot Ahern TD, 'to test a range of restorative interventions for adult offenders based on the recommendations' of the National Commission on Restorative Justice. The rationale for this project was to offer an additional robust restorative justice process for adults who receive a custodial sentence of less than 12 months duration.

The Probation Service has been given responsibility to monitor, oversee, and evaluate the implementation of the scheme and to report on the effectiveness and value for money of the model after a 12-month operational period.[75] The evaluation and report are anticipated at some point during 2012. In practice this pilot initiative comprises the expansion of Restorative Justice Services Tallaght to most of the Dublin District Court area and the extension of the work of Nenagh Reparation Project to include the District Court in Limerick city.[76]

5. Summary and outlook

Restorative justice in Ireland is still operating on the margins of the criminal justice system despite experimentation having taken place since 1999. While both the Joint Oireachtas Committee and the National Commission on Restorative Justice have urged the expansion of statutory provision for restorative justice to include adult offenders, no further action has been taken in this regard as yet. The goal set by the Commission is to have nationwide implementation by 2015 at the latest, including placing restorative justice for adults on a statutory footing.[77] However, since the publication of the report in 2009, economic constraints have increased and in the light of significant reductions in Govern-

73 *McCarthy* 2011.

74 *Haverty* 2009.

75 *Dáil Éireann* 2010

76 *O'Donovan* 2011

77 *DJELR* 2009.

ment expenditure, it seems unlikely that there will be much scope for new spending initiatives.[78]

Despite the restorative justice project occurring within a period of austerity, the implementation of the pilot scheme in 2010 is a significant indication of willingness to initiate a development agenda for restorative justice as part of the Irish criminal justice system. It is also an acknowledgement of the work of the National Commission on Restorative Justice and its recommendations.[79] An important task for the government in terms of ensuring the successful embedding of restorative practice within the criminal justice system is to reduce the knowledge gap of legal practitioners and other key players and stakeholders.[80] Ongoing monitoring and evaluation are also critical, to ensure performance to the highest standards as well as generate support.[81]

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78 *O'Donovan* 2011.

79 *O'Donovan* 2011.

80 *McCarthy* 2011.

81 *O'Dwyer* 2005.

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Italy

Lorenzo Picotti, Roberto Flor,
Elena Mattevi and Ivan Salvadori

1. Origins, aims and theoretical background of restorative justice

1.1 Overview on forms of restorative justice (RJ) in the criminal justice system

In Italy there are two different manifastations of RJ: on the one hand there is the most important and well-known victim-offender mediation, both for adults and minors; and the increase in restorative sanctions, like community service or reparation of damages on the other.

With the law relating to criminal proceedings involving adults before the "justice of the peace"[1] (JoP), which came into force at the beginning of 2002 (Legislative Decree No. 274/2000: LD 274/2000), victim-offender mediation for the first time came to be expressly recognized by the law and considered as a stand-alone intervention which can lead to an alternative settlement of the process without sentencing.

Before 2000 there had been increased testing and piloting in the juvenile justice system and some more general experiences with alternative dispute resolution in criminal matters, above all as an ancillary process parallel to other institutions, as shall be presented in this chapter.

Another form of RJ intervention, introduced into the Italian legal system by aforementioned LD 274/2000, is the "reparation" of damages (Art. 35), which

1 "*Giudice di pace*" – lay judges with jurisdiction in criminal matters, in particular with reference to petty crimes – assaults, property damages, defamation and insults, etc. – and in civil matters.

also can lead to the "expiration" of the criminal offence i. e. the offence is not prosecuted further.

In the special matter of the "administrative" liability of legal persons for criminal offences committed by managers or employees (Legislative Decree No. 231/2001) the application of the most serious "interdiction" sanctions (like suspension of activity, exclusion of subvention, prohibition of contracts with public administration, etc.) are not applied if the damages have been repaired, the organizational flaw that led to the offence has been alleviated and any criminal profits have been confiscated (Art. 17).

Finally, Legislative Decree No. 274/2000 also introduced the provision that the JoP cannot apply sentences to imprisonment. They can order fines, "house arrest" (the offender must stay at home for the period specified in the order, which shall not exceed 45 days) and community service orders. Beforehand, this latter instrument had not yet existed as a principal sanction in the common Italian justice system. Rather, it had been limited to the role of a substitute sanction for fines that offenders could not pay due to insolvency (Law No. 689/1981).

The Laws No. 94/2009 and No. 120/2010 concerning aggravated damages in particular circumstances (like sport competition (Art. 635 Par. 2 of Criminal Code – CC) and driving under the influence of alcohol or drug (Art. 186 and 187 Law No. 285/1992 – Road Traffic Code) introduced community service as an alternative to house arrest and fines. Where the community service order is successfully completed, the offence "expires" and is not prosecuted further (new Par. 9-bis of Art. 186 and new Par. 8-bis of Art. 187 of the Road Traffic Code) or, where sentence has been suspended on the condition that community service be rendered, the suspended sentence is deemed to have been completed and the case is closed (new Par. 3 of Art. 635 CC).

The same Law No. 94/2009, which introduced the criminal offence of insulting a public official (Art. 341-bis CC), provides that repairing in full the damage caused both to the individual person and to the public administration "extinguishes" the criminal offence (Par. 3 of Art. 341-bis CC).

1.2 Reform history

A look at the reform history of the first decade of the XXI century shows that there has as of yet been No. systematic program for promoting alternative dispute resolution, but new normative instruments have nonetheless already provided.

In the Italian system, there is a strict and virtually unconditional obligation to pursue criminal proceedings (Art. 112 of Italian Constitution) in the face of evidence of the crime and where there are reasonable indications for the

accused's guilt.[2] The principle of strict legality and official conduct of penal proceedings ("mandatory criminal action"[3]) has always represented a serious obstacle to the introduction of forms of diversion in Italy.

The legislator has provided normative instruments to loosen this strict principle in cases of offences prosecuted following a complaint of the victim i. e. complainant's crimes ("*procedibili a querela*"): in this case the complainant can also choose to stop the proceedings (essentially, to withdraw the charge) and the criminal offence is extinguished (Art. 120 and 152 CC).The Royal Decree No. 773/1931 (*Testo Unico Leggi di Pubblica Sicurezza*), still in force, establishes that the police may informally settle conflicts. Prior to the reforms effected by Law. No. 479/1999, the criminal procedure code (CPC) of 1988 had provided another instrument: According to Art. 564 CPC (now abolished), in cases of complainants' crimes the prosecutor, also before carrying out acts of pretrial investigation, could summon the complainant and the defendant to his office in order to verify whether the complainant wanted to dismiss the complaint under the condition that the defendant agreed with him. The prosecutor had to inform the litigants that they had the right to legal assistance. There was no prohibition for the prosecutor to exercise a similar reconciliative activity during the pretrial investigations.[4] Nevertheless, the mentioned reform has expressly transferred to the monocratic judge of the tribunal (Art. 555, 3, CPC) the duty to "*verify whether the complainant is disposed to withdraw the complaint and whether the defendant will accept such withdrawal*". This activity has to be realized after the penal action as been exercised, and does not involve a process of active mediation with a neutral facilitator.

The real weight of evidence on victim-offender practices in Italy is to be found in the field of Juvenile criminal justice.[5] Victim-offender mediation centres arose spontaneously in the Northern part (Milan, Turin, Trento) and the Southern part (Bari, Catanzaro) of Italy, during the early 1990s; most of them as a result of a shared concern between social workers and certain juvenile justice judges and public prosecutors, to find a proper response to youth crime".[6]

The impulse arose both from suggestions provided by a number of similar experiences abroad (especially in France and Germany) and from the need to provide a new instrument against the challenges posed by the youth crime.

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2 See *Orlandi* 2002, p. 2.

3 *Coronas* 2008, p. 15.

4 *Mannozzi* 2004, p. 23; *Ubertis* 2005.

5 See *Orlandi* 2002, p. 2.

6 *Ciuffo/Mastropasqua* 2007; see also the report *Mastropasqua/Buccellato* 2012.

In the juvenile field, the legislator[7] provided some normative instruments to overcome the obstacle represented by the obligation to pursue criminal proceedings. The current law for juveniles, although it does not regulate victim-offender mediation explicitly, provides legal opportunities for victim-offender mediation based on three different provisions: Art. 9 JCPC, Art. 27 JCPC and Art. 28 JCPC. They open up areas of non-punishment or non-prosecution and the accused juvenile may take advantage of these chances if he or she shows a certain willingness to undergo a re-educative project, such as victim-offender mediation[8]. But it should be emphasized that juvenile victim-offender mediation is not expressly incorporated into the Italian legal system and the decision for a referral to mediation lies within the public prosecutor's and judge's discretion.[9]

The experiences, however, "one might say pioneering, that have developed in the juvenile justice field, have clearly inspired the legal provisions regulating the penal jurisdiction of the justice of the peace,"[10] in adult criminal justice.The law establishing the possibility for the JoP to apply RJ instruments (victim-offender mediation, above all) came into force in 2002 (LD 274/2000).

It recognized the fundamental role of criminal mediation (victim-offender mediation) for favouring the achievement of an agreement between the parties (Par. 4 and 5 of Art. 29 LD 274/2000).

Apart from mediation, we have also to mention "reparation of damage" and "removal of the harmful consequences of the offence" conditions for dropping prosecution or sentence (Art. 35 LD 274/2000).

In 2009 and 2010 the Italian legislator enacted new preventive and repressive laws (so-called *pacchetti sicurezza*: "security/safety packages" of 2008 and 2009) for "aggravated damage" (Art. 635 Par. 2 CC, as modified by Art. 3-bis DL 8/2007) and "insulting a public official" (Art. 341-bis CC). In the first case, they provide that the removal of the harmful outcomes of the offence is the condition for the suspension of sentence (as an alternative to community service: Art. 635 Par. 3 CC); in the second case, that the complete reparation of damages both to the individual person and to the public administration "extinguishes" the offence i. e. the offender shall not be prosecuted for the offence (Par. 3 of Art. 341-bis CC).

Art. 34 LD 274/2000 has a marginal role ("offences not punishable because they are irrelevant"). Art. 27 JCPC, that is its equivalent in the juvenile justice system, is constantly promoted for the victim-offender mediation and the

7 Presidential Decree of 22 September 1988, No 448, "Juvenile Code of Criminal Procedure": JCPC.

8 See *Orlandi* 2002, p. 2, *Coronas* 2008, p. 94 and *Picotti/Mattevi/Ciappi* 2008.

9 *Coronas* 2008, p. 15; see the report by *Buccellato* 2012.

10 *Orlandi* 2002, p. 3.

reparative interventions only for the already mentioned lack of more specific normative instruments.[11]

With regard to restorative justice, while serving sentences or the sanctions that could be qualified as "restorative", it is possible to include measures to combat the damaging effects of short-term prison sentences and the crisis of the prison sentence and community service.

1.3 Contextual factors and aims of the reforms

As already described, victim-offender mediation and more generally restorative justice interventions have only fragmentarily and progressively been recognized by the Law, without a systematic planning of reform.[12]

In the juvenile justice system, thanks to the sensibility of system practitioners and a more flexible approach to criminal proceedings that favours the minor's educational demands over legality, there has been more widespread experimentation.[13]

In adult criminal justice, LD 274/2000 formally recognizes victim-offender mediation and other restorative measures, but the rules are poorly implemented.

Finally, a new impulse to introduce reparation measures into the common criminal justice system (besides mediation) emerged more recently in specific matters, like criminal offences committed in violation of the Road Traffic Code, insulting a public official and intentional aggravated damage (see *Section 1.2*).

Regardless, these measures currently fail to reflect in entirety the ambitious idea of the legislator expressed in the preparatory acts of LD 274/2000, which sought the establishment of a new model of penal justice that, upon positive evaluation through localized experimentation, can be spread throughout the entire country.

As *Prof. Padovani* (president of the ministerial committee charged with the preparation of the legislative decree) affirmed, the petty crimes (threats, property damage, insults etc), later attributed to the justice of peace jurisdiction, expired due to the huge workload of the judiciary institutions. For this reason the

11 *Patanè* 2012, p. 31.

12 *Mannozzi* 2004, p. 26.

13 For minors that have committed a crime, a need is put forward, not of "re-education", as for all of those subjected to criminal sanctions, but of "education" of values, addressing the developing personality. Art. 31 of the Constitution describes the State's task of "protecting maternity, infancy and youth, by favoring the necessary institutes which support this aim." Protecting juveniles means "the recovery of juveniles by society in such a way that, once mature, the subject can consciously make choices which respect penal rules" (*Larizza* 2004, p. 87). See *Picotti/Mattevi/Ciappi* 2008.

expectations of the people damaged by the offences remained let down, causing frustration, with the risk of an exponential growth of the conflict.[14]

The reform of 2000 aimed to guarantee effective protection of the victim against these offences, also through conciliation, victim-offender mediation and damage reparation. The mentioned instruments are fundamental for the justice of the peace (according to Art. 2 par. 2 LD 274/2000, conciliation is the primary aim of the JoP). The application of sanctions should almost be understood as a failure of JoP to fulfil his role. In reality, the prison sentence disappeared from the JoP's powers, because the legislative provisions replaced it with the fine, which is effective (cannot be suspended), while the other "soft" sanctions, such as house arrest and community service, are not really relevant, because they are applied only in a few cases in practice.

1.4 Influence of international standards

In Italy it is not possible to assert that RJ measures were introduced in order to harmonise domestic law to international standards and recommendations.

The current law for juveniles (JCPC) responds to a unique fundamental reasoning: faced with the need for the social recovery of juveniles, the achievement of the punitive pretext can be withdrawn. This model is extremely "attentive to the needs of minors" more than the "needs of the protection of the community"[15] and was outlined in the Beijing Standard Minimum Rules ("The Beijing Rules") for the Administration of Juvenile Justice, passed by the General Assembly of the United Nations with Resolution 40/33 of 29 November 1985.[16] Regarding the JoP System for adults, while the law expressly recognizes victim-offender mediation, no explicit reference to the international standards can be found in the parliamentary reports and acts.

Nevertheless, it is difficult to exclude any influence of the Council of Europe's Recommendation on Mediation in Penal Matters, No. R (1999) 19 on the Italian Reform of 2000 due to their temporal proximity.

In any case, the legislator took into account the Council of Europe recommendations about the efficiency of criminal justice.[17]

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14 *Padovani* 2001.

15 *Larizza* 2005, p. 104.

16 See Art. 11.1 (of the "The Beijing Rules"): "Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority."

17 See Recommendation No. R (87) 18, concerning the simplification of criminal justice, and Recommendation No. R (95) 12, on the management of criminal justice. See *Ciavola* 2010, p. 9.

After the adoption of the Framework Decision 2001/220/JHA of 15 March 2001 "on the standing of victims in criminal proceedings",[18] Italy did not adopt other legislative measures.

The international standards are reflected by the guidelines for the practice of mediation in criminal matters with juveniles drafted in 2008 by the Juvenile Justice Department.[19]

The European legal sources and particularly the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 "on certain aspects of mediation in civil and commercial matters" had a direct influence on the Legislative Decree No. 28/2010. It introduced mandatory preventive victim-offender mediation in certain civil conflicts (rent agreements, medical liability, property rights, etc.).

But the Italian Constitutional Court, in its decision issued on 24 October 2012, declared the illegitimacy of Legislative Decree No. 28/2010 implementing the "Mandatory Mediation" procedure for the resolution of certain disputes in civil matters (article 5.1). After this decision – which was grounded on the lack of provisions by the Delegation Law No. 69/2009, which did not explicitly refer to the Mandatory Mediation procedure – parties of a dispute of any kind are no longer subject to the preliminary mediation attempt and can therefore access the justice immediately regardless of the nature of their dispute. Anyway, these parties are still entitled to apply for the non-mandatory mediation procedure.

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

In Italy the main areas of application of restorative justice are concerned with two different jurisdictions: the juvenile criminal justice system and within the adults' field, the "justice of the peace". Nevertheless, other restorative measures are foreseen for adults.

2.1 Pre-court level

2.1.1 Adult criminal justice

In the adults' criminal justice system, the first possibility of restorative justice interventions is attributed to the police. The procedure is completely informal and it precedes the initiation of a criminal proceeding. Art. 1 of the RD Law

18 According to Par. 1 of Art. 10 of the Framework Decision: "1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure."

19 See *Mastropasqua* 2010, p. 154.

No. 773/1931 provides that the police guarantee the security of the citizens. The same authority provides for the "alternative resolution of private conflicts", "upon the request of the parties".[20] The police have discretionary power to promote conciliation when there are conflicts between private parties. When a crime has been committed, it is necessary to distinguish between complainants' and non-complainants' crimes. In the first case, conciliation can avoid the filing of a complaint or lead to its withdrawal (ex Art. 152 CC). In the second case, a positive solution through conciliation does not automatically interrupt the proceeding, with the exception of reparatory behaviour according to Art. 35 LD 274/2000[21] and – after the recent reform of 2009 – according to Art. 341-bis par. 3 CC for the single offence punished by this Law. In Italy, there are no other forms of reparative justice for adults at the pre-court level. The aforementioned Art. 35 LD 274/2000 and Art. 341-bis par. 3 CC represent the only exceptions (therefore normally applied at Court Level (see infra)).

2.1.2 Juvenile justice

In the juvenile criminal justice system, there is no explicit legislation regulating victim-offender mediation or restorative justice, but there are provisions allowing for relevant opportunities or gateways to implement these practices.

The Juvenile Code of Criminal Procedure includes two norms currently used by judges and public prosecutors to apply victim-offender mediation and restorative justice at the pre-court level: Art. 9 (personality assessment) and Art. 27 (irrelevancy of the act).

According to Art. 1 JCPC "In the proceedings of juveniles the provisions of the present decree and, for what is not specified there, the Code of Criminal Procedure can be observed. These provisions are applied appropriately to the personalities and educative needs of juveniles."

Juvenile procedures address the assessment of the juvenile's developing personality as well as the act of crime, and the collection of useful data with the aim of creating a real obligation for the prosecutor and the judge: the juvenile process is described as a "trial of the act and of the personality".[22]

Art. 9 JCPC requires the acquisition of an evaluative overview of the personal, family and social conditions and the resources of the juvenile. The investigation can even be conducted informally with experts and people in contact with the juvenile (e.g. the social services).[23]

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20 See *Mannozzi* 2004, p. 21.

21 *Galantini* 2002, p. 217.

22 *Forza* 2001, p. 187.

23 See *Picotti/Mattevi/Ciappi* 2008.

Juvenile prosecutors and judges must seek to apply the provisions that are best adapted to the "social recovery" of juveniles and that are consistent with the educative goal. They are required "to not interrupt ongoing educational processes, that is, to not damage the educational and personality needs of the offender."[24]

During the pre-trial stage, the judge, the prosecutor or the social services may refer the case to the victim-offender mediation centre, too.[25]

The application of this measure is discretionary and an admission of guilt is not always required.

In principle there is no restriction regarding the type of offences that can be referred to mediation. Any type of criminal offence – even serious ones – should be eligible if the mediation process would be beneficial for the offender and the victim agrees to the procedure.[26]

In these instances, mediation itself is an instrument that helps to assess the personality of the juvenile and the development of the person after the act: it constitutes a very important instrument for assessing the offender's capacity to enter into relations with others and to critically reconsider their behaviour.

At the same time, mediation in penal matters is used by the judge as an instrument for evaluating the damage caused by the crime and the perception of the criminal act from the point of view of the victim. Therefore, it is an important component, in order to recognize the possible "irrelevance of the act" (Art. 27 JCPC).

It is fundamental that the juvenile leaves the criminal justice circuit as early as possible. For this reason, a legal instrument is provided by Art. 27 JCPC, a particular means of diverting young people away from the criminal justice system, which requires three conditions simultaneously: the lack of severity of the crime, the occasional nature of the behaviour, and the educative aim.[27] During the preliminary investigation stage, a prosecutor can ask the judge to divert an "irrelevant" case from the criminal court process.

The crime committed must be of little seriousness[28] and must occur in a way ascribed to the "natural facility of youth, who do not adequately reflect on the consequences of their behaviour",[29] but the type of the crime is not decisively important.

The offender and the victim have a right to be heard and the judge must consider the attitude of the offender and the way in which the victim experiences

24 *Bouchard* 1995, p. 140.

25 *Mastropasqua* 2012, p. 35.

26 *Coronas* 2008, p. 15.

27 *Picotti/Mattevi/Ciappi* 2008, p. 195.

28 *Ricciotti* 2007, p. 61.

29 *Giambruno* 2003, p. 116.

the criminal offence. He must take into account the outcome of the victim-offender mediation process: the act can be rendered "irrelevant" via the material and/or moral compensation of the victim.[30]

2.2 Court level

2.2.1 Adult criminal justice

With regard to adults criminal justice, Art. 555 CPC – introduced by the Law No. 479/1999 – provides that the monocratic judge has the duty to "*verify whether the complainant is disposed to withdraw the complaint and whether the defendant will accept such withdrawal*". If successful, a judgment establishing that there are no conditions to proceed ("*sentenza di non doversi procedere*") will be passed.

The rule is not entirely clear and it does not introduce actual victim-offender mediation, because the judge himself seeks to achieve the conciliation of the parties, and not an impartial mediator or other third party. For this reason an active mediatory function of the judge should be excluded.

The law does not exclude the possibility of using statements made during unsuccessful conciliation in later proceedings.[31]

The legal provisions regulating the penal jurisdiction of the justice of the peace are very important for restorative justice. At the hearing, this judge should try to reconcile the victim and the offender (Art. 29 LD 274/2000). He deals with petty offences against the person and against property, such as slander, assault and battery, minor theft or burglaries, but he is competent to hear the cases concerning public property and interests, such as offences against public decency, too. For this latter category, it is unthinkable that conciliation could resolve the conflict.[32] On the contrary, for offences against the person or property, prosecuted following a complaint, the hearing can be postponed for a period not exceeding two months and the judge may also refer the case to any victim-offender mediation services ("public or private centres and structures") existing in the area if that appears to be purposeful.[33]

This referral is not mandatory – because the judge can carry out "conciliation" between the parties on his/her own – and an admission of guilt is not required.

30 See *Ciavola* 2010, p. 294; *Mannozzi* 2003, p. 264.

31 See *Ubertis* 2005.

32 *Orlandi* 2002, p. 3.

33 *Patanè* 2001, p. 360; *Coronas* 2008, p. 16.

The role of the victim is emphasised: if mediation is successful he or she normally withdraws the complaint; otherwise the judge declares the opening of the trial. Regardless, all statements made by the parties during the course of the mediation are confidential and cannot be considered as evidence or used at any subsequent stage of the proceedings (Para. 4 of Art. 29 LD 274/2000).

There are no other rules regarding this important and delicate stage of the proceedings by the justice of the peace.

Another question concerns how to close the proceeding when the victim does not want to dismiss the complaint. It is necessary to remember that Art. 35 LD 274/2000 offers another important instrument of reparative justice.[34] The justice of the peace can adopt a judgment establishing that the criminal offence is extinguished, when the defendant demonstrates that he has repaired the damage caused by the offence and eliminated its dangerous or harmful consequences. Such reparation and compensation have to be sufficient so as to satisfy the demand for prevention and reprobation (retribution).

Normally, such reparative action has to have been realized before the proceedings. In order to achieve this aim, the justice of the peace can postpone the procedure for a period not exceeding three months if the defendant was not able to do it earlier.

The JoP has always to listen to the victim. In the presence of the elements required by the Law, however, potential opposition on behalf of the offender does not exclude the criminal offence from being "extinct" i. e. the dropping of charges. The reparatory behavior of the defendant must be voluntary, but an admission of responsibility is not required.

The JoP has very wide discretionary powers. If the reparatory behaviour is not considered sufficient to render the criminal offence "extinct" according to Art. 35, it can be taken into consideration as a mitigating circumstance in sentencing.

As mentioned above (*Section 1.2*) the reforms of 2009 and 2010 regarding "aggravated damage" and "insulting a public official", and the reform on corporate liability (Law No. 231/2001) have increased the importance of the reparation of damages. According to Art. 62 CC, the judge (including the JoP), can mitigate the sentence by up to 1/3 if the defendant, prior to judgment, has repaired the damage caused by the offence.

The JoP can also issue community service orders.[35] This sanction is applied at the request of the offender (the participation of the offender is voluntary, in accordance with Art. 4 of the European Convention on Human Rights) and it is an alternative to "house arrest" (domestic detention). It entails the delivery of unpaid work to the benefit of the local community for state, regional and

34 See *Flora* 2002; *Garuti* 2003.

35 See *Panizzo* 2005.

provincial administrative bodies, as well as local authorities or voluntary organizations. Community service shall be performed within a period of 10 days up to six months. One day of community service is equivalent to 2 hours of work and normally there is a limit of 6 hours per week.

This sanction has found a poor implementation, for many reasons. As we have already seen, the work that the offender has to carry out is not linked to the nature of the crime committed or directly useful for the community that has suffered from the offence. Secondly, performing such work is more intrusive and severe for the offender than a mere monetary sanction (or in exceptional cases "house arrest"), which could be applied by the Justice of the Peace.

Law No. 94/2009 and Law No. 120/2010 have increased the relevance of community service as an alternative to the penal fine and house arrest. The judge can apply it in cases of aggravated damage (Art. 635 Par. 2 CC), as a condition for the suspension of sentence, as an alternative for the removal of the harmful outcomes of the offence (Art. 635 Par. 3 CC); and in cases of driving under the influence of alcohol or drug (Art. 186 and 187 of the Italian "Road Traffic Code"), if the driver has not caused an accident on the road. In the latter case, community service should be carried out in the field of safety and road traffic education.

The reforms also allow the criminal judge to order community service when the offender implicitly consents ("not opposition"); and the proper fulfilment of the unpaid activity not only replaces house arrest or a fine, but also renders the offence "extinct".

2.2.2 Juvenile justice

The Juvenile Code of Criminal Procedure includes two provisions currently used by judges and public prosecutors to apply victim-offender mediation at the "court stage" (preliminary hearing, above all): Art. 27 (irrelevance of the act) as already analysed above, and Art. 28 governing the suspension of the proceedings with probation.

According to Art. 28 JCPC, the judge may suspend the proceedings and postpone the sentencing decision.[36] This normative instrument appears in the larger family of probation, but this concept differs substantially from its application in other countries: in this system, probation precedes the final sentence.

It is doubtful whether the consent of the juvenile is necessary for the suspension.[37] Regardless, its imposition presupposes the criminal responsibility (if not definitively declared) of the offender.[38]

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36 See *Cesari* 2009; *Patanè* 2012, p. 30.

37 See *Bouchard* 1995, p. 153; *Ruggieri* 1998, p. 198; *Di Paolo* 1992, p. 2,866.

During probation, the juvenile offender is placed under the 'supervision' of the juvenile services and he or she will carry out the activities agreed upon with them for his/her rehabilitation. These activities may involve either educational programmes or voluntary work as well as activities directed towards dealing with consequences of the crime through repairing and restoring the relationship with the victim.

Victim-offender mediation can be included as a part of this project. The judge can "refer the case to the victim-offender mediation centres within the probation period, with the aim of 'conciliation', 'reparation' or 'mediation' if it has been stated in the 'supervision project' devised by the juvenile social workers".[39]

Probation can in theory be applied for every crime, including those of greater seriousness: in fact, the seriousness of the crime cannot be taken as excluding entirely the possibility that the juvenile had an exceptional moment of anomalous personal development.[40] The length of probation is established in court, but the period shall not exceed three years for serious crimes (punishable by imprisonment for a term exceeding twelve years) or one year in other cases.

At the end of the probation period, the judge must take into account the behaviour of the juvenile and the evolution of his/her personality, and can subsequently dismiss the case.[41] Otherwise, the trial continues all the way to sentencing.

2.3 Restorative Justice elements while serving sentences

The Italian legal system doesn't provide an additional specific set of rules for juvenile offenders subject to sanctions.[42]

Many provisions shall be applied not only to adult offenders but also to juvenile offenders: the juvenile's penitentiary system is not autonomous. It is important, nevertheless, to say that many measures provided for adults are applied to juveniles with greater breadth.

With regard to the execution of prison sentences, an opportunity to promote mediation practices is offered by Law No. 354 of 26th July 1975, partially amended by the Law No. 663 of 10th October 1986. It provides for the guilty party to be remitted to the social services (a probation measure), but

38 *Cesari* 2009, pp. 347-348.

39 *Coronas* 2008, p. 15.

40 See Constitutional Court, 27 September 1990, no. 412. *Giurisprudenza Costituzionale*, 1990, p. 2,505.

41 See *Coronas* 2008, p. 15.

42 *Picotti/Mattevi/Ciappi* 2008, p. 198.

subordinates the availability of the measure to the condition that he/she should "take steps so far as possible to benefit the victim of his crime" (Art. 47 Par. 7).[43]

The "surveillance judges" apply this measure. Through this disposition, victim-offender mediation can also be applied after a definitive sentence, even though in this case a fundamental element of restorative justice is missing: the voluntary participation of the offender.

The succesfully fulfilling the probation period extinguishes the prison sentence.[44]

3. Organisational structures, restorative procedures and delivery

In Italy, there are no official statistical data on adult mediation and juvenile mediation, except for limited topics and only at the juvenile justice level.[45] The research group developed a questionnaire with 20 questions structured as follow:

- Part I – Organizational information
- Part II – Mediation process
- Part III – Results of the mediation process.

The questionnaire was sent to 20 mediation centers in Italy and, in particular, to: Trento-Bolzano, Venezia, Torino, Sassari, Salerno, Palermo, Napoli, Milano, Latina, Genova, Foggia, Firenze, Catanzaro, Catania, Caltanissetta, Cagliari, Brescia, Bari, Ancona, Don Calabria comunità San Benedetto Verona.[46]

The questions were formulated on the basis of the project aims. The project seeks to investigate restorative justice programs not only as sanctions or court directives (either standalone or supplementary), but also as forms of diversion, elements of offender rehabilitation programs during the service of a sentence (either as an element of a community sanction or during imprisonment), as a

43 *Orlandi* 2002, p. 2

44 See *Mannozzi* 2004, p. 27.

45 See, for example, the statistical analysis on Art. 28 D.P.R. 448/88 (probation order), 2nd November 2011 (year 2010), Dipartimento di Giustizia Minorile, in: http://www.giustizia minorile.it/statistica/analisi_statistiche/sospensione_processo/Messa_Alla_Prova_2010.pdf. The report shows a progressive increase in the use of this measure, that includes social work and mediation. The use of the measure has grown from 788 cases (in 1992) to 2,979 cases (in 2010). See *Mastropasqua/Buccellato* 2012; *Mastropasqua* 2012, p. 33.

46 *Mastropasqua* 2012, p. 33, who specifies 20 centres that are working on the Juvenile Justice System: Trento, Bolzano, Torino, Sassari, Salerno, Palermo, Napoli, Reggio Calabria, Milano, Latina, Genova, Foggia, Firenze, Catanzaro, Catania, Caltanissetta, Cagliari, Brescia, Bari, Ancona.

condition for early release from prison or as an element of aftercare upon completing sentence.

In this context, the procedure we envisage begins upon apprehension of a criminal suspect by the authorities and ends at the latest upon release from custody or supervision and the completion of aftercare services.

The questions were formulated taking into consideration:

- Overview of the restorative process involved once it has been ordered (the procedure of the intervention itself; the outcome to be achieved, for example a form of contract, written agreement etc.);
- The participants/stakeholders in RJ processes/interventions and how is participation secured (victims, offenders, family members, mediators/ facilitators, police officers, social workers, legal representation etc.);
- The central coordinating and funding agencies/ministries/bodies and the delivery/execution of restorative procedures and interventions organized in terms of inter-agency collaboration and communication strategies;
- Who is responsible and authorized for the actual delivery of restorative measures (conducting mediation/conferences etc.) (public/private/ voluntary sector/organizations)?
- What qualifications are required for persons responsible for mediation and/or other forms of restorative justice? What forms of relevant staff training – both of judicial staff and of mediators/specialist RJ staff – are provided, and who delivers this training?
- Who bears the costs arising from the restorative measure (the State? The offender? Others?)?
- Are there statistical data on the use of RJ interventions, and the (possible) effects of RJ on court sentencing/diversion?
- Are there research evaluations/studies on RJ programs of which key findings could be presented? (studies on the implementation of RJ measures; comparative recidivism analyses; victim participation levels; satisfaction levels among stakeholders; stakeholders' perceptions of the procedure and the intervention; (economic) cost-benefit analyses; staffing and funding levels etc.);
- When is a restorative intervention/procedure deemed successful? What are the indicators for a successful restorative intervention?
- What have been the positive experiences with RJ, and which factors can be identified as being central to these positive experiences (including of course political, economic, social, cultural and legal context factors)?
- What are problems that the RJ programs have faced, both in theory and in practical delivery? (net-widening; proportionality issues; undermining of procedural and human rights safeguards; infrastructural issues due to lack of funding; Why is there a lack of funding? Are there bureaucratic

obstacles? Lack of political will? Conflicts in professional cultures? Could any factors be identified that are central to these problems?).

Only 50% of the centers sent feedback or answered all the questions.[47] With reference to juvenile justice, the report considers also the first national report on juvenile justice mediation.[48]

3.1 Victim-offender mediation

Taking into account the legal basis already analysed (see *Section 2* above), in practice, the social services can only refer cases to mediation in the juvenile justice system. This possibility is based on an agreement between the Centre and the Italian Juvenile Justice Department.

In the juvenile justice system there is no restriction regarding the kind of offences that can be referred to mediation, if the judge, the prosecutor or the social services think that victim-offender mediation could be useful.

During the period 2008-2010, mediation has been used for the following criminal offences: personal injury (23%), insult/defamation (12%), threat (11%), theft (11%), robbery (8%), damage (6%) and extortion (2%).[49]

At the restorative process level, both for adults and juveniles, the procedure is the same, except for the fact that, in the juvenile justice system, the social services also participate in the first phase.

The mediator gets in touch with both parties first by letter and then by phone, inviting them separately to an initial individual meeting. If both parties agree to mediation, the mediator arranges a joint meeting.

The mediator contacts the victim (usually by phone) to clarify some aspects of the process, to answer questions and address doubts, and to verify his/her willingness to participate in the first individual meeting. If the victim is willing to take part in this first meeting, the mediators decide when and where they will meet.

During the first meeting, the mediator explains the meaning and the nature of the mediation process: a confidential and consensual space for effective listening and communication. The mediator listens carefully to the victim's expectations and needs and explains his/her role, basically helping to talk about what happened and working out a possible restitution agreement.

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47 Among these, in particular: Bari, Brescia, Cagliari, Napoli, Don Calabria (Verona/ Veneto), Palermo, Ancona (Marche), Sassari, Trentino Alto Adige, Catanzaro and Torino.

48 *Mastropasqua/Buccellato* 2012.

49 *Buccellato* 2012, p. 59.

If the victim decides to join the mediation process, the mediators invite the offender to an individual talk; otherwise, they inform him about the impossibility to proceed with mediation.

Gaining the trust of the victim and the offender and collecting valuable information through the separate meetings are essential steps to the quality of the later joint meeting.

After meeting them both separately, the mediator arranges a face-to-face meeting. If one or both parties does/do not want to meet the/each other but both have an interest in discussing a restitution agreement, the mediator can indirectly express one's feelings, needs, wishes to the other to establish communication, even if indirect, and to check if an agreement is possible.

If the parties agree with mediation, the mediator should strive to detect whether either of the parties has adopted a instrumental and/or opportunistic stance towards mediation – i. e. whether the offender is attracting a lighter "penalty" than he would otherwise incur in the normal criminal procedure, and whether the victim is only keen to achieve more substantial pecuniary compensation. Starting from the assumption that there is no such thing as full, unconditional consent, the mediator should try and limit the risks related to partiality and remedy any inequalities between the parties.

If the face-to-face meeting takes place, the mediator sets the basic rules for communication (for example: do not interrupt each other). Each party starts to tell his/her own story, sharing the feelings and discussing losses. The mediator facilitates the expression of feelings, moods and disappointments, and helps the parties find the right words to let the other part understand his or her point of view.

At the preliminary meeting, only in the information phase, lawyers and parents (when the party is a minor) may be present. Only the victim and the offender participate at the "mediation meeting". In the juvenile system, at the end of the meeting (in the "closing phase"), parents and relatives may participate (i. e. be present) and lawyers, in the adult system, may receive the results of mediation.

Mediation is deemed successful if the mediator appreciates that the parties:

1. have freely expressed their feelings;
2. have achieved mutual recognition by eventually modifying the views they held of one another;
3. have changed their communication patterns; and
4. if the offender has decided to provide symbolic and/or material reparation.[50]

50 On the juvenile justice level, the Juvenile Justice Department of the Ministry of Justice has developed guidelines (see *Linee di indirizzo e di coordinamento in materia di mediazione penale minorile*, 30.4.2008). The guidelines consider the mediation positive when the parties have reached a satisfactory agreement, also through symbolic

The parties can decide if they want to sign a written agreement or whether they would prefer an informal agreement. Usually an informal agreement is the result of a mediation process in which parties have developed mutual trust and respect. This voluntary agreement does not have legal effects or consequences, but represents a way of taking charge of the situation.

Through the agreement, victim and offender become responsible for their decision: there is no external third party who decides on their behalf – instead, they are the main characters of their own conflict.

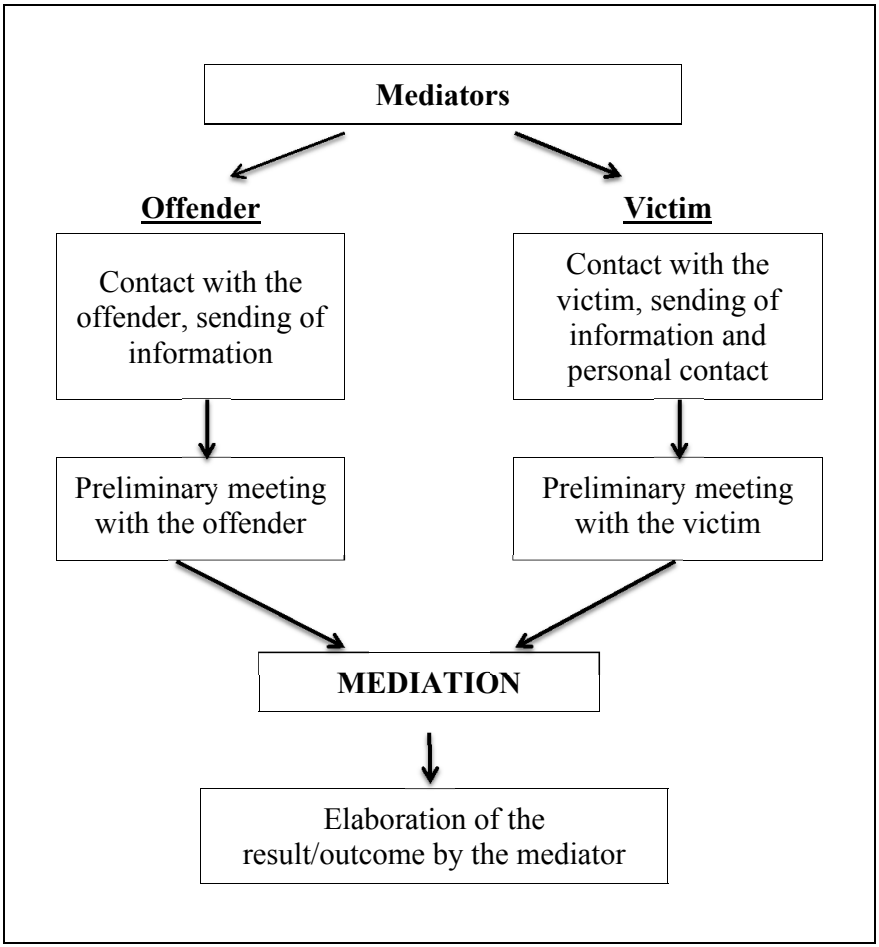
If a restitution agreement is arranged, it has to be perceived as fair by both of them. Mediators do not impose a restitution settlement.

A very short VOM summary, without any reference to the content of the meetings, is submitted to the judge and social services (in the juvenile justice system). This is one of the elements that the judge can take into consideration when deciding how to proceed, but there are the legislative limits explained above (in the juvenile justice system, see *Section 2* above).

For the juvenile justice system, the average duration of mediation from start to finish is two months, and there is no maximum time limit, but usually it has a corresponding term (closed investigations or preliminary hearing). This term may be subject to extension. For adults, the statutory period is 60 days (or up to the hearing). This term may be subject to extension, if it is not sufficient.

reparation. Mediation has "failed" when there is no agreement or "understanding" between the parties. The mediation is "not done" or "unrealized" when the parties have "resolved" the conflict, already in a preliminary phase, or they do not recognize the existence of a conflict. Mediation is "not feasible" when the consent of one or all parties is missing or it is not possible to find the parties or when the mediator considers it appropriate, for the specific case, not to proceed.

Figure 1: The mediation process



Regarding organizational structures (coordination and funding, staff and training) in most cases the centres/offices arise from an agreement between regions, provinces, municipalities, juvenile courts, prosecutors' offices, regional centers for juvenile justice and private/voluntary organizations. Funding agencies are the local entities (region, province and municipality), the centers for juvenile justice and private entities or associations.

Inter-agency collaborative partnerships are in place between centers in the same region or of different regions that have elaborated a partnership protocol.

There is no institutional coordination at the adult justice level. In juvenile justice, the Ministry of Justice plays a coordinating role, mainly through the instrument of "monitoring".[51] The first results from said "monitoring" are included in the reportmentioned above.[52]

Mediation is conducted by mediators whose required qualifications follow an interdisciplinary approach. They can be sociologists, professional educators, social workers, lawyers, teachers and university lecturers, independent professionals. The background of the mediators shows a great deal of variation (members of the social assistance service, psychologists, educators, graduates in various disciplines).

Mediators are only rarely employees of the public administration. Often they are temporary workers (one-year contract with the possibility of an extension), depending on funds available, or volunteers.[53]

There are specific training courses for mediators (i. e. DIKE Association of Milan) but, in most cases, the mediators participate in national conferences or meetings, some of which are organized by the Department of Justice, or at internal meetings organized by the individual centers (depending on the funds available).[54] There are cases in which the training activity is left to the responsibility of the mediators. The training models are: Bonafé Schmitt (Glisy of Lion), Jacqueline Morineau (Centre de Formation à la Médiation di Paris) or "Rogers approach".

The coordinators of the mediation centers can belong to several organizations. In some cases he/she is the Head of the Social Service for Minors of the Department of Juvenile Justice; in other cases there is an internal coordinator (one of the mediators) and an external coordinator (a member of the entities which have signed the protocol or the memorandum of partnership), or an office responsible of the region/province/local public administration.

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51 See *Linee di indirizzo e di coordinamento in materia di mediazione penale minorile*, supra.

52 *Mastropasqua/Buccellato* 2012.

53 See for example the TAA centre. This centre, part of the Autonomous Region Trentino Alto Adige, Department IV – Judicial Activity and Justice of the Peace, was founded in 2003 with the purpose of supporting the activities of Justices of the Peace. In 2005 the centre widened its field of activity to include mediation in juvenile justice cases. Nowadays, the centre staff comprises three persons, two Italian speaking mediators and one German speaking mediator. Mediators have attended a training course and regularly improve their competences through specialization programmes. The centre also works with schools and community services on promoting peaceful conflict resolution and mediation in social contexts such as family, neighbourhood and district, collaborating with the local Police Department. See also *Mastropasqua* 2012, p. 35.

54 *Mastropasqua* 2012, p. 36.

The costs of the "mediation process" (restorative procedures) are covered by the public administrations and the private entities which have signed the agreement/protocol. Private parties do not cover the costs beyond those arising from their own legal assistance.

3.2 Group conferencing

In Italy the instrument "Group conferencing" is not provided by the law and does not exist in practice.

3.3 Reparation, restitution orders etc.

Art. 35 Law No. 274/2000 (see *Section 1.2* above) provides that the making of reparation prior to being convicted by the court shall effect that the case is dropped. The JoP is competent to make such decisions when the defendant demonstrates that he/she has repaired the damage caused by the offence and eliminated its dangerous or harmful consequences. The reparation and compensation have to be able to satisfy the demand of prevention and retribution.[55]

The JoP can also order community service (see Section *2.2.1* above). Laws No. 94/2009 and No. 120/2010 regarding "aggravated damage" in particular circumstances like in the context of sport competitions (Art. 635 Par. 2 n. 5 bis CC), and driving under the influence of alcohol or drugs (Art. 186 and 187 of the Road Traffic Code), introduced community service. In the first case, the suspension of sentences depends on the elimination of the consequences or on community service being performed. In the second case, community service is an alternative to house arrest and fines, and when performed fully and satisfactorily, renders the offence "extinct" i. e. the offender is not held reposonsible for the offence the case is closed (new Par. 9-bis of Art. 186 and new Par. 8-bis of Art. 187 of the Road Traffic Code).

3.4 Restorative measures in prison

As already stated above, the Law does not provide an additional set of rules for juvenile offenders subject to sanctions.[56] With regard to the execution of prison sentences, an opportunity to promote mediation practices is offered by Law No. 354 of 26th July 1975, partially amended by Law No. 663 of 10th October 1986.[57] Through this disposition, victim-offender mediation can be applied after

55 Some statistics about the application of Art. 34 and 35 are available. In the region TAA, since 2002 to 2006, respectively.

56 *Picotti/Mattevi/Ciappi* 2008, p. 198.

57 *Orlandi* 2002, p. 2.

a definitive sentence, even though in this case a fundamental element of restorative justice is missing: the voluntary participation of the offender. When the probationary period has been successfully complted the prison sentence is not enforced (is "extinguished").[58] This type of mediation normally operates in prisons for juveniles.

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

At the national level, there are no official statistical data on the use of restorative justice measures in the adult system. Thanks to studies conducted by single researchers, it is only possible to know that, regarding Art. 34 and Art. 35 (system of the JoP), the application of Art. 34 accounts for no more than 1% of all JoP decisions (in 2004). The application of Art. 35 accounted for just under 5% (in 2009).[59]

Regarding the juvenile justice system, the questionnaires show that the centres keep internal statistics on who "activates" the mediation (who starts the process/proceeding of mediation). Data for the centre in Torino are given in *Table 1* below. From the data presented, it becomes clear that the public prosecutor in practice inititiates the bulk of mediations. Data from Brescia show a significantly lower share of prosecutor-initiated mediations (34%) in 2011.

Table 1: Use of mediation at the centre in Torino according to who initiates mediation, 2008-2011

	Public prosecutor	Judge of first hearing	Social services for juvenile	Local/regional social services
2008	135	1	13	4
2009	136	8	18	1
2010	139	11	15	2
2011	98	8	15	2
Total	508	28	61	9

58 See *Mannozzi* 2004, p. 27.

59 *Mattevi* 2010, pp. 80-81. See supra, note 52.

The center of Cagliari claims to do statistics, but has not published the data. It is possible to find some data and information (until 2010) in the first report on juvenile justice system.[60] In particular, regarding the activation of mediation,[61] it is possible to distinguish between who activated the mediation and the legal instrument used. It is clear that the use of mediation during the execution of the sentence plays a marginal role in practice.

Table 2: Mediation in juvenile cases in Cagliari based on initiating authority and legal instrument used, 2008 to 2010

	Art. 9 JCPC	Art. 27 JCPC	Art. 28 JCPC	Art. 47 Law no. 354/1975	Others	Total
2008						
Public prosecutor	437	0	0	0	34	471
Judge	15	1	37	0	112	165
Social services	19	0	172	3	13	207
Others	0	0	1	0	38	39
Total	**471**	**1**	**210**	**3**	**197**	**882**
2009						
Public prosecutor	304	0	0	0	5	309
Judge	6	3	45	0	100	154
Social services	3	0	100	0	34	137
Others	2	0	1	0	23	26
Total	**315**	**3**	**146**	**0**	**162**	**626**
2010						
Public prosecutor	70	0	2	0	14	86
Judge	29	0	23	0	39	91
Social services	1	2	56	0	9	68
Others	0	0	0	0	28	28
Total	**100**	**2**	**81**	**0**	**90**	**273**

60 *Mastropasqua/Buccellato* 2012.

61 *Buccellato* 2012, p. 67.

4.2 Findings from implementation research and evaluation

Regarding the adult justice system, at the national level there are no statistical data on the use of RJ interventions, and the (possible) effects of RJ on court sentencing/diversion, except for the limited information mentioned above. Nor are there research evaluations on RJ programmes or economic cost-benefit analyses.

For the juvenile justice system, it is possible to present some data and information about mediation from report mentioned above. Since 2012, the system for the collection of data has been reformed, but the information has not yet been made available.[62]

As we have said before, the mediation is "successful" if the mediators appreciate that the parties: have freely expressed their feelings; have achieved mutual recognition by eventually modifying the views they held of one another; have changed their communication patterns; and if the offender has decided to provide symbolic and/or material reparation. Also, the parties can decide whether they want to sign the agreement or if they prefer an informal agreement.

The analysis of the Department shows that: in 18% of cases, mediation resulted in reparation (symbolic and/or material reparation), in particular in 10% of the cases the result of the mediation was positive and in 8% without the consent of the victim.[63]

With regard to juvenile mediation, available only for 50% of the cases due to the low response rate, the results are the following (*Table 3*).[64]

Table 3: Outcome of Mediation in juvenile cases

	2008	2009	2010
Negative	77	71	4
Unclear	3	3	1
Positive with reparation	105	49	26
Positive without reparation	285	201	68

The analysis of the results of the questionnaires does not help to understand what have been the positive experiences with RJ, and which factors can be identified as being central to these positive experiences.

62 *Mastropasqua* 2012, p. 34.

63 *Buccellato* 2012, p. 70.

64 *Buccellato* 2012, p. 74.

In general an important role is played, at the mediation process level, by the mediator and, at the administrative level, by the involvement and the participation of the local administrations.

The questionnaires show that, at the cultural and social levels, mediation is considered as the exclusive result of the meeting/encounter between offender and victim, and not between mediators and standardized indicators.

Staffing and funding levels are determinated in each centre and by different protocols, but without national coordination.

The problems that the RJ programs have faced, both in theory and in practical delivery, are primarily infrastructural due to a lack of funding that in turn also impacts on staff recruitment and training.[65]

The main or central factor that could be identified remains the lack of political will. At the adult justice level, there are no other legal instruments other than those provided for the JoP system. Secondly, in addition to the funding problems, it is possible to identify other factors: the lack of coordination at national level, also on staff training and its continuity, and the lack of a stable system of mediators (temporary workers).

5. Summary and outlook

In Italy two different forms of restorative justice intervention are available. The most important and well-known, victim-offender mediation, is applicable both for adults and minors, but has only been expressly introduced in the *Justice of Peace-System* (Para. 4 and 5 of Art. 29 Legislative Decree 274/2000 entered into force in January 2002: the judge may also refer the case to any victim-offender mediation service – "public or private centres and structures" – existing in the area if that appears to be helpful). This possibility regards a restricted list of petty offences (threats, property damage, insults etc.) for which prison sentences are excluded anyway.

Although *juvenile* victim-offender mediation is not expressly incorporated into the Juvenile Procedural Criminal Code (Presidential Decree of 22nd September 1988, No. 448) and the decision for a referral to mediation lies within the public prosecutor's and judge's discretion, since the early 1990s the concrete possibility of victim-offender mediation has been more and more developed through increasing testings and centres that opened rather spontaneously in northern (Milan, Turin, Trento) and southern (Bari, Catanzaro) Italy, most of them as a result of a shared concern between social workers and certain juvenile justice magistrates, in the search for a proper response to youth crime.

Single provisions like Art. 9, 27 and 28 of Presidential Decree No. 448/1988 allow juvenile judges and public prosecutors to take into account the personal,

65 *Mastropasqua* 2012, p. 33.

familiar and social situation of the minor when making their decisions about the penal liability of the offender, the social relevance of the offence and the civil and penal "measures" to be applied. They therefore open up non-punishment or non-prosecution routes that avoid formal sanctions for juveniles and guarantee a rapid exit from the justice system (when the offence is irrelevant "due to the tenuity of the act" or through the "suspension of the proceedings with probation" – "messa alla prova"). In the criminal Justice system for adults, the more recent tendency has been to increase restorative sanctions (like reparation of damages and community service), which lead to the "extinction" of the offence or of the sentence if correctly applied and executed. These sanctions are not applied frequently in practice, even though Legislative Decree 274/2000 that introduced them had a more ambitious goal.

Art. 35 of LD 274/2000 provides that the offence is "extinguished" (i. e. not prosecuted further) when reparation has been made before judgement is passed on the case. The defendant has to demonstrate that he/she has repaired the damage caused by the offence and put right the dangerous or harmful outcomes it caused. Reparation and compensation have to be such that satisfy the demands of prevention and reprobation (retribution). In the special matter of "administrative" responsibility of legal persons for criminal offences committed by managers or employees (corporate liability ex Legislative Decree No. 231/ 2001), the most serious "interdiction" sanctions (like suspension of activity, exclusion of subvention, prohibition to contract with the public administration, etc.) are not applied if the damages are repaired, the organisational shortcomings that facilitated or led to the offence have been alleviated and all criminal profits have been confiscated (Art. 17). The reforms of 2009 and 2010, also regarding "street offences" like aggravated damage (Art. 635 Par. 2 CC) and insulting a public official (Art. 341-bis CC), provide: in the former case, that the removal of the harmful consequences of the offence is a condition for the suspension of the sentence (in alternative to the community service: Art. 635 Par. 3 CC); in the latter case, that the complete reparation of damages both to the individual person and to the public administration "extinguishes" the offence (Par. 3 of Art. 341-bis CC).

Legislative Decree No. 274/2000 introduced community service as an independent sanction. However, it is basically not applied by the Justice of Peace in practice, and this for some rather important reasons. First, the work that the offender has to carry out for free is not linked to the nature of crime committed or directly useful for the community. Second, the work required is more severe for the offender than a monetary penalty would have been (or house arrest in exceptional cases), which could be applied by the Justice of the Peace. The recent reforms of 2009 and 2010 increased the relevance of community service as an alternative to the penal fine and house arrest. It can be applied by the (common) criminal judge for offences of aggravated damage (Art. 635 Par. 2 CC) as a condition for the suspension of sentence, as an alternative to the

removal of the harmful outcomes of the offence (Art. 635 Par. 3 CC introduced by Law No. 94/2009). In cases of driving under the influence of alcohol and drugs (Art. 186 and 187 of the Italian "Traffic Law Code"), if the driver has not caused an accident on the road, community service is applicable as an alternative to house arrest and fines, and when the work is performed properly and in full, the offence itself is "extinguished" (new par. 9-bis of Art. 186 and new par. 8-bis of Art. 187 of the Traffic Law Code introduced by Law No. 120/2010). In this case, the work should by priority be carried out in the fields of traffic safety and street education. Both reforms allow the criminal judge to order community service with the implicit consent ("non-opposition") of the defendant. An opportunity to promote mediation practices in prisons is offered by Art. 47, Law No. 354 of 26th July 1975, partially amended by Law No. 663 of 10th October 1986. It subordinates the availability of the probation measure to the condition that the guilty party should "take steps so far as possible to benefit the victim of his crime" (Art. 47, para. 7).

The most important juridical hindrance to the successful implementation of restorative justice procedures and interventions in the Italian system is the strict and virtually unconditional "obligation to pursue" criminal proceedings in the face of evidence of the crime and indication of the accused's guilt. The principle of strict legality and official conduct of penal proceedings ("mandatory criminal action": Art. 112 Italian Constitution), has always represented a serious obstacle to the introduction of forms of diversion in Italy. However, the legislator and practitioners have provided more normative instruments to overcome this obstacle. For offences prosecuted only following a complaint of the victim ("*procedibili a querela*") the complainant can also choose to stop the proceedings which causes the offence to be "extinguished" (Art. 120 and 152 CC).

The weight of evidence on victim-offender practices in Italy is to be found in the field of juvenile justice, even though such practices are not expressly recognised in the legislation.

The important reform of the Justices of the Peace (Legislative Decree 274/2000) provided more juridical instruments to implement mediation, reparation and alternative sanctions (like community service).

However, experience shows that organizational and financial difficulties cannot be overcome if there is lack of political will to implement an efficient system of mediation centres and professional practicioners.

For many years the criminal policy in Italy was oriented towards reinforcing the severity of the penal system to ensure the "security of citizens" against the most openly apparent and visible (although not most dangerous) forms of crime, like "street offences" or immigration law infringements.

Therefore, victim-offender mediation and more generally the restorative justice interventions have been recognized by the Law only fragmentarily, and

are applied in practice without a systematic planning of legislative reform and coordinated implementation.[66]

In the juvenile justice system, it is only thanks to the sensibility of the operators of that system and to a more flexible process discipline that favours the minors' educational demands that more widespread experimentation in RJ has been achieved.

In adult criminal justice, Legislative Decree No. 274/2000 recognized victim-offender mediation and other restorative measures (community service and reparation as grounds for "extinguishing" the offence or the sentence), but to date the frequency of their application in practice has been very low.

In the special field of "administrative" liability of legal persons for criminal offences committed by managers or employees (corporate liability ex Legislative Decree No. 231/2001) the reparation of damages can exclude the application of the most serious "interdiction" sanctions in certain circumstances (see above).

Finally, more recently, new restorative impulses have been seen in the common criminal justice system that have seen the introduction of measures beyond mediation for certain categories of offences, like traffic offences (driving under the influence of alcohol or drugs: Art. 186 and 187 of "Traffic Law Code"), insulting a public official (Art. 341-bis Par. 3 CC) and aggravated intentional damage in particular circumstances (Art. 635 Par. 2 and 3 CC).

The need to find new, more efficient and more proportionate solutions to the problem of controlling crime in all of its different manifestations and in a fashion that considers individual dangerousness remains unsolved as of yet.

In conclusion, in Italy restorative practices are not being used to their full potential. At first, the seriousness of organised crime in the south of Italy, above all, hinders the implementation of restorative justice for such crimes, because the offenders are involved in criminal groups and the victims need particular protection. On the other hand, we need new perspectives to overcome the insufficient responses of the traditional criminal justice system to the new requests of justice coming from the citizens.

The former government (Minister of Justice, *Prof. Paola Severino*) presented to the chamber (29th February 2012) the bill No. 5019, assigned to the Justice Committee (19th March 2012), then No. C5019-bis: but it wasn't approved before the conclusion of the legislature. It provided, for adults, the "*Sospensione del procedimento con messa alla prova*" (suspension of the proceedings with a probation order), introducing into the Criminal Procedure Code an instrument similar to that provided for minors (Art. 28 D.P.R. No. 448/1988), but only for criminal offences punishable by fine or imprisonment for no more than four years.

66 *Mastropasqua* 2012, p. 34.

In particular, the bill provided that, in proceedings for criminal offences punishable only by a fine, or by imprisonment (either with or without a fine) not exceeding four years, the judge could, upon request by defendant (until the beginning of the trial), suspend the proceedings and order probation.

The probation order should include community service as well as offender-compliance with different requirements.

In case of a "positive" result/success, the judge may declare the "extinction" of the offence. Otherwise the proceedings continue.

This provision indicates that the politicians are aware of the importance of developing RJ in Italy as a means of achieving a more rational use of interventions on the side of community service. But the different kinds of "prescriptions" that the judge can order, may also improve the making of reparation of damages or the use of other interventions like victim-offender mediation.

The essential question today is whether or not there is the political will to choose a clear direction in favour of putting restorative justice on a more systematic and efficient footing at both the normative and the organizational level. No instructions in this regard could be found in the recent Final Report for Institutional Reform, written by a group of experts (named by the President of the Italian Republic) on 12 April 2013 (s. Ch. V, No. 24, letter f) and g)).

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Latvia

*Ilona Kronberga**

1. Origins, aims and theoretical background of restorative justice

The primary goal of the justice system is to ensure justice itself, to balance rights and duties. Furthermore, the existence of justice is a precondition for a safe society. The justice system does not consist only of the written law – it also includes legal principles and a system of law enforcement agencies,[1] as well as their goals and objectives. The aforementioned components are of such importance that any changes in their content may cause a shift in understanding of the concepts "justice" and "safety". In order to avoid interpretation of the justice concept and to ensure safe surroundings for all members of society, creators and developers of criminal justice policy have to answer a substantial question: "What should the State's reaction to a criminal offence be?"

In general, it is not so complicated to answer this question. If one can assume that, as a result of criminal offence, the balance between one person's (victim) rights and other person's (offender) duties to respect those rights is disturbed, it can be concluded that the goal of justice is to restore fairness (the legal balance). The result of a criminal offence is a conflict between two parties and the State's duty to restore fairness by intervening with the tools provided by the justice system. Only by implementing all aspects of justice – restoring both the legal balance and fairness can people be provided with safety. If this consideration is not duly valued it can lead to a situation in which the offending behaviour is stopped and the offender is identified and convicted, but fairness is

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1 Author's note: for instance, police, prosecutors' offices, courts, probation offices and the prison system.

still not restored, therefore making the described approach only "formal".[2] Restorative justice, on the other hand, includes methods that offer possibilities to restore the fairness for both the victim and the offender.[3] Considering the fact that restorative justice is a separately defined concept, it differs from formal justice in terms of its goals and results. Therefore, it can be inferred that restorative justice tools include such approaches and programmes that result in: the compensation of damages to the victim; the restoration of justice; the application of inclusive interventions; treating the interests of specific persons and wider society respectfully; the reintegration of victim and offender; the fair settlement of legal relations.

1.1 Overview of forms of Restorative Justice

A more detailed description of all restorative justice tools and approaches that are in place in Latvia, as well as the context and legal framework of these tools, will we given below in *Sections 2* and *3*. However, in order to provide an overview of what is available, the following approaches must be highlighted:

- Victim–offender mediation (VOM), referred to in the Law on the State Probation Service as "settlement with intermediary". VOM is carried out by specialists from the State Probation Service of Latvia and this process can be part of criminal proceedings with referrals coming from the police, prosecutors, offenders and courts. Depending on the type of offence, the result of VOM can result in termination of the criminal proceedings or the reached settlement can be considered as a mitigating circumstance in sentencing.
- "Restorative conferencing" is another restorative practice carried out by the State Probation Service specialists with consequences similar to those of VOM – conferencing is used as an approach for reaching settlement between the victim and the offender (minors in most cases). It, too, can result in termination of the criminal proceedings or be considered as a mitigating circumstance in sentencing.
- Community service is a criminal sanction the content, implications and goals of which can be seen as being in accordance with restorative justice thinking. There are differences when applying these measures to underage persons and adults, nonetheless the goals are similar – even though community service is part of the criminal justice system, the

2 Author's note: victim's material damages are not compensated, damage to health is not averted etc.

3 "A systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by crime." See the glossary of the International Juvenile Justice Observatory: http://www.oijj.org/en/docs/glossary?letter=R(accessed: 22.5.2013).

offender remains within the community and is not excluded from his/her social networks of family, work and school.

- Different project-based initiatives which are not yet part of the criminal justice system but which are implemented in accordance with the basic principles of restorative justice, for instance "circles of accountability and support" for the integration of high risk sex-offenders, and victim support circles.

1.2 Reform history, contextual factors and aims of the reforms

Research[4] has shown that "*... a large portion of society is skeptical about the ability of the State to combat crime, to protect people against criminal offences, to prevent new criminal offences, to have a positive impact on the future behaviour of offenders. Furthermore, a lack of confidence in the system is expressed also by those whose professional work is directly aimed at achieving the aims of criminal justice – police officers, prosecutors, judges. Several interviewed process facilitators give an accurate description of problems of criminal justice in Latvia, pointing out that they lack legal instruments that would enable them to be more efficient in achieving the overall aims of criminal justice. By using the legal remedies and instruments provided by legal acts, the system responds in a formal way to criminal offences, however, it provides only a short-term result; it does not focus on "agents of crime", it fails to cure the social disease "crime", it only reacts to its external symptoms, trying to prevent or minimize them.*"[5]

All of the above indicates that a large part of society faces difficulties when it comes to accepting new methods of influencing crime – more support is received by formal and simplified, yet short-term solutions. Taking into account these and other considerations, the Ministry of Justice of the Republic of Latvia elaborated amendments to the Criminal Law.[6] The purpose and aim of criminal punishment was thus clarified, and a "restorative" component was also added.

As a result, at the moment the objectives of punishment are: to protect public safety; to restore justice; to punish the offender for the criminal offence; to re-socialize the punished person.

Nevertheless, restorative justice as a part of the Latvian justice system has not yet been defined – there are only several laws and regulations which provide for the implementation of tools that are in accordance with the goals and

4 *Kronberga et al.* 2010.

5 *Judins* 2010, p. 10.

6 The Criminal Law of the Republic of Latvia. Available in Latvian at: http://likumi.lv/doc.php?id=88966 (accessed: 22.5.2013).

philosophy of this approach. It is those specific tools and methods that allow us to say that there is restorative justice in Latvia and it functions. However, the mere fact that such measures and processes exist does not imply that restorative justice has been systemically elaborated. At the moment the situation in Latvia is as follows – restorative justice tools are available locally as a consequence of individual projects (State and local government institutions) or are carried out by non-governmental organizations on their own initiative.

It is almost impossible to evaluate how common restorative justice methods are and what role they play in practice, unless there was a separate law for all of these methods and the results of the implementation of that separate law were recorded and presented in official, formal statistics. While the amendments of 1 April 2013 to the Criminal Law introduced "restoring fairness" as one aim of criminal punishment, to date there are no clear guidelines on how this new wording of Article 35 of the Criminal Law should be interpreted and implemented in practice. It can be concluded that the legal framework of restorative justice in Latvia is rather diverse: there are laws and regulations[7] *directly providing* for the implementation of restorative justice tools. Others *stipulate* the implementation of specific restorative justice tools. The rest *do not prohibit* implementing restorative justice tools as part of pilot projects.

As the lack of concrete criteria makes it impossible to dissociate and identify all methods of restorative justice, further analysis will be carried out on those methods foreseen in laws and regulations, and the most commonly implemented ones.

1.3 The role of international standards

International standards have been of considerable significance for the development of the legal framework of restorative justice related issues as well as for the development of the legal framework governing the rights and obligations of offenders and victims in general. It must also be taken into account that, for instance, the concepts of victim-offender mediation and community service are of relatively recent history and at the time of establishing the system, most of the international standards were available for consideration.

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)[8] can be mentioned as one of the most important documents both for practitioners and for the further development of

7 The Criminal Law and the Criminal Procedure Law. Available in Latvian at http://likumi.lv/doc.php?id=107820 (accessed: 22.5.2013).

8 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).

the legal framework. In Latvia, the State Probation Service held the first victim-offender mediation meetings in 2005 and the process was organized in accordance with Recommendation No. R (99) 19, as national rules on organizing "settlement with intermediary" (VOM) entered into force only in 2007. As a result, how the State Probation Service organizes and leads "settlement with intermediary"[9] is largely based on that Recommendation, practical experience of intermediaries, and the overall directions of development of the Latvian criminal justice system. When mediation and restorative justice methods were relatively new concepts to practitioners in Latvia, Recommendation No. R (87) 18 of the Committee of Ministers to Member States concerning the simplification of criminal justice[10] was also mentioned[11] as additional justification for the need of mediation within the Latvian legal system.

Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)[12] once more highlighted the importance of mediation within criminal proceedings (penal mediation in the course of criminal proceedings), and by the time the State Probation Service had established its procedure for organizing and leading "settlement with intermediary", the legal framework of "settlement with intermediary" was in compliance with Article 10 of the Framework Decision.

Overall criticism of the implementation of the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) resulted in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.[13] Implementation of the directive will lead to several substantial changes in the criminal justice and victim support systems in Latvia. Within the context of restorative justice services, practitioners have stressed the need to supervise fulfillment of the conditions that are included in settlement agreements – this aspect will be addressed among all the other improvements that derive from the directive.

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9 4.12.2007. Rules of the Cabinet of Ministers No. 825 "Procedure of how State Probation Service organizes and leads settlement with intermediary" (in Latvian). Available: http://likumi.lv/doc.php?id=167543 (accessed: 22.5.2013).

10 Recommendation No. R (87) 18 of the Committee of Ministers to Member States concerning the simplification of criminal justice.

11 See for instance *Judins* 2005.

12 Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

13 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Available: http://db.eurocrim.org/db/en/doc/1828.pdf.

2. Legal framework of separate Restorative Justice methods within laws and regulations of Latvia

Without a doubt, restorative justice methods can be implemented in various environments due to their broad range of possible application – in schools, work environment, local communities, within the field of criminal justice and civil justice.[14] At the moment, all of the aforementioned forms of restorative justice can be identified in Latvia, but in-depth analysis of each form would require more detailed research on the issue. For the purposes of this research, restorative justice will be analyzed from the criminal justice point of view with the following consideration as the basis of research: "*restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community. Restorative justice programmes are based on the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community*".[15]

2.1 Victim-offender mediation

In Latvia, one of the most commonly used tools with the most detailed regulation is *mediation*. The legislative framework has developed in such a fashion that there are now two types of mediation in place:

1. mediation[16] in civil and commercial matters that will be regulated in the "Mediation Law" after its adoption by the Latvian parliament, Saeima. In order to develop unified practice of mediation, an association[17] "Council of Mediation" was created. The goal of this association is to unite all the non-governmental organizations (NGOs) working in

14 Author's note: On the basis of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, on 17 February 2009 a conception titled "Introduction of Mediation for Settlement of Civil Disputes" was drafted. In accordance with the conception, an action plan for its implementation in 2010-2012 was elaborated. On 5 May 2010 the Cabinet of Ministers decided to support the action plan. As it was foreseen in the action plan, the Mediation Law (available: http://ej.uz/su9b) is currently in the process of passing the second reading in Seima (Parliament of the Republic of Latvia). It must be taken into account that the Mediation Law will regulate mediation only for civil and commercial disputes.

15 *United Nations Office on Drugs and Crime* 2006, p. 6.

16 Mediation Law of the Republic of Latvia. Available in Latvian at: http://ej.uz/su9b (accessed: 22.5.2013).

17 Author's note: The association "Council of Mediation" consists of 4 NGOs. It cooperates with institutions from the justice system as well as with state and local government organizations.

the field of mediation, to promote cooperation among them, to elaborate/develop a Code of Ethics for mediators, quality standards and training. The association will also be responsible for certifying new mediators, maintaining the list of certified mediators and promoting the development of a beneficial environment for mediation in Latvia.

2. victim-offender mediation in criminal cases, which is regulated under the Criminal Procedure Law[18] and State Probation Service Law.[19]

Since 2005 victim-offender mediation in criminal cases has been carried out by the State Probation Service. Article 381 of the Criminal Procedure Law stipulates that, in cases of settlement, an intermediary (mediator) trained by the State Probation Service may facilitate the conciliation of a victim and the persons who committed a criminal offence. The person or agency directing the proceedings – police officer, prosecutor or judge – *may* inform specialists from the State Probation Service of the possibility of settlement in given cases. If the offender is a juvenile, the State Probation Service *must* be informed in any case, except when settlement has already been entered into.

Article 13 of the State Probation Law stipulates that specialists from the State Probation Service (SPS) shall ensure the possibility for a victim and a probation client to engage voluntarily in the process of mediation. SPS also provides training for volunteer mediators. Article 13 also indicates that the Cabinet of Ministers of the Republic of Latvia must determine the procedure for certifying volunteer probation officers and how they later become intermediaries in settlement cases. Therefore, the work of intermediaries (mediators) is currently laid down in the 04 December 2007 Rules of the Cabinet of Ministers No. 825 on the "procedure of how the State Probation Service organizes and leads settlement with intermediary"[20] and in the 20 November 2007 Rules of the Cabinet of Ministers No. 782 on the "procedure of certification of volunteer probation officers who are intermediary in settlements".[21]

According to these rules, the SPS organizes and leads settlement between the offender and victim:

1. Before the beginning of proceedings;
2. Within all stages of criminal proceedings;
3. After the court's ruling;

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18 Criminal Procedure Law of the Republic of Latvia, Section 381.

19 State Probation Service Law of the Republic of Latvia. Available in Latvian at: http://likumi.lv/doc.php?id=82551 (accessed: 22.5.2013).

20 4 December 2007. Rules of the Cabinet of Ministers No. 825 on the "procedure of how the State Probation Service organizes and leads settlement with intermediary".

21 20 November 2007. Rules of the Cabinet of Ministers No. 782 on the "procedure of certification of volunteer probation officers who are intermediary in settlements". Available in Latvian at: http://likumi.lv/doc.php?id=166680 (accessed: 22.5.2013).

4. After the injunction of a public prosecutor regarding a punishment has come into effect;
5. After a decision to conditionally terminate criminal proceedings has come into effect.

According to the amendments to the Criminal Procedure Law that came into effect on 16 June 2009, it was planned that, from 1 July 2009 to 31 December 2012, in situations foreseen in Article 381, part 1 and part 2, intermediaries from the SPS will engage in settlements within criminal proceedings *only up until the case goes to court*. As of 1 January 2013, the aforementioned limitations were abolished. Specialists from the SPS can now engage in the process of settlement at the pre-trial stage of proceedings all the way to the stage of punishment execution. Also, there are no limitations for organising settlement also in cases of imprisonment. If an offender is convicted and sentenced to imprisonment, VOM can be carried out on the prison grounds with the presence and participation of an SPS specialist and the victim. Such settlement might factor into decisions pertaining to the offender's early conditional release from prison.

"Settlement with intermediary" is also used as a tool for diversion[22] for under-age offenders or as an alternative to punishment. On 22 April 2010, amendments to the Law on Compulsory Measures of a Correctional Nature[23] came into effect. The law now stipulates that "settlement with intermediary" is also possible in cases in which the judge is deciding on whether to apply compulsory measures of a correctional nature and sees a possibility to terminate criminal proceedings on the basis of settlement. If the criminal liability for the offence is foreseen in the Criminal Law, settlement should be organized by the SPS.[24]

When working with the issue of mediation within criminal proceedings, professionals from the SPS apply principles of restorative justice. In specific cases[25] foreseen by the law, the criminal proceedings can be terminated on the basis of settlement if the committed offence is a misdemeanor or a less serious

22 Diversion: A child is diverted where he or she is in conflict with the law but has their case resolved through alternatives, without recourse to the usual formal hearing before the relevant competent authority. To benefit from diversion, the child and/or his or her parents or guardian must consent to the diversion of the child`s case. Diversion may involve measures based on the principles of restorative justice; see the glossary of the IJJO at http://www.oijj.org/en/docs/glossary?letter=D (accessed: 22.5.2013).

23 Law on Compulsory Measures of a Correctional Nature of the Republic of Latvia. Available: www.vvc.gov.lv (accessed: 22.5.2013).

24 *Ibid*., Section 6.

25 Criminal Procedure Law, Section 379. Termination of Criminal Proceedings, Releasing a Person from Criminal Liability: An investigator with the consent of a supervising public prosecutor, a public prosecutor or a court may terminate criminal proceedings, if the person who has committed a criminal violation or a less serious crime has settled with the victim or his/her representative.

crime and the offender has reconciled with the victim or his/her representative. Therefore, "settlement with intermediary" can be used as an alternative to punishment if the offence is a misdemeanor or a less serious crime. A successful process of settlement with an intermediary (VOM) can be a reason to exempt a person from criminal liability or can be regarded as a mitigating circumstance when bringing offender before the court in other cases. In accordance with the Criminal Law, a misdemeanor is an offence for which law foresees deprivation of liberty for a term from fifteen days to three months, or a lesser punishment. A less serious crime is an intentional offence for which the law foresees deprivation of liberty for a term exceeding three months but not exceeding three years, or an offence which has been committed through negligence and for which the law foresees deprivation of liberty for a term not exceeding eight years.[26]

2.2 Different types of community service

There is no reason not to regard certain criminal sanctions as having a certain restorative nature to them, so long as the content of those sanctions is in accordance with the goals and values of restorative justice. The most noteworthy sanctions in Latvia that fall within this category are "compulsory work" and "community service". Compulsory work[27] is a criminal punishment that can be applied to persons of legal age and underage persons that have reached the age of 14 years, while community service[28] is a "compulsory correctional measure" that can be applied to minors aged 11 to 17 and which does not lead to a criminal record.

"Compulsory work", as a basic or additional punishment, implies the compulsory participation of the offender in indispensable public services in the local community outside of the offender's regular schooling and working hours. "Compulsory work" ordered at the court level shall be for a term of not less than forty hours and not exceeding two hundred and eighty hours. A public prosecutor, in determining community work in the injunction regarding punishment, may apply no more than one half of the length of the maximum number of hours stated above. "Compulsory work" as an additional punishment may be ordered for a term of not less than forty hours and not exceeding one hundred hours against persons who have received a suspended sentence.

"Community service", as a compulsory correctional measure for children and juveniles aged 11 to 17, implies the involvement of a child or young person in public services free of charge in the local community outside schooling and

25 Criminal Law, Section 7. Classification of Criminal Offences.

27 Criminal Law: Section 36. Forms of Punishment. Part (1), Para 5, Community service.

28 Law on Compulsory Measures of a Correctional Nature; Section 6. Compulsory measures. Part (1), Para 7, Duty to perform community services.

working hours. Community service shall be organized taking into account the prohibitions and restrictions on child employment specified in the law.

The content of the sanctions is identical in both cases – work for to the benefit of the general public with the objective of diminishing the negative consequences of an offence. The goal of this sanction is in accordance with the principles of restorative justice and provides several promising possibilities both for the offender (for example, being spared formal sentencing and potentially imprisonment, connections with the family are not broken, employment can be retained, reparation can be made) and the victim (victim and society are given a possibility to receive compensation for the damages they have suffered). In Latvia, the work cannot be performed directly to the victim, nor is the victim involved in determining what kind of work should be performed. However, performing such work can be an element of an agreement stemming from mediation.

The difference between compulsory work and community service lies primarily in their legal consequences and the number of hours that can be ordered (community service for children – from 10 to 40 hours; compulsory work as a criminal punishment – from 40 to 280 hours). Underage people can only be required to perform such forms of work that are suitable and useful for their further development and that do not jeopardize their well-being.

2.3 Compensation mechanisms for victims of crime

Reaching the goals of restorative justice is not possible without restoring fairness (justice) for all the parties somehow involved in the offence – the offender, society in general and most importantly the victim.

It is understandable that a single, formal action is not enough to restore justice. A comprehensive and targeted set of measures is required – one that diminishes the negative consequences of a criminal offence and is in place parallel to the formal criminal proceedings. This set of measures includes financial, emotional and psychological support to the victims as well as providing the necessary legal assistance. Research about the support mechanisms for victims of crime that are in place and are necessary in Latvia was carried out in 2013.[29] The study showed a number of problems that are preventing principles of restorative justice from being fully implemented concerning the victims of crime.

Within the research, it was concluded that there are several significant elements forming the system, but the system itself – the Victims Support System – is greatly lacking. There is no targeted set of measures based in the law. State compensation for victims of crime (a) and legal assistance (b) are only two small

29 Full research report titled "Mechanisms for compensation of victims in criminal proceedings in the EU". Available: http://providus.lv/upload_file/Publikacijas/Kriminalt/Restorative_Justice_Latvia_Report.pdf (accessed: 22.5.2013).

elements of the whole system. The victim compensation system that is foreseen in the Criminal Law and the Criminal Procedure Law forms only one part of the compensational mechanism in Latvia. Support that is provided for specific groups of victims does not mean that there is sufficient victim support in Latvia, and the annual budget allocated for compensations provided by the State is not the ultimate solution.[30]

The status of a victim and his/her rights are stipulated in Chapter 6 of the Criminal Law and in general all the components from international legislation are included there. However, there is no reason to think that safeguarding victim's rights begins or ends with the criminal proceedings. Restorative processes of justice expand beyond the traditional[31] criminal proceedings and its goals.

In order to ensure restoration of justice, it is not enough to terminate the criminal proceedings. For the victim and offender, restoration of justice and fairness does not end in prison or court. Rather, it ends only once the legal balance has been restored for the victim (including restoration of damages to health, compensation of material losses and other negative consequences) and once the offender has been reintegrated into society. A victim support system must be based on an inter-institutional cooperation model where all the institutions involved are not merely focused on splitting responsibilities, but rather on developing cooperation methods instead. All institutions that are part of the victim support system should be able to jointly do their work – the victim should not be sent from one institution to the next, instead institutions should "gather around" the victim.[32] In order to implement this approach, law enforcement institutions should develop comprehensive cooperations with local governments, providers of social services and other institutions and organizations – working together for restoration of justice and fairness in an inter-institutional environment. It must be admitted that this is one of the most serious challenges when speaking of establishing a victim support system in Latvia.

At the moment the rights of victims are regulated in three laws – the Criminal Procedure Law, the Law on State Compensation to Victims[33] and the State Ensured Legal Aid Law.[34] According to Section 22 of the Criminal Procedure Law, a person upon whom harm has been inflicted by a criminal offence shall, taking into account the moral injury, physical suffering, and

30 *Kronberga et al.* 2013.

31 Author's note: The term "traditional" means the process that has been considered as sufficient until now.

32 *Kronberga et al.* 2013.

33 Law of the Republic of Latvia on State Compensation to Victims. Available in Latvian at: http://likumi.lv/doc.php?id=136683 (accessed: 22.5.2013).

34 State Ensured Legal Aid Law of the Republic of Latvia. Available in Latvian at: http://likumi.lv/doc.php?id=104831 (accessed: 22.5.2013).

financial loss thereof, be guaranteed procedural opportunities for the requesting and receipt of moral and financial compensation.

Victims of crime have the right to receive compensation from the offender. In specific cases indicated in the law, the victim has the right to receive compensation from the State. Victims can request compensation within criminal proceedings, but if he/she is not satisfied with the level of compensation granted, there are possibilities to submit a claim in civil court, thus initiating separate proceedings. According to Section 95, part one, of the Criminal Procedure Law, a victim in criminal proceedings may be a natural person or legal person to whom harm was caused by a criminal offence, that is, a moral injury, physical suffering, or a material loss. Compensation for moral injury can be requested by natural persons, while compensation for material loss can be requested both by natural and legal persons.

Article 350 of the Criminal Procedure Law stipulates that compensation is payment specified in monetary terms that a person who has caused harm with a criminal offence pays to a victim as atonement for moral injury, physical suffering, or financial loss. Compensation is an element of the regulation of criminal-legal relations that an accused pays voluntarily or on the basis of court adjudication. If a victim believes that the entire harm caused to him/her has not been compensated with compensation, he/she has the right to request the compensation thereof in accordance with the procedures specified in the Civil Procedure Law. In determining the amount of compensation, the compensation already received in criminal proceedings shall be taken into account. In addition, Article 353 provides that a special law[35] shall determine the procedures by which harm must be compensated from the State funds to victims, and the amount of harm to be compensated from such funds.

The Law on State Compensation to Victims entered into effect in 2006 and it is in accordance with Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, which stipulates that all Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent crimes, which guarantees fair and appropriate compensation to victims. It is also in accordance with Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, which stipulates that Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.

Compensation from state's budget is granted only in specific cases, if an intentional criminal offence has resulted in the following:

35 Law of the Republic of Latvia on State Compensation to Victims.

1. the death of a person;
2. severe bodily injuries to the victim;
3. violations of the victim's sexual inviolability or morality;
4. if the person is victim of trafficking in human beings;
5. if the victim has, through the offence, been infected with the human immunodeficiency virus, Hepatitis B or C.

The amount of compensation victims can receive is limited and is determined according to the harmful consequences that the offence has caused. If the amount of compensation granted by the State is smaller than the harm that was caused by the offence, the victim retains the rights to request the remaining share of compensation from the offender. The amount of money the victim receives as compensation from the State is later recovered from the offender.

The maximum amount of State compensation that can be paid to one victim of a criminal offence is five minimum monthly wages as specified in the Republic of Latvia (currently the amount is 1,422.50 €). The amount of State compensation to be paid shall be calculated taking into account the minimum monthly working wage[36] as was determined at the time when the person was formally recognized a victim. Compensation is paid if:

a) death of the person has occurred – in the amount of 100% (five minimum monthly wages);
b) For severe bodily injuries have been caused to the victim or sexual inviolability of the victim has been violated, or the victim has been infected with the human immunodeficiency virus, Hepatitis B or C, the victim receives 70%.[37]

State compensation for victims can be considered as a crucial toll for restoring justice after the criminal offence has occurred. Most of the offenders do not have the financial resources necessary for compensating the harm they have caused, often not even a small proportion. The victim has to cover the expenses of resulting treatment. In cases of serious harm, those expenses can be considerably higher than the financial resources available to the victim. Research has shown that only a small part (30-40%) of all requests for compensation are collected from the offender in favour of the victim.

Legal aid, just like the compensation of the damages, is one of the most important needs of victims. In order for victims to exercise their rights foreseen in the law they require legal consultation on how to do that. Even though the Criminal Procedure Law stipulates a right for the victim to invite a lawyer as his/her representative in criminal proceedings, there is reason to believe that

36 Author`s Comment: the minimum monthly working wage in Latvia is LVL 200 or 284.50 €.

37 Law on State Compensation to Victims, Article 7: http://likumi.lv/doc.php?id=136683 (accessed: 22.5.2013).

defending the interests of a victim is more complicated than defending the interests of an offender. Legal assistance for the offender is provided by the State and is free of charge, while the victim, on the other hand, it not entitled to such free of charge assistance.

Research[38] that was carried out in 2013 concluded that "the offender within criminal proceedings (as a suspect, accused person or a defendant) is entitled to have a representative provided by the State if the offender cannot afford to hire one himself/herself. In order to ensure an equal defence of victims' interests, one should have rights to State-provided legal assistance from the moment a person is recognized as a victim within criminal proceedings. This right should not be dependant on whether the person has a low income, nor should it result from the existence of the status "victim" within criminal proceedings". The afore-described situation leads to conclusion that offenders' rights to legal assistance are greater than victims' rights and that the rights of offender and victim for defending their interests within criminal proceedings should be equal.

The State Ensured Legal Aid Law[39] stipulates that free-of-charge legal aid is available only to victims who:

a) have obtained the status of a low-income or needy person in accordance with the procedures specified in the regulatory enactments regarding the recognition of a natural person as a low-income or needy person; or
b) they find themselves suddenly in a situation and material condition which prevents them from ensuring the protection of their rights (due to a natural disaster or *force majeure* or other circumstances beyond their control), or are on full support of the State or local government (for instance, persons in homes for elderly or persons in orphanages).

In order for legal aid to be fully considered as reflecting restorative justice thinking and for it to achieve restorative objectives, its legal framework needs substantial improvements.

3. Organizational structures, restorative procedures and delivery

The previous chapter analyzed instruments of restorative justice, the application of which is already regulated in the Latvian law. However, there are several methods which are not regulated by law, but which are nevertheless exercised practically via the execution of pilot projects. Considering the high number of projects being executed every year, the scope of this research paper is too limited to describe and analyze them all. Therefore, only the methods which are being implemented at the highest speed will be considered.

38 *Kronberga et al.* 2013, p. 23.

39 State Ensured Legal Aid Law of the Republic of Latvia.

In Latvia, methods of restorative justice are mostly used in the field of crime prevention. These methods can be used for working with all groups, depending on the behavioural risks, which correspond to the group in question – individuals from low risk groups (such as children and young people, who have not yet committed any crimes), as well as individuals who are under arrest for serious crimes and people who have concluded their imprisonment via early release.

3.1 Circles of accountability and support[40]

On 15 of January 2013, Latvian State Probation Service began work on the localised project of EC special program *EU Specific Programme Daphne III 2011-2012 Circles for Europe (CIRCLES4EU)*. "Support and accountability circles" in this context are used as a method of restorative justice that promotes the social re-integration of high risk sex-offenders upon release. Latvian State Probation experts believe this group of offenders to have a particularly high risk of committing violent crimes and sexual crimes. In order to introduce support and accountability circles to Latvia, help has been provided by specialists from the Netherlands, Belgium and Great Britian.

Support and accountability circles[41] are intended to assist sex-offenders with their social re-integration after having served their sentence. This method solves two problems at once – it helps them overcome the barriers to integration and the resistance of society to accept them, and at the same time it decreases the risk of them committing new crimes.

The pre-condition of the support and accountability circles is for the ex-offenders to recognize their risks and to wish to overcome them (accountability) and in return they receive organized support (support).

This practice comprises two parts – internal and external. The internal circle contains the sex offender and volunteers, who support and simultaneously monitor the individual in question, whilst compensating for the risks of exclusion and negative attitude from the society. The external circle consists of specialists who assist the volunteers and circle-coordinators with solving professional issues. Even though this method is still in its early stages of implementation in Latvia[42], in the future it is planned to ensure longevity of the method,

40 For more details see www.restorativejustice.org/RJOB/good-news-from-canada-on-circles-of-support-and-accountability (accessed: 22.5.2013).

41 A Circle of Support and Accountability is a community-based initiative operating on restorative justice principles. A circle assists individuals who have served a prison sentence for a sexual offence(s) in their effort to re-enter society. For more, see the website of the Correctional Service Canada at: http://www.csc-scc.gc.ca/text/pblct/lt-en/2006/31-3/7-eng.shtml (accessed: 22.5.2013).

42 See page 10 of the presentation by *Dixon* and *Farnsworth* titled "Circles of Support and Accountability", available on the website of the International Institute for Restorative

which is why, parallel to the pilot project, methodological materials are being developed.

3.2 Restorative conferencing[43]

One of the methods introduced in Latvia in 2010 is the restorative conferencing model. It is mostly used when working with minors and their parents. All parties affected by the crime take part in the conference, but for the settlement meeting professionals can be invited to support the victim as well as the offender and to decrease the consequences of the crimes.

The legal framework of restorative conferencing is similar to that of victim offender mediation, as it, too, is used as one of many possible approaches for reaching "settlement" with the participation of an intermediary. Cases are referred to the State Probation Service by police, prosecutors' office, offenders or victims themselves. Specialists from the State Probation Service prepare the conference and the parties that are part of the process, and participate in the meeting as a facilitator.

The restorative conference method is considered to be particularly fitting for work with minors, because it allows for the victims and their family/friends to talk to other people about what has happened whilst (a) letting the offender take responsibility for the situation, (b) allowing the offender to minimize the damage done to the victim, (c) allowing the victim to participate in the conference together with his/her relatives and thus feel safer throughout the procedure of negotiating for a favourable compromise to decrease the effects of the crime committed. In contrast to victim-offender mediation, this method is particularly appropriate for children and young people, as it includes more active support from victims' parents and friends, who can assist the minor throughout the process – which is a particularly important aspect of the method, regardless of whether the minor is the victim or the offender.

The legal consequences of a restorative conference, too, mirror those of VOM. Reaching a settlement can result in termination of the criminal proceedings in cases of misdemanours or less serious crimes, or can servce as a mitigating factor for other offences.

Practices at: http://www.iirp.edu/pdf/Nova-Scotia-2011-Presentations/Nova-Scotia-2011-Dixon-Farnsworth.pdf (accessed: 22.5.2013).

43 Author`s Comment: A restorative conference is a voluntary, structured meeting between offenders, victims and both parties' family and friends, in which they address consequences and restitution.

3.3 Victim support circles

Restorative justice can help not only the offenders, but also the victims of crime. In Latvia the status quo has been to mainly concentrate on the offender – to identify, put to trial and to punish the individual responsible, leaving the victim to assume the role of a passive observer.

The research project conducted this year, "Provision for the Needs of Crime Victims: Support for the Prevention of Victimization in Latvia" concluded that, over the last five years, nearly every other inhabitant of Latvia has been a victim of crime and more than half of these individuals have not received support of any kind, even though they have been in need.[44]

Jan Van Dijk[45], Professor at Tilburg University, stated the following about the support system for victims: "If the system of criminal justice consisted of private enterprises, they would all be forced to leave their businesses, because half of their clients (namely victims) are unhappy with the service they provide".

Undoubtedly, in order for the general framework to change, a series of complex steps have to be taken. It starts, however, with a single effort and in the case of Latvia this happened in 2011, when a pilot project of support circles for victims was introduced by three Latvian NGOs. The support circles were used as a method of restorative justice and targeted women as well as parents of children who had become victims and had difficulty admitting it. The leaders/ chairpersons of these circles were first trained and prepared for the activities by specialists from the USA and the Netherlands.

It has to be noted that the support circles for victims are organized and practiced by NGOs and that the specialists get involved on their own initiative or within the framework of projects. Hence, the method is not an ongoing option and is not available to all those in need in Latvia.

4. Research, evaluation and experiences with Restorative Justice

The criminal procedure and criminal justice are crucial elements of social regulation, but their purpose and content will depend on the form of societal organisation. In authoritarian societies, criminal justice is a tool of control, so that the government can contain its legitimacy. In democratic societies, on the other hand, criminal justice works in two directions simultaneously – it provides

44 *Zavackis et al.* 2013.

45 See *Van Dijk* at www.tilburguniversity.edu/webwijs/show/?uid=jan.vandijk (accessed: 22.5.2013).

a way of 'dealing with' offenders and at the same time protects democratic freedoms of the society in question.[46]

Without a doubt, the best practices of restorative justice in Latvia are victim offender mediation and community service. Both of these methods correspond to the values of restorative justice and are currently used as alternatives to the methods of "traditional justice".

Both of these methods really stand out against the backdrop of general criminal justice practices in the country. However, it has to be noted that both of these good practices are used with the purpose of facilitating the re-socialization of offenders – a set-up where the role of the victim is still secondary to the offender. To illustrate, victim offender mediation was introduced and is regulated as one of the possible options for the offender, not the victim, and community service is defined by law as a form of compulsory measure of a correctional nature for minors. This is one of stages of criminal-policy development, which is pointed out by *Tony Peters* and *Ivo Aertsen*: "For a long time the interests of victims of crime have been *une quantité négligeable.*[47] Punishment and the social reintegration of the offender polarize the powers of criminal justice. From the moment of reporting the offence the victim experiences victimization. Once a case enters the criminal court system, the victim-witness becomes susceptible to a myriad of problems and needs".[48]

Bearing this in mind, it can be concluded that the system of criminal justice in Latvia has still not accepted that the victim and the offender are at least equally important both in the context of the criminal process as well as outside it and that consequences of a criminal offence cannot be eliminated merely within the framework of the criminal process. That it is precisely why methods of restorative justice are important, as it is possible to work with those both in secondary[49] as well as primary[50] forms of prevention.

46 For more details, see *Nuttall* 2000, p. 10.

47 ENG: a negligible amount.

48 *Peters/Aertsen* 2000, p. 35.

49 Secondary crime prevention seeks to change people, typically those at high risk of embarking on a criminal career.

50 General measures to promote social justice and equal opportunity, which thus tackle perceived root causes of offending such as poverty and other forms of marginalization. See the glossary of the IJJO. Available: http://www.oijj.org/en/docs/glossary?letter=P (accessed: 22.5.2013).

4.1 Statistical data on the use of Restorative Justice in practice

4.1.1 Victim offender mediation (VOM)

VOM has been conducted by specifically trained professionals at the State Probation Service since 2005. VOM is a voluntary process of conversation between the victim and the offender, led by a neutral and specially trained mediator, who helps the sides to come to a fair and acceptable solution. There are 93 intermediaries at the State Probation Service, which includes 20 volunteers. "Settlement" via VOM is based on principles of restorative justice and the aim of it is to highlight the needs of the victim so as to decrease the damage (consequences) caused by the crime (offence) and to allow the offender to assume responsibility for his/her actions.

If there are children involved in the VOM process, their parents and other persons of support are included. If the victim of the crime is not willing to meet the offender in person, VOM is not possible. If the police, prosecutor or the court find that settlement is a viable option, probation specialists are informed instantly. If the offence has been committed by a minor, it is the responsibility of the police, the court and prosecutor to inform the probation specialists about the case, which then makes an offer of VOM to the minor. The State Probation Service begins to organise the settlement once it has received a formal request from the police, prosecutor, court, the victim or the offender.

When the meeting takes place, the intermediary explains to both parties their rights, obligations and the process of the meeting. Generally, the meeting is held in Latvian but the parties are entitled to agree on a different language. In case of necessity, the meeting can be postponed to another day. The meeting is based on several questions that have to be addressed by both parties – the first step is introductions, then the parties discuss the situation, the past – what happened, the present – what are the consequences and how the situation has influenced them, the future – what is the possible solution and content of the agreement?[51]

If the parties reach settlement (i. e. reach an agreement), the intermediary prepares an agreement which is then signed both by the victim and the offender. In most cases, agreements include conditions – in 2012, only 14% of all settlements did not foresee any kind of conditions.[52] Conditions usually foresee financial compensation – in 2013, that was the case in 56% of all settlements,

51 Presentation by *Diāna Ziediņa*, head of Mediation Division, State Probation Service of Latvia. Available in Latvian at: http://www.slideshare.net/providus/atjaunojosa-taisnigguma-izpratne (accessed: 22.5.2013).

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

14% of victims received an apology, while in 22% of cases other conditions were included in the agreement (for instance, visiting specific specialists – psychologists, addiction specialists etc.).[53]

It is important to note that the number of cases when VOM was used dropped in 2009 due to the economic crisis, but has been restored fully in 2013, meaning that the number of VOM cases has grown significantly – there were 1,090 VOM requests in 2013, including 273 cases involving minors. By comparison, in all of 2012 there were only such 108 requests involving minors.

Table 1: Absolute number of cases of mediation, 2005 to 2013

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
VOM cases	51	251	744	1,140	745	440	696	706	1,090
Juveniles	not available	not available	not available	not available	104	79	118	108	273

Source: Annual report of State Probation Service of Latvia (2012)[54] and Annual report of State Probation Service of Latvia, Department of Mediation (2013).[55]

The majority of offenders, who are involved in VOM have committed crimes that have to do with property – thefts, robberies, fraud; less so those who have committed physical offences and more serious crimes.

In order to apply VOM more widely in Latvia, it is pivotal that the efficiency of VOM is improved and developed. For example, there should be a system in place to ensure that the offenders keep the promises they have made during the settlement.

Similarly, because VOM is a new method, its benefits need to be explained and presented to society. This would promote and foster implementation of restorative justice ideas whilst also convincing the society and the specialists of the field that there are ways for the system of justice to work much more effectively.

In order to provide an approximate overview of the quantitative role VOM has in the criminal justice system in Latvia, the following criteria can be taken into account – the total number of initiated criminal proceedings, the total

53 *Ibid*.

54 Annual Report of the State Probation Service of Latvia, 2007. Available in Latvian at: http://www.probacija.lv/uploads/gada_parskati/vpd_gada_parskats_2007.pdf (accessed: 22.5.2013).

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

number of convicted persons, and the number of VOM cases per year. These are shown in *Table 2* below.

Table 2: The quantitative role of VOM in criminal justice practice

	Number of initiated criminal proceedings	Number of convicted persons	Number of VOM cases
2011	49,528	9,187	696
2012	45,018	8,942	706
2013	45,096	8,038	1,090

Source: Annual Report from the State Police[56] and Public Statistics from the Judicial Information System.[57]

There are no publicly available statistics on the legal consequences of VOM. Nonetheless, there are several indicators to consider. As mentioned before, criminal proceedings can be terminated on the basis of settlement if the committed offence is a misdemeanour or a less serious crime and the offender has reconciled with the victim or his/her representative. In 2013, 69% of all VOM cases where the offence was committed by a person of legal age were initiated on the basis of a misdemeanour or a less serious crime. For minors, the percentage of cases involving misdemeanors or less serious crimes reached 70%. That means that, in addition to restored justice and fairness, a rather high percentage of all VOM cases might also lead to termination of criminal proceedings.

Table 3: Breakdown of types of offences referred to mediation in 2012

Type of Crime	Number of VOM
Different types of theft	306
Destruction of property of another person	84

56 Annual Report by the State Police. Available in Latvian at: http://www.vp.gov.lv/?id =189&said=189 (accessed: 22.5.2013).

57 Judicial Information System. Available in Latvian at: http://tis.ta.gov.lv/tisreal?FORM=TIS_STaT_O (accessed: 22.5.2013).

Type of Crime	Number of VOM
Different types of bodily injury, including cases with serious consequences	74
Violations of road traffic	26
Hooliganism	11
Other	25

Source: Annual report of State Probation Service of Latvia, Department of Mediation (2012).[58]

4.1.2 Community service

In Latvia, community service is organized and overseen by the State Probation Service. Every year approximately 3,500 convicts are assigned to community service. During the process of community service two main goals are set – to restore justice and to resocialize the convicts (i. e. to achieve their social reintegration).

With this in mind, the State Probation Service cooperates with socially responsible entrepreneurs, creating a range of work options that do not belittle the convicts and allow them to perform the service with dignity, matching their skills and abilities. Entrepreneurs, organizations and companies who offer work to the convicts become part of the community service process and in a way represent the interests of society, and thus the offender is given a chance to compensate for the damage that he/she has caused.

When choosing the potential employer of the offenders for community service, special attention is paid to the ability of probation clients to use their knowledge and skills, so that both society and the offender can gain as much as possible and the inclusionary component of the punishment is exercised. Recently, employers have started to more actively entrust offenders with responsible tasks that directly latch onto their expertise. For example, offenders with an education in engineering have constructed benches and swings, which were fit for the security requirements and fit in the corresponding setting. Similarly, a probationer with qualifications in cynology took part in dog socialization training at an animal shelter. In these cases, not only is the employer satisfied, but the probation clients feel they have done something meaningful and are given a chance to develop their existing skills further and to gain new experience whilst being integrated into society.

58 Annual Report from the State Probation Service of Latvia, 2007.

Table 4: Number offenders involved in community service

Year	2005	2006	2007	2008	2009	2010	2011	2012
Persons serving community service	1,059	2,545	3,159	3,904	4,290	4,018	3,724	3,951

Source: Annual Report of the State Probation Service of Latvia 2012.[59]

Based on data provided by the Latvian Judicial Information System,[60] 28% of all offenders in Latvia are sentenced to community service. Community service as a sentence can be applied to many different cases of criminal offence: the majority of individuals are sentenced for thefts, robberies and fraud (32%), for driving under the influence of intoxicating substances (23%), for aquiring, storing and selling narcotic drugs and psychotropic substances (5%), for intentional damage to property (4%) and others. In some cases, community service can be used as an additional punishment when the offender has been subjected to probation supervision.

4.1.3 Circles of accountability and support, conferencing

Circles of accountability and support are project-based initiative that are still new to practitioners in Latvia. Therefore the first steps that have to be taken are time consuming preparatory activities – recruitment and training of volunteers as well as selection of circles' core members (sex offenders who are released from prison). Up until mid 2013 two circles have been initiated – in Riga and Valmiera with the core members being aged 22 and 21 respectively.[61]

As for the background of the offenders (core members) – the offender in Valmiera had been sentenced to imprisonment at the age of 15 and spent six years in prison, while the offender in Riga had been conditionally sentenced to imprisonment with five years of probation in 2013.[62]

Currently, circles of accountability and support consist of four volunteers in Valmiera and six volunteers in Riga. All volunteers are of different backgrounds

59 Annual Report of the State Probation Service of Latvia, 2007.

60 Data from the Judicial Information System 2005–2012.

61 See the presentation by *Iveta Darzience* titled "Implementation of Circles in Latvia." Available: http://www.circles4.eu/uploaded_files/Pres_2S&A_%20seminar_Presenta tion_Darzniece.pdf.

62 Ibid.

and 60% of all volunteers are women with the remaining 40% being men.[63] It is planned to create a third active circle and all of them will be operating for a period of 12 months.[64]

Regarding restorative conferencing, only quantitative data are available which indicate that, in 2013, 22 restorative conferencing meetings were held. This is a significant increase compared to the 12 conferences held in 2012, but nonetheless, the case numbers remain very low.[65]

4.2 Findings from implementation research and evaluation

In order to evaluate the process of VOM and assess potentially necessary improvements, each year the State Probation Service surveys both victims and offenders who have participated in VOM. In 2013, 484 returned questionnaires were suitable for further analysis, providing SPS specialists with demographical data on victims and offenders as well as their perceptions of the quality of VOM and satisfaction rates. SPS questionnaires are of practical relevance as the findings are used for improving the work of mediators.[66]

The results from 2013 show that the majority of offenders are aged 14 to 40 years, while the victims are 25 to 60 years of age. 153 women and 312 men took part in the research (19 respondents did not indicate their gender). 78% of respondents stated that it was useful to meet the other party within the process of VOM. 12% thought it was partly useful, 7% found it hard to answer the question and only 3% indicated that meeting the other party served no purpose for them.

When the respondents were asked whether they would suggest others in their position to participate in VOM, 77% answered positively, 8% said that they would not suggest it to others and 15% were uncertain, indicating that it is hard to say.

Respondents were asked to evaluate how understandable the explanation of the consequences of VOM was – 92% stated that the mediator explained the consequences in an understandable fashion, 7% found that the explanation was 'more likely' to be considered understandable and 1% of respondents thought that the consequences were explained in a rather incomprehensible way. As for the explanation by the mediator of each party's rights in the VOM process – 92% felt that the mediator had explained their rights comprehensibly, while the

63 For an overview of Circles4EU in Latvia, see the presentation by *Andris Šillers*: http://www.circles4.eu/uploaded_files/Pres_2S&A_%20seminar_Presentation_Sillers.pdf.

64 See the presentation by *Iveta Darzience* titled "Implementation of Circles in Latvia," cited above.

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

66 *Ibid*.

remaining 8% said that the explanation of their rights had been "more likely to be considered understandable".

Respondents were also asked to indicate what they consider as the most important aspects of VOM. The most common response was the need for a well trained and professional mediator. The fact that VOM provides a possibility to find a solution tot he conflict that is quicker than the lengthy process of litigation was the second most frequently mentioned aspect. The third was the need for a well-prepared, safe and comfortable environment.

When asked to express their opinion about the negative aspects of VOM, respondents mentioned the amount of paperwork and spent time, commuting to the meetings, communication that did not form as well as several elements relating to the physical environment – type of premises, lack of beverages etc.

As for the positive aspects respondents mentioned peaceful conversations with the opposite party and hearing each other's explanations, professionalism and responsiveness of the mediator, quick resolution of the conflict and the possibility to avoid litigation as well as the feeling of safety in the presence of the mediator.

The vast majority of positive answers lead to the conclusion that VOM has been implemented successfully and this approach benefits the criminal justice system as a whole as well as each person involved in VOM – both as a victim and as an offender.

5. Conclusion

In Latvia, restorative justice is considered to be reflected in such justice practices and programmes that result in: the compensation of damage to victims; the restoration of the rule of law; inclusive reactions that respect the rights of individuals and general society; the re-integration of the offender and the victim into society, and; a fair settlement of legal relations.

A large part of society finds it difficult to accept and adopt new approaches to responding to crime, including restorative justice, and is more sympathetic to formal, simplified, short-term solutions.

Many of the Latvian restorative justice tools have been developed within the framework of individual projects (national and local authorities) or are based on the initiative of NGOs. In fact, only *victim-offender mediation* and *community service* are regulated by law, and have been successfully implemented with the support of State funding.

The Latvian mediation system foresees two types of mediation: a) mediation in civil and commercial matters, and b) settlement with the mediator (victim-offender mediation in criminal cases), including restorative conferencing, which is currently in a stage of experimentation, however the law does presuppose it.

Two forms of community service exist in Latvia: one is the criminal penalty for persons aged 14 years and above, while the other is a coercive measure for children from the age of 11.

Although the Latvian State provides a system of compensation for victims of crime, it can only be received by a certain range of persons who have suffered the most serious of consequences of crime. Even thought there are many significant parts of the judicial system in place in Latvia, the victim support system, as a well-focused and legally secured entity, is not one of them. Legal aid for and the compensation of victims of crime are only two small elements of the system.

In Latvia, state compensation to victims is a very important instrument for restoring justice after a crime has been committed. Most offenders do not have the financial resources to compensate even a small fraction of the damage they have caused.

Despite the fact that the Latvian Criminal Law stipulates that the victim is entitled to a lawyer to defend his/her interests in criminal proceedings, there is reason to believe that the interests of the victim in criminal proceedings should be defended in a more elaborate way, as the victims (in contrast to the offender) are not entitled to free protection of their interests, unless they are officially recognized as a low-income or needy person.

Restorative justice practices other than VOM are currently in their initial implementation phase in Latvia and are mostly used in the field of crime prevention. They are mostly funded from the resources of individual projects: circles of support and accountability – for high-risk offenders (a), restorative conferencing – for victims and young offenders (b), and victim support circles – for individuals (and their loved ones) who have suffered from various forms of violence (c).

It has still yet to be recognized in the Latvian criminal justice system that the offender and the victim are both at least equally important to the criminal process, and that that process is not enough to eliminate the harmful consequences of a crime. In order to develop a justice system that serves the purpose of restoring justice, rather than just focusing on punishment and guilt, work is needed in all areas of justice – from the creative development of legal norms to training professionals who work with those norms, and regularly informing society about the benefits of safety and order, and of the suitability of restorative justice approaches in providing it.

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Lithuania

Skirmantas Bikelis, Gintautas Sakalauskas

1. Origins, aims and theoretical background of restorative justice

From the outset, it needs to be made clear that, in Lithuania, the notion of restorative justice is used only on a theoretical level. In law and practice, restorative justice does not exist as a uniform ideological strategy. There is no mediation in criminal matters in Lithuania, and nothing lets us assume that it will be introduced in the near future. However, the term "restorative justice" may be found among the keywords used in different governmental programme[1] measures (which aim at describing, researching and introducing to police officers the idea and models of restorative justice, good practices from abroad and international recommendations, as well as projecting experimental models etc.) which, however, usually result in nothing more than the publication of research and recommendations. On the other hand, the Lithuanian Criminal Code, the Code of Criminal Procedure and the Code on the Execution of Punishments provide some norms which reflect the idea of restorative justice insofar as they focus on the offender's duty to pay damages to the victim. We focus more on these provisions in our analysis, and also explain why restorative justice does not exist in law and practice in Lithuania.

1 For example see the "Plan of Measures for the Implementation of the Juvenile Justice Programme for 2009–2013", which was established by the decision of the Government of the Republic of Lithuania on 2 September 2009 No 1,070 (measures: to consider perspectives of restorative justice model development in the system of juvenile justice; to identify who could provide services of peacemaking mediation in certain areas; to prepare rules for peacemaking mediation process), "Plan of Measures for the Implementation of the National Program on Crime Prevention and Control for 2007–2009", which was established by the decision of the Government of the Republic of Lithuania on 8 August 2007, No 806 (measure: to prepare the draft of the Concept of the Lithuanian Restorative Justice System and draft of measures for implementation thereof).

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

In Lithuania, the idea of restorative justice balances between theoretical speculations, popularity and "modernity" of the topic on the one hand, and heavy inner resistance, especially in practice, on the other. A decade ago, implementing the idea of restorative justice could have been rather easily achievable, by referring to positive experiences and good practices from abroad. For now it is clear that restorative justice needs a certain social and cultural environment, an environment which we lack in Lithuania at the moment. First, the level of trust in law enforcement is very low in Lithuania. Data from *Eurobarometer* (2009) show that only approximately 24% of the population trusts in law enforcement in Lithuania. On the other hand, society associates the implementation of justice primarily with severe punishment. This attitude is determined by Lithuania's totalitarian past, general ignorance towards alternative options and a lack of experience. Though ideas of restorative justice do appear in the programmes of Government, it happens only due to the efforts of academics. They have support neither at the political level, nor within law enforcement, nor in society. The other important issue is a lack of motivated mediators who are ready to work. In addition, in Lithuania the network of NGO's that work in the field of social matters is very weak and is insufficiently subsidised by the State. Only few NGO's operate in the field of criminal justice, mostly supporting prisoners and persons released from imprisonment. Though they consider mediation as an important and feasible field for their activities, they lack the necessary material background, human resources and support of State institutions.

In a recent academic publication on restorative justice, in contrast to other more "enthusiastic" Lithuanian publications, the outlook for restorative justice was drawn with a great deal of scepticism and caution. The author came to the conclusion that the idea of restorative justice faces heavy resistance because of societies' spontaneous orientation at retribution (revenge) for criminal acts, especially regarding more serious offences.[2] Victims and society spontaneously seek retribution and revenge and the primary measure that comes to their mind is severe punishment (imprisonment in particular). However, deeper insight could reveal that such aspirations may rise from different important needs (need for a sense of safety, a wish to regain lost property or recover impaired health, etc.) on the one hand and a lack of knowledge of or (and) trust in alternative means for satisfying these needs on the other. In fact, victims and society expect that institutions of law enforcement will fulfil their expectations to find and to punish the offender. In Lithuania, such reactions are quite common and the

2 See *Reches* 2010.

relatively harsh penal policy reflects it – at the beginning of 2014, Lithuania had more than 315 prisoners per 100,000 inhabitants.[3]

In general, there are several legal norms and elements of the Lithuanian criminal justice system and criminal process that could be associated with restorative justice, either directly as a measure or process reflecting (at least in part) key restorative principles, or indirectly in that they provide gateways or access-points through which restorative thinking can enter into the process. Many of these norms and measures are subject to certain reservations that are explained in the course of this article. These measures are:

1) reconciliation between the offender and the victim (§ 38 CC);
2) release from criminal liability on bail (§ 40 of CC);
3) private prosecution cases ("complainant's crimes") (§ 407 of CCP);
4) restriction of liberty and obligation to compensate, fully or in part, the property damage caused by a criminal act or to eliminate such damage through work (§ 48 CC);
5) community service (§ 46 CC);
6) penal sanctions – compensation for or elimination of property damage (§ 69 CC) or unpaid work (§ 70 CC) or payment of a contribution to the fund for crime victims (§ 71 CC);
7) release of juveniles from criminal liability (Art. 93 1.1. of CC);
8) mitigating circumstance – voluntarily compensation for or elimination of the damage incurred by the offence (Art. 59 1.3. CC);
9) References to the principle of restorative justice which are provided in the law on probation. Article 4 para. 3 provides that the principle of restorative justice is one of the principles governing the execution of probation. Article 18 para. 9 provides that measures of restorative justice are one of the means for rehabilitating persons on probation that should be applied in order to reconcile the person on probation with the victim as well as to compensate for damages caused by a crime.

1.2 Reform history

The current Lithuanian Criminal Code, Code of Criminal Procedure and Code on the Execution of Punishments came into force on 01 May 2003. However, the legislative roots of reconciliation lie in 1993, when the 1961 Criminal Code was complemented with a new Article 53^1 that provides for the release of an offender from criminal liability where he/she has reconciled with the victim. It

3 For more on the system of penal justice and penal policy in Lithuania see *Dobryninas* 1996; *Čepas/Sakalauskas* 2010; *Sakalauskas* 2006; 2010; 2010a; 2010b; *Dobryninas/Sakalauskas* 2011.

was established that a person who commits an act mentioned in this Article[4] could be released from criminal liability where he:

1) has confessed to the criminal act,
2) voluntarily compensated for or eliminated the damage incurred to a natural or legal person or the State,
3) reconciled with the victim or a representative of a legal person or a State institution. A person with a criminal record as well as persons who had previously already been released from liability on the same basis could not be released on the basis of the Article 53^1. If a person released from criminal liability under Article 53^1 committed a new intentional crime within the period of one year, the previous decision releasing him from criminal liability would become invalid and a decision would be adopted on the prosecution of the person for all the criminal acts committed.

The current wording of a similar article in the new Criminal Code is presented in *Section 2* below. However, though options for reconciliation have been extended somewhat, it would not be true to say that this mechanism for release from criminal liability has been transformed into mediation by this new article.

An effort to improve mechanisms for compensation of damages for victims of crimes was made toward the end of 1998. Amendments of the Criminal Code were adopted, which provided that the compensation of at least half of the material damages caused by a crime (if such damage had been caused) shall be an obligatory condition for early release from imprisonment.[5] This amendment failed to achieve its goals,[6] the amount of compensated damages did not increase and the number of early releases from imprisonment decreased.[7] This provision was abolished in mid-2002.[8]

Probably the first Lithuanian legal act to make any mention of restorative justice was the "National Programme on Crime Prevention and Control", adopted by the Seimas (the Lithuanian Parliament) on 10 March 2003.[9] § 36 of the Programme states that one of the underlying ideas in policy on sentencing and on the execution of sentences should be the introduction of a restorative justice strategy that would aim to restore the pre-crime state of the parties

4 In the last wording of the article, 20 acts were mentioned, for example intentional less serious bodily injury, negligent serious or less serious bodily injury, defamation, crimes against public order, ordinary theft, ordinary fraud, intentional damage of property etc.

5 OG, Žin., 1999, Nr. 1-2.

6 See *Sakalauskas* 2006.

7 *Švedas* 2006, p. 207.

8 OG, Žin., 2002, Nr. 73-3098.

9 Official Gazette "Valstybės žinios" (OG, Žin.), 2003, Nr. 32-1318.

affected by the crime (the victim, the offender and society). The Lithuanian Government, which is competent to approve the "Plan of Implementation Measures for the Programme" mentioned above, repeatedly provided for measures to develop restorative justice. For example, the "Plan Implementing Measures for National Crime Prevention and Control Programmes for 2005–2006"[10] provided: to examine social and economic conditions for introducing a system of restorative justice; to explore practices of other countries; to provide the Commission for the Implementation of the Programme with a proposal to draw up a concept for restorative justice in Lithuania as well as a plan for implementing said concept; to develop options for victim-offender reconciliation; to create an experimental programme for reconciliation in juvenile justice and a corresponding plan for its implementation. Preparation of the projects of the Concept of the restorative justice system in Lithuania and the plan implementing measures for the Concept was repeatedly included into the "Plan for the Measures for Implementing the National Crime Prevention and Control Programme for 2007–2009".[11] On the basis of this plan, in 2008 the Law Institute of Lithuania developed the draft of the Concept of restorative justice as well as the draft of the 2009–2011 plan of implementing measures. A three-step plan was proposed: 1) to carry on with the experimental project for mediation in juvenile justice in one of the districts of Lithuania (which has sadly yet to be put into practice); 2) to expand the experiment to adult justice as well as to expand the territory covered by the project; 3) to enact a Law on Mediation in Criminal Matters as well as amendments to the Criminal Code and the Code of Criminal Procedure. The drafts were delivered to the Ministry of the Interior, however since then no elaborations or enactments on the basis of the Concept have been made. The measure "experimental project for mediation in juvenile justice" was transferred from the measure plan of the above mentioned Programme to the measure plan of the "juvenile justice programme", adopted by the government in 2009.[12] On the basis of this programme, the police department, together with other partners, carried out a project which aims at introducing restorative justice to police officers and training them to apply restorative justice methods in their work with juveniles.[13] However, there have been no other steps to develop restorative justice in Lithuania. In other words, certain ideas that reflect restorative justice appear in some programmes. Certain institutions are being appointed to be responsible for the implementation of the measures that implement provisions of those programmes. However, the implementation of ideas of restorative justice does not go any further constructing theoretical models. These

10 OG, Žin., 2005, Nr. 6-158.

11 OG, Žin., 2007, Nr. 90-3575.

12 OG, Žin., 2009, Nr. 110-4664.

13 Http://mediacija.policija.lt/index.php?id=118

models fall neatly into the drawers of the civil servants with little perspective for putting them being put into practice due to a lack of comprehension of the idea of restorative justice, a lack of motivation and funds, and a lack of competent and responsible people to take action to implement them.

More recently, on the legislative level, restorative justice was declared as the background policy idea in the Law on Probation (adopted on 22 December 2011).[14] The law establishes the principle of restorative justice as one of the backgrounds for the implementation of probation. This means that measures of restorative justice should be taken during the process of probation, which should facilitate reconciliation between the victim and the offender as well as effective compensation of the damages caused by the offence. Article 18 para. 9 provides that measures of restorative justice are one of the forms of the resocialisation of persons on probation that should be applied in order to reconcile the person on probation with the victim as well as to compensate damages caused by a crime. The Law on Probation came into force on 1 July 2012. However, as of yet no steps have been taken to implement these provisions in practice.

The most recent initiative by the Minister of Justice to form working groups to review the current legal framework and to submit proposals for the incorporation of idea of restorative justice into the system of criminal justice sheds some light on the perspective of restorative justice in criminal matters in Lithuania. However, the aim of working groups is to deliver a *Concept* for the development of the system of restorative justice in Lithuania (deadline is 30 September 2014). Another Concept? Yes. What about the Concept 2008? Nothing. We can only hope that this time the Concept will finally result in the law on restorative justice which would include provisions on mediation in criminal matters.

1.3 Contextual factors and aims of the reforms

Enactments of the new codes were aimed at developing a new core of Lithuanian criminal justice, based on the new national legislation, which would replace former codes based on the Soviet legal tradition. However, the idea of restorative justice found almost no reflection in the new legislation (see *Section 2*). Only few relevant moments could be mentioned – the list of the goals of punishments was supplemented with the goal of implementation of justice, the lists of punishments and penal measures were extended and some elements of restorative justice were included.

The new Law on Probation mentioned above, which came into force on 1 July 2012, aims at providing a more comprehensive probation procedure, more individualised offender treatment, encourages cooperation between State

14 OG, Žin., 2012, Nr. 4-108.

institutions and NGO's and enhances options for the implementation of restorative justice.

1.4 Influence of international standards

International standards on mediation and especially recommendations of the Council of Europe are well known in Lithuania. But they are being implemented rather sluggishly. One of many reasons may be that, in criminal justice in Lithuania, it is nearly unthinkable to implement measures that have no statutory basis. In this legal and administrative tradition, reforms through practice (or "bottom-up" reform) as they have occurred in many Western countries, can hardly be successful. Furthermore, in contrast to some other countries, Lithuania lacks a tradition of community-based mediation.

Despite the fact that recommendations of the Council of Europe are known, a reluctant attitude towards mediation is common at almost every level of State governance: at the legislative, executive and judiciary levels – in Parliament, the Ministry of Justice, institutions tasked with the execution of punishments, the courts and prosecutor's offices.

The hearing of the Lithuanian Parliament at the Human Rights committee in the middle of 2011 is one example for this. At the hearing, the proposal for a Directive of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime[15] was discussed. Members of the Committee, with the support of representatives of the Prosecutor's General Office, the Ministry of Justice and other institutions, decided to propose to establish exactly at which stage of the criminal proceedings Article 11 of the Directive (which is dedicated to restorative justice and mediation) shall be applied. One could think that everyone who has at least some interest in or understanding of the idea of restorative justice and its implementation should know that restorative justice need not and should not be restricted to any stage of criminal proceedings. In many Western jurisdictions restorative justice is implemented successfully in the beginning of the criminal proceedings as well as during the execution of the sentence or even after it. We think that such apathetic discussion on restorative justice reflects the great scepticism of Lithuanian State institutions towards the notion of restorative justice. It seems that, at least for now, only academics (but also not everyone) show interest in international recommendations (for some results from research, see *Section 4*).

15 Doc No.: COM(2011) 275 final. 22 June 2011.

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

2.1 Pre-court level

According to Article 38 of the Lithuanian Criminal Code (this Article replaced the Article 53[1] of the 1961 CC), offenders can be freed of criminal liability if they achieve reconciliation with the victim and meet other legally defined requirements. The Article states:

"1. A person who commits a misdemeanour, a negligent crime or a minor or less serious premeditated crime[16] may be released by a court from criminal liability where: 1) he has confessed to commission of the criminal act, and 2) voluntarily compensated or eliminated the damage incurred by a natural or legal person or agreed to compensate or eliminate this damage, and 3) reconciles with the victim or a representative of a legal person or a state institution, and 4) there is a basis for believing that he will not commit new criminal acts.

2. A repeat offender, a dangerous repeat offender, also a person who had already been released from criminal liability on the basis of reconciliation with the victim, where less than four years had lapsed from the day of reconciliation until the commission of a new act, may not be released from criminal liability on the grounds provided for in paragraph 1 of this Article.

3. If a person released from criminal liability under paragraph 1 of this Article commits a misdemeanour or a negligent crime within the period of one year or fails, without valid reasons, to comply with an agreement approved by a court on the terms and conditions of and procedure for compensating the damage, the court may revoke its decision on the release from criminal liability and decide to prosecute the person for all the criminal acts committed.

4. If a person released from criminal liability under paragraph 1 of this Article commits a new premeditated crime within the period of one year, the previous decision releasing him from criminal liability shall become invalid and a decision shall be adopted on the prosecution of the person for all the criminal acts committed."[17]

While, at first glance, one could assume that reconciliation in Lithuania bears some of the hallmarks of mediation, upon closer investigation it becomes

16 A minor crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of up to three years. A less serious crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of three to six years (Article 11 of CC).

17 Law on the Approval and Entry Into Force of the Criminal Code of Republic of Lithuania, on the website of the Parliament (Seimas) of the Republic of Lithuania: http://www3.lrs. lt/pls/inter3/dokpaieska.showdoc_l?p_id=366707.

clear that the two approaches and practices differ greatly. Besides the fact that the procedure involved in reconciliation in Lithuania is very formal, there are three major weaknesses compared to mediation: 1) an independent and well-trained third party (mediator) is not involved in the process; 2) release from liability is conditional, dependent on the offender resisting from reoffending. If he/she reoffends with intent within one year, the decision not to prosecute is voided, and a decision should be adopted on the liability of the person for all the criminal acts committed; 3) there are some other conditions, which preclude the process of reconciliation, and which are more relevant to the considerations on re-offending risk rather than the idea of mediation (real reconciliation and reparation of damages). For example there is the restriction that, for persons who have already been released from criminal liability on the basis of reconciliation within the last four years (between previous reconciliation and the new offence), Article 38 CC shall not have effect.

The offender and the victim may reconcile on the basis of Article 38 CC during the pre-trial investigation, the preliminary hearing and also during the trial, however no later than when the court leaves for the chambers to consider judgement.

The offender may be released from criminal liability on the ground of reconciliation with the victim during pre-trial investigation upon the decision of a pre-trial judge, who confirms the decision of the prosecutor (Article 212 para. 5 and Article 214 para. 2 of Code of Criminal Proceedings (CCP)).

In Lithuania, there are no research data on what is really going on between the victim and the offender during the release from liability upon reconciliation. It is probable that the offender and the victim "reconcile" following various motives – reward for damages, threats, unwillingness to engage in long lasting criminal proceedings, the desire to avoid severe punishment etc. Essentially, "true reconciliation" is likely to occur rarely in such proceedings.

2.2 Court level

Article 38 CC can also be applied at the court level. Proceedings may be terminated on this basis: at the preliminary hearing stage by court decision (Art. 235 CCP); during the trial at the court of first instance or appellate instance by court ruling (Art. 254 5., 303 4., 326 2.1., 327 2. of CCP); and during the trial at the Court of Cassation upon decision of the court (Art. 382 2., 383 of CCP).

Reconciliation is also an option in private prosecution cases – minor offences defined in Article 407 CCP (for example causing physical pain or a negligible health impairment (Art. 140 1. CC), non-severe health impairment through negligence (Art. 139 1. CC), sexual harassment (Art. 152 CC), libel (Art. 154 CC), insult (Art. 155 CC)). Pre-trial investigation is not carried out in such cases, unless the public prosecutor assumes control of the proceedings on the grounds that are provided in Art. 409 CCP. The proceedings take place at the

court. Article 413 CCP provides obligatory conciliation hearings in private prosecution proceedings. However, reconciliation in private prosecution cases is even more formal than on the basis of Article 38 CC. In fact, conciliation here is just a mere opportunity to withdraw the charge.

Article 413 of the Code of Criminal Procedure provides the order of the proceedings in private prosecution cases. When the court receives an application filed by the victim or his legal representative bringing private prosecution, the victim and the person accused are summoned before the judge for conciliation. The conciliation hearing is opened by the judge's statement presenting the contents of the victim's application and an invitation for conciliation. Thereafter, the parties to the offence are given the opportunity to present their arguments. If they reconcile, the proceedings on the application are terminated i. e. the victim withdraws the charge. After conciliation has been reached, victim and offender may conclude an agreement on the delivery of reparation for incurred damages. A writ of execution may be later issued under the agreement. If the parties fail to reconcile, the judge makes an order to commit the victim's application for trial. The victim's failure to appear at the conciliation hearing without a good reason is considered as a withdrawal of the charge. In such cases, the proceedings in respect of the application are terminated. Should the offender fail to appear at the conciliation hearing, conciliation is regarded as having failed and the victim's charge is sent for trial.

The Lithuanian Criminal Code also provides for some duties for offenders that at least to a certain degree reflect the idea of restorative justice (see *Figure 1* below*, grey background*). Persons sentenced to "restriction of liberty"[18] (Art. 48 CC) may be obliged to compensate, fully or in part, the property damage caused by a criminal act or to eliminate such damage with his own work. Although this obligation is mandatory for the offender, it may not only force but also encourage an offender to compensate damages for a victim, and thus one of the elements of restorative justice could be embodied. However, it remains coercive, and whether the delivery of such reparation or work is met with true remorse on

18 Restriction of liberty may be imposed for a period from three months up to two years. Persons sentenced to restriction of liberty are under the obligation not to change their place of residence without giving prior notice to a probation officer. Also, a court may impose one or more prohibitive or mandatory injunctions in respect of a person upon whom the penalty of restriction of liberty has been imposed, i. e. to refrain from visiting certain places; to refrain from communicating with certain individuals or groups of individuals; to stay at home at a certain time; to compensate, fully or in part, the property damage caused by a criminal act or to eliminate such damage through work; to take up employment or register at a labour exchange; to study; to undergo treatment against alcohol addition, drug addiction, addiction to other substances or a sexually transmitted disease, where the convict agrees thereto; to perform unpaid work for up to 200 hours within a period fixed by a court, but not exceeding the term of restriction of liberty, for health care, social care and guardianship establishments or non-state organisations caring for the disabled, the elderly or other vulnerable persons in need.

behalf of the offender or is delivered purely as a result of that coercive nature is of secondary consideration.

In contrast to restriction of liberty, the penalty of community service (§ 46 CC) may be imposed only with the consent of the offender. In how far this measure can be deemed restorative, however, depends on the way in which it is executed. Community service is imposed relatively rarely in Lithuania (accounting for only 3% of all court-imposed penalties). The work 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.

An adult person who has been released from criminal liability, who has received a suspended sentence (§ 75 CC) or has been released early from imprisonment (on the basis of Art. 157 of the Code on the Execution of Punishments) may be subject to the following penal sanctions: compensation for or elimination of property damage (§ 69 CC), unpaid work (§ 70 CC) or payment of a contribution to the crime victim's fund (§ 71 CC). The offender's consent is not a prerequisite for the imposition of these sanctions, making them coercive interventions. Thus, while they seek the delivery of reparation and restitution to victims, they nonetheless force the offender to take active steps towards restoring the damaged interests of victims. As with community service (see above), whether or not the delivery of reparation occurs in connection with sincere remorse on behalf of the offender is not a primary consideration.

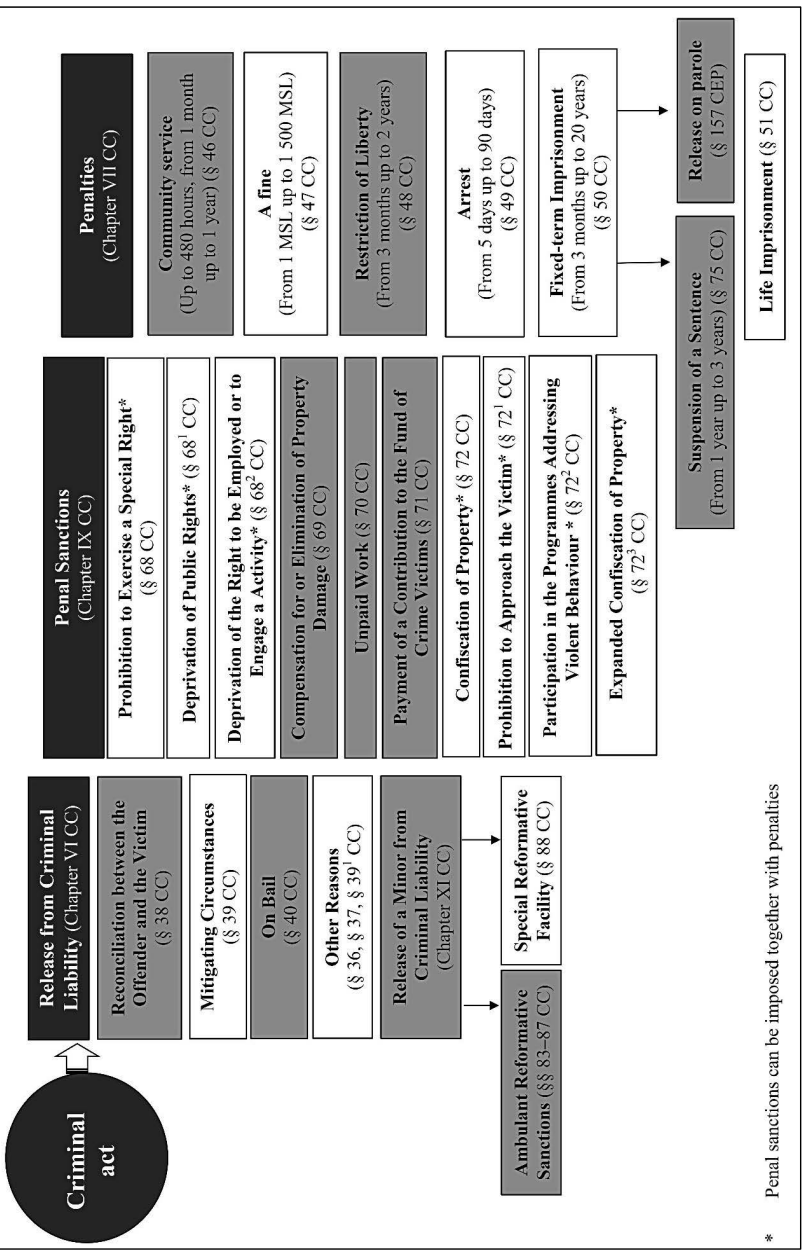
Furthermore, one of the mandatory conditions for release from criminal liability on bail (§ 40 CC)[19] is the requirement that an offender has at least partly compensated or eliminated the damage caused or has undertaken to do so.

19 Compared to victim-offender reconciliation (Art. 38 CC), this gound for release from criminal liability is applied far more rarely (approx 200 times a year, about 20 times less than Art. 38 CC), though the conditions for their use do not differ substantially. A person who commits a misdemeanour, a negligent crime or a minor or less serious intentional crime may be released by a court from criminal liability subject to a request by a person worthy of a court's trust to transfer the offender into his responsibility on bail. Bail may be set with or without a surety. A person may be released from criminal liability on bail by a court where: 1) he commits the criminal act for the first time, and 2) he fully confesses his guilt and regrets having committed the criminal act, and 3) at least partly compensates for or eliminates the damage incurred or undertakes to compensate for such where it has been incurred, and 4) there is a basis for believing that he will fully compensate for or eliminate the damage incurred, will comply with laws and will not commit new criminal acts. A bailsman may be the parents of the offender, close relatives or other persons worthy of a court's trust. When making a decision, the court shall take account of the bailsman's personal traits or nature of activities and his/her possibility of exerting a positive influence on the offender. The period of bail shall be fixed at between one and three years.

Thus, efforts by the offender to put right the damage caused by his/her offending can indeed be taken into consideration.

Also, one alternative ground for the release of a *juvenile* from criminal liability is the requirement that he or she has offered an apology to the victim and has (or is openly willing to) compensated for or eliminated, fully or in part, the property damage caused, either through work or in monetary terms (Art. 93 1.1. CC). Article 82 1. 2. CC provides compensation for or elimination of property damage as a reformative sanction. This reformative sanction may be imposed on a minor. Also, voluntary compensation for or elimination of the damage caused by the offence is regarded as mitigating circumstance in sentencing (Art. 59 1. 3. CC).

Figure 1: State reactions to crimes according to the Criminal Code and Code on the Execution of Punishments



* Penal sanctions can be imposed together with penalties

2.3 Restorative Justice elements while serving prison sentences

There are currently no nationwide strategies or initiatives in place that seek to promote the use of restorative justice while serving prison sentences. Damages are compensated very rarely (see *Section 4* below), and meetings between victim and offender do not take place. Restorative processes and practices are used in prisons only occasionally at the local level upon the initiative of well-motivated personnel, where offenders are encouraged to write letters of apology to victims in the context of resocialisation programmes within the institution.

3. Organisational structures, restorative procedures and delivery

3.1 Reconciliation between the offender and the victim

The major shortcoming of this legal instrument is that no mediation is provided and no mediator is involved in the process. Purposeful communication and reflection of the conflict do not take place (or at least no provision is made to facilitate it). The initiative to reconcile may come from the offender, the victim, an investigator, a prosecutor or a judge. There are no research data in Lithuania on who usually takes the first step to reconcile. However, it is very likely that offenders and case investigators have the biggest interest in closing the case in this way, either to finish the process quickly, or to avoid the risk of being formally sentenced.

One of the necessary preconditions for the development of restorative justice in Lithuania is the establishment of a facilitative role (the involvement of mediators) in the process of victim-offender reconciliation. There were some efforts to include such provisions in the draft of the new Criminal Code, but they received very little support and were essentially ineffective. Formal release from criminal liability without a mediator or mutual reflections on the conflict and consequent agreements shows that reconciliation in Lithuania is not a restorative process. Even more, it provides opportunities to abuse position – for offenders, for victims and for case investigators.

3.2 Conciliation in cases of private prosecution

Conciliation in private prosecution cases is limited to the judge formally inviting the parties to present their takes of the circumstances of the event in the hearing of the case and to agree to reconcile. In practice, this should be understood as being merely an invitation to agree to close the case. In this process, as well as in the process of release from criminal liability described above, usually no

reflections on the conflict take place (except recognition or rejection of the facts of the case). Accordingly, it bears the same defects that were mentioned above.

4. Research, evaluation and experiences with restorative justice

4.1 Statistical data on the use of restorative justice

Data from the Department of Information Technology and Communications (subordinated to the Ministry of the Interior) show that prosecutors successfully completed 46,332 investigations in 2013.[20] 6,977 investigations were closed on the ground of victim-offender reconciliation (Art. 38 CC), accounting for 15.1% of all successfully completed investigations (see *Table 1* below). Compared to 2011, this share has more than doubled, also in terms of absolute figures. The causes of such a dramatic turn of the trend (which had been evidently downwards-orientated since 2005) are not clear. On the one hand, it could be a result of recent changes to the inner system of evaluating the work of prosecutors. Until recently, prosecutors had earned more "evaluation points" for transferring a case to the court than for dismissals on the grounds of victim-offender reconciliation.[21] On the other hand, the increase in the number of investigations closed according to Art. 38 CC could have been caused by recent changes in legal regulations governing the initiation of investigations in cases of domestic violence.[22] Initiation of such investigations has recently become mandatory, even if the victim has no intention of prosecuting the offender. Many such investigations could be closed on the ground of victim-offender reconciliation. Release from criminal liability on bail (Art. 40 CC) is applied only in up to 200 cases a year.

20 Succesfully completed investigation means that investigation collected enough evidence to accuse an offender and the case was transfered to the court or dismissed on the grounds for release from criminal liability or dissmised due to the expiration of statutes of limitation.

21 This information was orally declared by the Prosecutor General at the meeting in Seimas on 21 January 2013.

22 The Law on Protection from Domestic Violence was adopted on 26 May 2011 (Valstybės žinios (Official Gazette), 2011, No. 72-3475).

Table 1: Release from criminal liability on the basis of Art. 38 CC and Art. 40 CC in pre-trial investigation[23]

Year	Successful investigations	Closed on basis of Art. 38 CC	Share among successful investigations (%)	Closed on the basis of Art. 40 CC
2004	38,335	5,193	13.5%	18
2005	37,596	5,445	14.5%	42
2006	36,244	4,363	12.0%	63
2007	32,828	3,992	12.2%	53
2008	34,143	3,937	11.5%	95
2009	36,788	3,294	8.9%	130
2010	36,096	2,978	8.2%	218
2011	35,598	2,678	7.5%	203
2012	42,884	5,622	13.1%	199
2013	46,332	6,977	15.1%	371

Table 2 shows data on the administration of penalties imposed on offenders by Lithuanian courts. The data show that, in 2012, restriction of liberty accounted for 21.3%, suspended sentences accounted for 8.2% and community service made up 7.8% of all imposed penalties.

In 2012, penal sanctions – compensation for or elimination of property damage (§ 69 CC), unpaid work (§ 70 CC) or payment of a contribution to the fund of crime victims (§ 71 CC) – were imposed on only 187, 711 and 190 offenders respectively, i. e. very rarely. Together, they accounted for only 5.7% of the total number of criminal penalties imposed (19,003). This number has not changed much in recent years.

Since 2004, the Information Technology and Communications Department of the Ministry of the Interior has provided statistical data on the material damage caused by registered offences. Damage is counted in accordance with the instruction adopted by the 30 June 2006 order of the Minister of the Interior No. 1V-252 "on adoption of instruction for filling, registering, providing and holding of statistics' cards for objects of inner register of offences" (new wording).[24] § 58 of the instruction provides that, in the statistics cards, the amount of material damage shall be specified on the basis of estimation in

23 Based on data from the Department of Information Technology and Communications within the Ministry of the Interior. Https://www.ird.lt.

24 OG, Žin., 2006, Nr. 79–3118.

criminal proceedings (in litas) if the criminal proceedings are being carried out on the basis of offences which by the wording of the Criminal Code cause material damage. Such entries on the statistics cards are made by the officer of pre-trial investigation on the basis of information available to him in the stage of pre-trial investigation. In fact, only material damage is counted, and only in cases of property offences, which account for approximately 80 percent of all registered offending in Lithuania. Offences against human life and health may cause much more significant damage. However, it is very difficult to estimate the level of such damage and consequently register it, which is why such statistics are not collected.

Table 2: Types of sentence imposed by Lithuanian courts, 2003-2012[25]

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total sentences:	17,555	17,882	16,007	15,150	14,533	14,295	15,318	16,236	15,958	19,003
Imprisonment	6,435	5,316	5,393	4,834	4,409	4,370	4,605	4,830	4,680	4,603
	36.7%	29.7%	33.7%	31.9%	30.3%	30.6%	30.1%	29.8%	29.3%	24.2%
Fine	2,996	3,465	4,260	4,393	4,514	4,339	4,532	4,747	4,744	5,227
	17.1%	19.4%	26.6%	29.0%	31.1%	30.6%	29.6%	29.2%	29.7%	27.5%
Restriction of Liberty	490	962	1,558	1,752	1,788	1,912	2,217	2,549	2,738	4,057
	2.8%	5.4%	9.7%	11.6%	12.3%	13.4%	14.5%	15.7%	17.2%	21.3%
Suspension of Sentence	3,725	3,397	2,314	2,360	2,251	1,967	2,013	2,005	1,543	1,555
	21.2%	19.0%	14.5%	15.6%	15.5%	13.8%	13.1%	12.3%	9.7%	8.2%
"Arrest" (short-term detention)	705	1,352	1,601	1,154	1,098	1,295	1,456	1,450	1,572	1,961
	4.0%	7.6%	10.0%	7.6%	7.6%	9.1%	9.5%	8.9%	9.9%	10.3%
Community Service	916	819	569	470	272	261	334	482	540	1,482
	5.2%	4.6%	3.6%	3.1%	1.9%	1.8%	2.2%	3.0%	3.4%	7.8%
Life Imprison-ment	9	6	8	6	7	8	3	7	3	2
	–	–	–	–	–	–	–	–	–	–
Other punish-ments[26]	2,279	2,565	304	181	194	145	158	166	138	116
	13.0%	14.3%	1.9%	1.2%	1.3%	1.0%	1.0%	1.0%	0.9%	0.6%

25 Data of national courts' administration, http://www.teismai.lt.

26 Suspended fine, suspended "arrest" (short-term detention), deprivation of rights to work, absolution from imprisonment. In 2003–2004, suspended fines and suspended arrests accounted for the majority of them. In the middle of 2004, suspended arrest and

The total amount of material damage differs greatly from year to year (see *Table 3* below). For example in 2007, it was estimated to have been only one third of the total sum for 2004 (in this year the amount of material damage against the state was very high by comparison). In order to draw any conclusions, separate comprehensive criminological research should be carried out. *Table 3* shows that the registered annual amounts of damages have ranged from 90 to 403 million Litas in the last 10 years. We can also identify from *Table* 3 that the amount of voluntary compensation for damages has constantly been below 10% (and even lower in some years). So we may conclude that only a very small portion of the material damages caused by offences against property is actually compensated during criminal proceedings.

Table 3: Material damage caused by offences against property (as estimated by pre-trial investigation institutions) 2004–2013 (in million LTL)[27]

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total damage	**285.5**	**118.5**	**91.6**	**94**	**122.7**	**104.4**	**164.5**	**229.2**	**236.8**	**403.2**
Natural persons	66.6	32.2	30.6	34.1	36.5	27.3	40.6	49.3	56.6	57.7
Legal entities	61.5	65.9	28.7	28	39.7	46.5	82	108	102.4	270.4
State	157.4	20.4	32.2	31.9	46.4	30.7	41.9	71.9	77.8	75.2
Damages paid on voluntary basis	3.8	4.3	8.7	7.3	10.1	8.4	13.6	10.8	14.9	13.5

The numbers in *Table 3* are estimations, made by pre-trial investigation institutions in the starting stages of criminal proceedings (during the pre-trial investigation). *Table 4* shows the numbers of claims for damages and payments for the claims as estimated by the Prisons Department under the Ministry of Justice. It shows that, during the last years, 35–40% of prisoners had claims for damages caused by the criminal offence. In the beginning of 2014, the total amount of claims exceeded 74 million LTL. In 2013, only a very small portion of claims was actually paid: a sum of voluntary payments and discounts from salary makes just a little more than 1% of the sum of claims.

Persons under the supervision of probation agencies (i. e. sentenced to non-custodial punishments, those serving suspended sentences, and those on early

suspended fine options were abolished. In 2011, the penalty of deprivation of rights to work was abolished and it received new legal status of penal sanction (it enabled the courts to impose it together with a penalty).

27 Information Technology and Communications Department under the Ministry of Interior, statistical report "Data on material damage (Forma_ŽALA)". Sums are rounded to the nearest 100,000.

release) repay bigger portion of claims for damages than prisoners: approximately 30–40%. Nearly 50% of persons who receive court obligation to compensate damages fulfil it. More detailed data are presented in *Table 5*.

Table 4: Prisoners and their payments of damages 1999–2014[28]

Date	Persons, having duty to pay damages (total/ % of total number of prisoners)	Total sum of damages (LTL)[29]	Salary deductions for payment of damages (LTL)	Voluntarily paid damages (cases)	Voluntarily paid damages (LTL)
01 Jan 1999	6,189 (52.4%)	79,334,000	-	389	110,129
01 Jan 2000	6,828 (56.4%)	65,922,000	-	741	298,409
01 Jan 2001	4,163 (57.3%)	71,078,000	434,003	490	163,602
01 Jan 2002	4,802 (53.1%)	36,483,000	483,478	338	120,801
01 Jan 2003	4,180 (47.9%)	33,700,000	479,173	195	67,893
01 Jan 2004	2,400 (38.4%)	28,396,835	380,491	68	197,758
01 Jan 2005	2,151 (34.6%)	70,892,454	337,740	89	5,823
01 Jan 2006	2,597 (41.4%)	20,322,744	255,468	131	14,922
01 Jan 2007	2,409 (37.6%)	27,671,882	307,031	165	16,308
01 Jan 2008	2,385 (38.2%)	32,858,733	367,382	181	49,246
01 Jan 2009	2,145 (34.2%)	39,215,000	432,550	220	38,339
01 Jan 2010	2,387 (34.7%)	45,548,000	629,760	190	25,579
01 Jan 2011	2,614 (35.7%)	48,336,000	371,600	263	21,359
01 Jan 2012	2,846 (35.7%)	49,928,308	406,905	216	15,054
01 Jan 2013	2,815 (35%)	67,707,600	424,179	434	49,469
01 Jan 2014	2,829 (36.7%)	74,530,300	579,600	521	51,655

In the context of compensation of damage these numbers strongly favour alternatives to imprisonment. About half of persons under the supervision of probation institutions (not imprisoned convicts) pay damages in full in the course of one year. Without additional research, it is hard to explain why the number of sentenced persons who receive the penal measure "obligation to pay damages" is so relatively small (from 6 to 12%). It is also important to note that

28 Summary of social rehabilitation activities for 1999–2014, prepared by sector of information systems and projects at Prisons Department under the Ministry of Justice.

29 For 1999–2003 and 2009–2011, the sums are rounded up to the nearest thousand.

the awarded sums of damages are several times smaller when the person is sentenced to non-custodial punishment (it is related to the seriousness of the offence). However, there are also some methodological differences in these estimations. The damages to be paid by prisoners are calculated on the basis of the claims awarded by the courts. Statistics on persons who are under the supervision of probation agencies cover payments for damages that are ordered by the court via a specific penal measure – namely the "obligation to pay material damages caused by the offence" (Art. 67 2.2. and 69 of CC).

Table 5: Payment of damages by persons who were under supervision of probation institutions, 1998–2013[30]

Data	Persons who received court obligation to pay damages for the offence (total/% of all sentenced)	Total sum of awarded damages (LTL)	Persons who fulfilled court obligation to pay damages	Paid damages (LTL)
1998	2,058 (6.9%)	7,058,005	1,040	2,367,453
1999	2,121 (6.6%)	6,826,124	1,151	2,301,713
2000	1,738 (5.7%)	7,267,205	896	2,611,515
2001	1,800 (6.4%)	6,117,775	851	2,166,923
2002	2,000 (7.2%)	4,899,677	951	1,256,651
2003	2,042 (7.5%)	6,191,046	942	1,191,102
2004	2,411 (10.1%)	6,762,001	1,180	2,138,843
2005	2,495 (11.7%)	7,405,463	1,247	2,635,859
2006	2,111 (11%)	6,765,314	1,249	3,122,911
2007	1,787 (9.9%)	6,380,784	1,104	2,911,736
2008	1,606 (9.1%)	5,922,833	916	2,371,231
2009	1,690 (9.6%)	6,139,687	887	2,146,228
2010	1,708 (9.1%)	6,570,743	943	2,143,110
2011	1,755 (9.4%)	6,554,457	1,063	3,064,250
2012	1,623 (7.7%)	6,165,628	917	2,618,798
2013	1,548 (7.2%)	15,085,231	953	3,192,005

30 Summary on work with sentenced persons who were under supervision of local probationary inspections for 1998–2013, prepared by the administrative branch of the Prisons Department within under the Ministry of Justice.

We can conclude that the effectiveness of compensation for damages for material or non-pecuniary losses caused by criminal offences is very poor. Though statistic on damages for all losses (both material and non-material) are unavailable in Lithuania, the statistical data that *are* available let us assume that no more than 20% of damages are compensated: up to 10% of material damages caused by offences against property are being compensated during pre-trial investigation, prisoners compensate approximately 1% of damages, convicted persons who are under supervision of probation institutions compensate 40% of damages as they execute the specific penal measure "compensation of material damages" (however, this number does not cover payments for civil claims for damages). There are no data on damages and effectiveness of payment of damages when the offender is sentenced to a fine. In the context of the statistics provided above, we may assume that effectiveness of payments of damages caused by criminal offences does not exceed 20%. Considering the fact that prisoners are obliged to pay major amounts of damages and also knowing the fact that effectiveness of payment of damages among prisoners is some 1%, we must emphasize a need to develop an infrastructure which would enable prisoners to pay damages more effectively (i. e. provide more labour options, organize negotiations with the victim, establish more flexible proceedings for recovery of damages).[31] Our experience from the recent past shows that straightforward pressure to pay damages (i. e. by restricting options for early release) does not work. In Lithuania, such attempt has already been made in the past and it appeared to be ineffective.[32]

4.2 Findings from implementation research and evaluation

On the basis of the above mentioned "Plan for implementing measures of National Crime Prevention and Control Programme for 2005–2006", in 2006 the Law Institute of Lithuania carried out the research on restorative justice. The researchers analysed international recommendations on restorative justice, experiences of foreign countries with implementing restorative justice models and the social and legal environment for the development of a restorative justice system in Lithuania.

On the basis of the "National Crime Prevention and Control Programme for year 2007–2009", in 2008 the Law Institute of Lithuania renewed its aforementioned research and, in addition, prepared a draft of the "Concept of the

31 There are cases where present or former convicts who are obliged to pay huge sums of damages avoid to work legally as they know that a significant part of their income would be deducted to pay damages. Such a situation gives nothing to the victim (the victim does not receive any compensation). It is unfavourable for the convict as well as he or she is discouraged from integration into the labour market.

32 See *Švedas* 2006, p. 207.

Restorative Justice system in Lithuania" and also the draft of the "Plan of the concept for implementing measures" and delivered it to the Ministry of the Interior. However, until 2013 no further political or practical steps towards establishing the system of restorative justice have been taken, if not to mention the implementation of a limited experimental model of restorative justice in criminal proceedings for juveniles (which in practice is more focused on educating police officers than on actually testing certain models of restorative justice).[33] In 2013, the Minister of Justice formed three working groups tasked with preparing a "Concept for developing a system of mediation" by the end of September 2014. This allows us to anticipate some practical steps of implementation of restorative justice into the legal system and practice within some period of time. Therefore, research on the implementation of restorative justice in practice is still waiting for its moment in the future.

At the end of 2011, the Law Institute of Lithuania carried out research on the social integration of sentenced persons.[34] Staff of probation institutions as well as other people working with sentenced persons were asked to respond to a questionnaire that included questions relating to restorative justice. Only 19% of respondents indicated that the probation system may effectively contribute to achieving actual reconciliation between the victim and the offender. The aim of this research was to find out how persons who work with sentenced people assess the effectiveness of their professional functions. They were given a question as to how effective their professional activities are in certain spheres of assistance to people (i. e. in job search, in treatment of addictions, etc., 11 functions in total). Having an influence on effective reconciliation between victim and offender was named as least effective. In other words, this function is not considered as very important and it is implemented relatively rarely.

5. Summary and outlook

In Lithuania, the concept of restorative justice remains primarily theoretical, and an effective ideological strategy does not exist in law and practice. While there are some legal instruments in the criminal law and in criminal proceedings that include the term "reconciliation", these instruments are rather formal and differ significantly from the concept of restorative justice. Therefore, it is true to say there is no mediation in criminal matters in Lithuania, and thus no provision is made for *truly* restorative processes, practices or outcomes.

In Lithuania, the idea of restorative justice balances between theoretical speculations, popularity and "modernity" of the topic on the one hand, and heavy inner resistance, especially in practice, on the other. A decade ago, it

33 Http://mediacija.policija.lt/index.php?id=118

34 *Sakalauskas/Kalpokas* 2012, p. 85.

would have been ease to achieve implementation of the restorative justice idea by referring to good practices from foreign countries in the context of the wide-ranging reforms in 2003. For now, it is clear that restorative justice needs a certain social and cultural environment that we still lack in Lithuania at the moment.

On the one hand, the level of trust in law enforcement in Lithuania is very low. According to data from Eurobarometer (2009), in Lithuania only 24% of the population trusts in law enforcement. On the other hand, the practical execution of criminal justice is associated with the imposition of severe penalties for offenders. Such an attitude is determined by the totalitarian past and ignorance towards alternative options as well as a lack of experience. Though ideas of restorative justice do appear in the programmes of Government, it is only due to efforts on behalf of academics. They have no support, neither at the political level, nor within law enforcement or in society in general.

Restorative justice has encountered heavy resistance in Lithuania, most prominently the fact that victims' spontaneous reaction to being victimised is often a call for harsh punishment (revenge), which is in turn reflected in the relatively harsh penal policy of recent years – at the beginning of 2014, Lithuania had more than 315 prisoners per 100,000 inhabitants. There are even academic opinions that do not support the idea of restorative justice at all in Lithuania.

The other important issue is a of lack mediators who are ready and motivated to work. In addition, in Lithuania the network of NGO's that work in the field of social matters is very weak and insufficiently funded by the State. Only few NGO's operate in the field of criminal justice, mostly providing support for prisoners and for persons released from imprisonment. Though they consider mediation as an important and feasible field for their activities, they lack the necessary material and human resources as well as support from State institutions.

In 2008, drafts of the "Concept for a Restorative Justice Strategy in Lithuania" and of the "Plan of Measures for the Implementation of the Concept" were prepared by the Law Institute of Lithuania and subsequently delivered to the Ministry of the Interior. Five years have passed and no further political or practical steps have been taken towards establishing a system or strategy of restorative justice.

In 2013, the Minister of Justice formed three working groups with the task of delivering (again!) a "concept for the development of a system of mediation" by the end of September 2014. This most recent step, though inducing a sense of déjà vue, gives us vague hopes that the role of restorative justice in Lithuania shall be expanded in the more or less distant future.

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Macedonia

Gordana Lažetić-Bužarovska

1. Origins, aims and theoretical background of restorative justice

Restorative justice is understood as a new way of dealing with the consequences of criminal offences. This approach does not insist on imposing the most severe sanction that criminal law allows, but rather on involving the victim(s) and also the community in the process of resolving the conflict and searching for a mutually acceptable solution. Restorative justice as a concept encompasses three affected subjects: the perpetrator, the victim and the community. As such, restorative justice should be interpreted as a philosophy of living in a community with others, and as an approach that regards the crime not only as a violation of legal norms but as harm done to persons as well.[1] It is also very important to emphasize that criminal policy must not be seen as firmly and immanently connected only with the interests of judicial authorities, but it must also have characteristics of so-called "citizen-oriented-justice-policy".[2]

Contrary to retributive justice, the following characteristics of restorative justice can be underlined as being the most vital: resolving disturbed relationships, rectifying the consequences of the offence, a forward-looking orientation, special prevention, fostering a sense of achievement and responsibility, tailoring processes to be beneficial to victims and perpetrators and, last but not the least, making the victim an active participant rather than a silent observer. The aim of restorative justice is reintegration without isolation, changing the offenders' attitudes and raising their level of moral reasoning. It is important to point out that restorative justice redefines the primary aims of the criminal law – to restore

1 A Charter for Practitioners of Restorative Justice, 3.IX.2003, www.sfu.ca/crj/fulltext/-charter.pdf.

2 *Delattre* 2004, p. 5.

peace, heal the injury, redress the harm, and to teach offenders empathy and compassion for human suffering. Imposing severe sanctions does little to settle the conflict between the offender and the victim, possibly leaving both with a sense of dissatisfaction, a feeling of being misunderstood or being an outsider in their own case.

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

In the understanding of the author, restorative justice implies the existence of a restorative process and a restorative outcome, and different practices can be included into this concept – reconciliation, mediation, compensation and restitution. At the same time, certain facets of the criminal procedure play a central role in the context of Restorative Justice, in particular diversion from the formal criminal court procedure, and the discretionary decision-making power of public prosecutors and the principle of opportunity.

One should underline the public prosecutor's role in dealing with criminal cases in a restorative manner toward adults and juveniles in Macedonia. Accepting an attitude that the public prosecutor needs to give restorative justice the prominent place it deserves within a modern criminal justice system,[3] there are several diversionary possibilities at the public prosecutor's level. Such diversion proceedings enable prosecutors to refer cases to mediation, to discontinue the prosecution if the perpetrator repairs the harm caused to the victim or the perpetrator is prepared and ready to do so, so long as the victim freely consents. It is important to take into consideration the absence of severe violence or intimidation in the commission of the offence, the commitment of offenders to repair damages and a readiness on their behalf to participate in imposed commitments or to comply with determined restrictions, reservations or prohibitions. The public prosecutor can postpone the prosecution after consent of the damaged party for less serious crimes if the suspect expresses his/her willingness to comply with instructions (to fulfill commitments, to obey prohibitions, to respect restrictions) given by the public prosecutor. This possibility can be regarded as diversion with intervention.

When analyzing the position of the victim and damaged person in the criminal procedure we may start by defining the legal term "victim". According to the Criminal Code (Art. 122 para. 1 line 22), a victim of a crime shall be any person who has suffered damage, including physical or mental injuries, emotional suffering, material loss or other injury or threat of his fundamental freedoms and rights as a consequence of a criminal offence. A child –victim of a crime is a person under the age of 18. The new CCP (2010) differentiates

3 *Löschnig/Gspandl*, p. 28.

between a victim (as defined in the Criminal Code) and a damaged party – a person apart from the victim whose personal or property rights have been violated or endangered by a criminal offence and who participates in the criminal procedure by joining the criminal prosecution or for the purpose of effectuating a property legal claim.

Victim-offender mediation in juvenile and adult criminal justice is a newly adopted possibility within the conflict-resolving process. Once its advantages have been understood, and a certain political will develops in support of it, mediation will gain recognition by and support from the criminal justice system.

Offenders who have committed an offence punishable with a fine or imprisonment of up to three years can be acquitted by the court if they have repaired the damage or harm caused by the offence and the damaged party agrees thereto. Within alternative measures as criminal sanctions, for offences punishable with a fine or imprisonment up to one year there is the possibility to conditionally terminate the criminal proceedings after hearing and gaining consent from the damaged party. If the offender does not reoffend within the period of one year, the proceedings will be terminated definitively. Community service is an alternative sanction that can be ordered against adults who have committed an offence punishable with a fine or imprisonment of up to three years. The offender has to consent to the order, which can require between 40 and 240 hours of work.

Regarding juveniles, there are several restorative interventions regulated by the Law on Juvenile Justice. The Republic of Macedonia enacted a new Law on Juvenile Justice in July 2009 that promotes diversion without intervention (measures for assistance and protection determined by Centers for Social Work and Mediation) as well as diversion with intervention by the public prosecutor (reparation, reconciliation, conditional postponement of prosecution). Within this Law, alternative measures as criminal sanctions are also available – community service, suspended sentences with protective supervision, and conditional postponement of the criminal procedure. Diversion with intervention is represented by intermediation and reparation that can be ordered by the public prosecutor. Mediation in cases of juveniles can be applied for a crime punishable with imprisonment of up to five years by the public prosecutor or by the juvenile judge. “Admitting responsibility and agreement upon a type of sentence” is a kind of plea bargaining procedure that can be applied when conditions for punishing older juveniles (aged 16 and 17) have been fulfilled before the public prosecutor submits the request to initiate the preliminary phase of the criminal procedure. Pursuant to the conditions set out by the Law on Juvenile Justice, there are also alternative measures that can be pronounced toward older juveniles: conditional sentence with protective supervision, conditional termination of the proceedings, and community service.

1.2 Reform history

1.2.1 Restorative roots in the Republic of Macedonia

The roots of restorative justice in Macedonian society can be seen in the so-called Peace Councils. These Councils were established under provisions of the 1967 Constitution of the Socialist Federative Republic of Yugoslavia and the 1968 Macedonian Law on Peace Councils. Their emergence was to a certain extent a result of a tendency for transferring certain State functions to local community bodies.[4] Peace Councils were competent for dispute resolution in cases of endangering personal safety, property disputes, public peace and order, and other disputes that violate societal values. Regarding criminal offences, Peace Councils were competent for bodily injuries and crimes against honor and reputation (for instance insult and defamation). Citizens affected by a dispute agreed to refer their "case" (or conflict) to a Peace Council, which was a body of the local municipality. The single judge (in accordance with provisions of the CCP of 1977) was also obliged to refer cases to Peace Councils for offences that came within the single judge's competence (summary procedure for minor crimes) whenever the single judge decided that there were no grounds for dropping the charge. Proceedings taken by the Peace Council were free of any expenses and were conducted according the principles of immediacy, informality and voluntary participation of the parties. If a mutually acceptable solution could be reached, parties signed a written agreement. The agreement was binding for the parties and in a case where one party did not perform the obligation voluntarily the court took necessary measures in order to enforce execution of the obligation. There were three-member chambers at Peace Councils, with one of the members presiding as president of the Council. Every adult citizen with voting rights who lived in the territory of the local community where the Peace Council was established could apply and subsequently be selected as a Council member. It was very important for the members to be citizens who enjoyed a good social standing and dignity, to be respected by other citizens and to be an example for younger generations. There were no formal conditions regarding the education, experience or special expertise for the members of Peace Councils. Members were citizens' representatives in the given local municipality who were familiar with specifics of the local population. Peace Councils existed until the early 1980s.

4 Закон за мировните совети, ("Official Gazette of People's Republic of Macedonia" no. 21/68).

1.2.2 The concept of Restorative Justice in the modern criminal law context

Restorative justice is a rather new approach and not yet very well developed in the Republic of Macedonia. Taking into account different types of criminal justice according to *Eglash* (1977),[5] there is retributive justice based on punishment and distributive justice based on therapeutic treatment of offenders in different Macedonian laws. This is not the case with restorative justice that is based on restitution. Academics have devoted increased attention to the concept in the last 15 to 20 years, mainly by conducting research and analyses on mediation,[6] restitution as a separate sanction,[7] the main characteristics of community sanctions[8] (especially community service[9]), the advantages of restorative justice,[10] diversion proceedings,[11] the role of the Centers for Social Affairs in the new way of dealing with juvenile offending,[12] to name some examples. The main goal was to familiarize the Macedonian legislator with the restorative interventions, outcomes and processes that exist in different European countries.[13]

Various foreign experiences and analyses[14] had an immense influence on Macedonian academics in their coming to understand that traditional criminal justice rules, standards, measures and processes are inefficient, not cost-effective, burdened by bureaucracy and time-consuming. If we accept the attitude that social systems should be organized in a fashion that nurtures conflicts and makes them visible, and that prevents professionals from having a monopoly on resolving conflicts,[15] we have to agree with the fact that it is of vital importance for social peace that a criminal policy is promoted that aims to: prevent antisocial and criminal behavior; to develop alternative sanctions and measures; to take extra care to support and meet the particular needs of victims; to re-

5 See *Eglash* 1977, p. 92; *van Ness/Strong* 2010, p. 22.

6 *Бужаровска-Лажетиќ* 2003, 2006c; *Бужаровска-Лажетиќ*/Мисоски 2009.

7 *Бужаровска-Лажетиќ* 2003; 2005; 2006c; 2006d.

8 *Арнаудовски* 1983; *Камбовски* 1983; 1984; *Марјановиќ* 1995; 1996; *Бужаровска-Лажетиќ* 2002a; 2006a; *Арнаудовски et al.* 2004.

9 *Марјановиќ* 1997; *Бужаровска-Лажетиќ* 2002c; 2003.

10 *Бужаровска-Лажетиќ* 2006b; *Bačanović* 2009a; 2010; *Bužarovska-Lažetić/Misoski* 2011; *Камбовски* 2004; 2011.

11 *Бужаровска-Лажетиќ* 2002b; *Бужаровска-Лажетиќ*/*Пајовиќ-Мишевска* 2010.

12 *Бужаровска-Лажетиќ* 2006e.

13 *Бужаровска-Лажетиќ* 2003.

14 *Blad/van Ness* 1998; *Akester/van Ness* 2005.

15 *Christie*, pp. 1-15.

integrate offenders into society; to construct specific means of reacting to juvenile offenders and to promote the restorative role of courts and prisons.[16] These conclusions are in the spirit of *Franz von Liszt's* argument given a hundred years earlier, in 1905, where he stated that "a good social policy is the best criminal policy".[17]

1.2.3 Legislative reforms regading restorative justice

Since 2005 there have been several legislative steps that have sought to introduce different restorative approaches in the Republic of Macedonia. The general goal of the National Strategy for the Reform of the Judicial System[18] was to put in place a functional and efficient justice system based on European legal standards. The Strategy for the Reform of Criminal Legislation[19] promoted the simplification of the procedure and the introduction of alternative means of solving criminal cases, like mediation and compensation of damages. According to the Strategy, the reform of the criminal procedure should promote improvement of the position of the victim in the procedure and enhance his/her active role and involvement during that procedure. Hence, there were several amendments to the Criminal Code and Code of Criminal Procedure that bear restorative hallmarks, as did the new Law on Juvenile Justice that was enacted in 2005.

In the Criminal Code[20] compensation of damage is an important fact for court decisions in several cases:

a) acquittal due to removal of the harmful consequences of the crime, in cases when the damaged party agrees, if the offender returns what he/she has taken from the damaged party, or otherwise compensated the damage caused to the damaged party;
b) a suspended sentence may be revoked if the offender does not compensate the damage caused by the crime;
c) the judge can decide upon conditional postponement of the criminal procedure after consent of the damaged party, particularly taking into account expressed regrets and apologies by the offender, removal of the

16 26th Conference of European Ministers of Justice.

17 *von Liszt* 1905, p. 246.

18 Government of the Republic of Macedonia 2005, http://siteresources.worldbank.org/INTECA/Resources/Macedoniastrategija.pdf.

19 Ministry of Justice 2007, http://www.coe.int/t/dghl/cooperation/cepej/profiles/FyromCrimStrategy_en.pdf.

20 Казнен законик на РМ, (Criminal Code), ("Official Gazette of the Republic of Macedonia" no. 37/1996; 80/1999; 4/2002; 43/2003; 19/2004; 81/2005; 60/2006; 73/2006; 7/2008; 139/2008; 114/2009; 51/2011; 135/2011).

consequences of the crime and compensation of damages caused by the crime.

In the Republic of Macedonia there has been a Code of Criminal Procedure since 1997 (with several amendments) as a law that is applied in the judicial system.[21] A new Code of Criminal Procedure was enacted in 2010 that is scheduled to come into force in December 2013.[22] So, throughout the remainder of this report, both CCPs are taken into account and quoted as "CCP 1997" and "CCP 2010". There are several restorative provisions in both of them that are explained in more detail below.

The Law on Juvenile Justice is based upon diversion and restorative justice for juveniles.[23] It had a great impact on juvenile mediation, the role of the victim, sought to raise awareness as to the importance of the victim's opinion and his/her consent as a legal prerequisite for the application of various procedural options.

1.3 Contextual factors and aims of the reforms

The procedural law reform, which contains the basic tools for performing the functions of the judicial institutions, aims to provide prompt access to justice, prompt and easy exercise of the rights and interests of citizens and legal entities, efficient crime protection, while litigation guarantees the protecting human rights through the justice system mechanisms. One direct effect of the reform should be an increased efficiency of judicial institutions and a decrease in caseloads.

The reasons for the reform of the criminal legislation are clearly explained in the Strategy for Reform of Criminal Legislature mentioned in *Section 1.2* above. The state of the judiciary is central to political and expert discussions and has been one of the main obstacles in the way of achieving integration into the EU and NATO. Despite accepting contemporary theoretical paradigms such as fundamental freedoms and human and civil rights and the rule of law, the legal and criminal system is in a state of permanent crisis. The crisis does not only entail protracted and inefficient judicial procedures, but also articulates a general lack of trust in the quality and predictability of the judiciary, which causes erosion of the entire legal order. Inefficiency in the criminal part of the legal system can be removed by redefining the role of the participants in the criminal procedure, institutional strengthening of the public prosecutor, defining priori-

21 Закон за кривичната постапка, (Code of criminal procedure), ("Official Gazette of the Republic of Macedonia" no. 15/1997; 44/2002; 74/2004; 83/2008; 67/2009; 51/2011).

22 Закон за кривичната постапка, (Code of criminal procedure) ("Official Gazette of the Republic of Macedonia" no. 150/2010).

23 Закон за малолетничката правда, (Law on juvenile justice), ("Official Gazette of the Republic of Macedonia" no. 87/2007; 103/2008; 161/2008; 145/2010).

ties of criminal policy, simplifying court proceedings, applying shortened procedures and out-of-court negotiations and agreements upon guilt and penalty.[24]

A restorative approach turns the criminal procedure into an exception and *ultima ratio* model of dealing with conflicts. The existence of a traditional (retributive) justice system is not suitable for restoring damaged relations, injured feelings and encouraging dialogue between offender and victim. The conclusion imposes itself – restorative justice takes place outside courtrooms, and seeks to balance concerns of the victim and the community with the aim of integrating the offender into society, assisting the victim's recovery and enabling all parties with a stake in the justice process to participate fruitfully in it.[25]

Newly adopted provisions in substantive and procedural criminal law in the Republic of Macedonia have served as a mean for raising awareness and increasing visibility of the concept of restorative justice in a legislative manner. There are many things that need to be done to foster successful implementation of different restorative interventions. Restorative processes are no less important than restorative outcomes, with a better understanding of advantages offered by restorative justice depending upon social, cultural, historical as well as legal and political background factors at the national level.

Restorative and diversionary interventions in Macedonia should be seen as alternatives to traditional criminal justice for less serious crimes committed under mitigating circumstances by first-offenders or juveniles with voluntarily participation of the parties including victims and community representatives.

1.4 Influence of international standards

Macedonian legislation has taken into consideration many international instruments. The main aim of this process has been (and remains) the harmonization of domestic law to international standards, while adopting new forms of dealing with juvenile delinquency, as well as new approaches toward adults as perpetrators of criminal offences. Macedonian legislation is based upon the following instruments:

United Nations – Convention on the Rights of the Child (1990) with two Optional Protocols (The involvement of children in armed conflict (2002) and The sale of children, child prostitution and child pornography (2002)); Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules", 1985); Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines", 1990); Rules for the Protection of Juveniles Deprived of their Liberty ("The Havana Rules", 1990), Standard Minimum Rules for Non-Custodial Measures ("The Tokyo Rules", 1990), Guidelines for Action on Chil-

24 *Krapac et al.* 2007.

25 *Wright* 2002.

dren in the Criminal Justice System Recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997; Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice, Resolution 1999/26, 28.07.1999; Declaration of Basic Principles on the Use of Restorative Justice Programs in Criminal Matters, 2002; Resolution No. 2 on the Social Mission of the Criminal Justice System – Restorative Justice, MJU-26 (2005).

Council of Europe – European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5); European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51); the following recommendations: No. R (87) 18 concerning the simplification of criminal justice; No. R (87) 20 on social reactions to juvenile delinquency; No. R (92) 16 on the European rules on community sanctions and measures; No. R (95) 12 on the management of criminal justice; No. R (96) 8 on crime policy in Europe in a time of change; No. R (97) 12 on staff concerned with the implementation of sanctions or measures; No. R (99) 19 on mediation in penal matters and explanatory memorandum to the Recommendation; No. R (2000) 19 on the role of public prosecution in the criminal justice system; No. R (2000) 22 on improving the implementation of the European rules on community sanctions and measures; No. R (2000) 20 on the role of early psychosocial intervention in the prevention of criminality; No. R (2003) 20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice; No. R (2006) 8 on assistance to crime victims; No. R (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse; CM/Rec (2010) 1 on the probation rules.

European Union – Council Framework Decision on the standing of victims in criminal proceedings, 2001/220/JHA, 15 March 2001, Official Journal of the European Communities, L 82, 22.3.2001; European network of national contact points for restorative justice, Official Journal C 242 of 8.10.2002; European Forum for Restorative Justice, www.euforumrj.org.

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

2.1 Pre-court level

2.1.1 Adult criminal justice

At the pre-court level, prosecutorial discretion and the principle of opportunity play an important role in allowing restorative justice thinking to enter into the criminal justice process. The public prosecutor can conditionally postpone prosecuting an offender if the following conditions are cumulatively fulfilled:

a) the damaged party consents,
b) the offence is punishable with a fine or imprisonment of up to three years and,
c) the suspect is willing to comply with instructions given by the public prosecutor.

Such instructions encompass specified commitments that reduce or alleviate the harmful consequences of the offence, for instance rectifying or delivering compensation for the damage suffered; paying a certain amount of money to the State Budget, to an institution with public authority or to a charity; or fulfilling obligations related to family and child support. Any imposed commitments should be required to be fulfilled within no more than six months. If the suspect fulfills the obligations, the public prosecutor shall dismiss the criminal charge and the offence does not appear on the suspect's criminal record. Should he/she fail to fulfill the obligations either in full or in part without reasonable excuse, the criminal procedure will be initiated by the public prosecutor and the offender can be sentenced by the court. This decision of the public prosecutor cannot be appealed.[26]

The Code of Criminal Procedure of 2010 makes provision for a similar opportunity to conditionally postpone prosecution. Overall, the same preconditions, procedure and consequences apply as those described above. However, the CCP 2010 expands the aim of the commitments that should be focused toward eliminating disturbances resulted from the criminal offence and reintegration of the suspect. Of those commitments, one that is of relevance to the context of restorative justice (albeit in a wide sense) is Community Service.

2.1.2 Juvenile justice

The Law on Juvenile Justice provides several possibilities for restorative intervention at the pre-court level: intermediation and reparation (Articles 68-71); mediation (Articles 72-78); admitting responsibility and agreeing upon type of sentence (Article 101).

Intermediation and reparation. When a juvenile has allegedly committed an offence punishable with a fine or up to three years in prison, and the prosecutor deems the evidence to be sufficient for further prosecution, the prosecutor has several options at his disposal:

a) to drop the case,
b) conditional termination (as also described for adults in *Section 2.1.1* above),
c) to drop the case when Intermediation and Reparation have been delivered through agreement between the juvenile and victim before the prosecutor/judge; or

26 More details for implementation in *Bužarovska-Lažetic* 2007.

d) to propose to the judge to order Community Service (as described for juveniles in *Section 2.2.2* below). In any such case, consent by the juvenile and his legal representative, the defence lawyer and the damaged party are necessary.

Mediation is possible at the prosecutorial and court level for a crime punishable with imprisonment of up to five years. Written consent from the juvenile and his legal representative, the attorney and the damaged party is necessary before the parties can be referred to mediation. The parties shall choose the mediator (one or more of them). Mediation is successful when it results in a written agreement, in contrary with a written statement of the mediator, expiry of 45 days or the parties withdraw. Although it is not explicitly stated in the law, if a juvenile fails to fulfill the content of the written agreement, the criminal procedure shall continue.

Admitting responsibility and agreeing upon a type of sentence (art. 101) is a kind of plea bargaining procedure that can be applied by the public prosecutor prior to initiating the preliminary procedure in cases of older juveniles (16-18 years old) who are alleged to have committed serious criminal offences. In order to be applicable, the damaged party has to consent to this course of action and there must be clear evidence that the older juvenile was responsible for the offence. The bargaining occurs between juvenile offender and victim in the presence of the prosecutor, representatives from the Center for Social Work and the juvenile's defence lawyer. If the bargaining is successful all concerned parties sign a written agreement. The juvenile criminal council can accept the agreement and deliver a judgement or may assess the agreement as unacceptable and return the case to the public prosecutor for the preliminary procedure to be initiated.

Damaged party compensation – restorative aspects of juvenile justice are also reflected by the possibility of the damaged party to be compensated in the Center for Social Work in the context of the procedure for determining measures for assistance and protection. This opportunity can be implemented when a juvenile's action is prescribed by the law as a crime or misdemeanor by which a child, younger or older juvenile "at risk"[27] has obtained financial benefit or has caused damage. The Center for Social Work has to intermediate between the child's family and the victim (if the victim is a child or a juvenile, then the victim's family should also be included). The professional team should invest

27 According Law on juvenile justice (Art. 12), a child at risk is a person that at the time of committing the act determined by law to be a crime or misdemeanor, has reached the age of seven and has not reached the age of fourteen, as well as a juvenile at the age of 14 if he/she is drug, psychotropic substances and alcohol addict, a child with mental handicap, a child – victim of violence and educationally and socially neglected child that is in a position of hindered or disabled realization of the educational function within the family or a child that is not included in the educational system or turned to begging or prostitution, that due to such conditions is or may be in a conflict with the law.

great efforts into finding a mutually acceptable solution. The Law on Juvenile Justice does not provide for mandatory compensation or reparation to victims. Such intermediation can last for a maximum period of 30 days. If this process remains unsuccessful, the damaged party may, within 30 days of the notification that the proceedings were unsuccessful, submit a proposal to the juvenile judge requesting the initiation of proceedings for confiscation of assets from the person who holds them or to whom they were transferred, or submit a proposal for damage compensation. Upon these requests, the juvenile judge applies the relevant provisions from the Code of Criminal Procedure. Successful intermediation results in the signing of an agreement as an out-of-court settlement. After signing the agreement the damaged party has no right to initiate civil litigation.[28]

2.2 Court level

2.2.1 Adult criminal justice

At the court level, the legislation governing adult criminal justice provides several forms of "diversion from court" that are applicable where sincere remorse has been expressed or where apologies and/or compensation have been made to victims. On the other hand, there are also: certain court-sanctions ("alternative sanctions") that can be said to have a "restorative character"; the possibility to file a property legal claim during the criminal procedure; and mediation in cases of "complainants crimes" (private prosecution cases).

Firstly, according to Article 43-a of the Criminal Code, an offender can be acquitted by the court if he/she has rectified the harmful consequences of the crime (either by returning to the damaged party what was taken from him/her, by compensating the damaged party for his/her loss or by rectifying the harm caused to the damaged party in another way).[29] Such acquittals are possible in cases of criminal offences that are punishable with a fine or imprisonment of up to three years that were committed under particularly mitigating circumstances (for example, negligent act committed without presence of alcohol or drugs, no violence etc.), and only where the damaged party consents to receiving such reparation and to the case being closed as a result of that.

In a similar vein, according to Article 58-a of the Criminal Code, criminal proceedings against an offender can be closed on the condition that the offender does not reoffend within one year. Preconditions for the applicability of this option are that the offence in question is one that is punishable with a fine or with imprisonment for up to one year, that both the offender and the damaged

28 More details in *Бужаровска-Лажетиќ/Пајовиќ-Мишевска* 2010.

29 *Камбовски* 2004; 2011; *Марјановиќ/Каневчев* 2010.

party have been heard, and that the latter agrees to this course of action. If there is no consent by the damaged party, the willingness of the offender is not enough for this legislative possibility. When deciding upon application of this measure the court will consider all circumstances of the offence, but shall place particular weight on any expressed regrets and apologies by the offender, his/her alleviation of the harmful consequences of the offence and delivery of compensation for the damage caused. Should the offender refrain from reoffending within the one year period, the case shall be dropped by the court and the offender does not receive a criminal record (his/her "slate remains clean").[30]

There are also several sanctions in the Criminal Code that bear some of the hallmarks of restorative justice in a broader sense. Restitution is not a separate sanction as such. Rather, the willingness of the defendant to compensate caused damages, or to eliminate or "make right" the consequences of the offence is an important circumstance and significant factor for the court in determining whether or not to apply "alternative sanctions". Alternative sanctions can be ordered when it is to be expected that the purpose of punishment can already be achieved by the mere prospect of punishment (conditional sentence), a warning (judicial notice) or measures of assistance and supervision of the offenders' conduct, while not being incarcerated. Compensation of damage is a legal ground for revoking the suspendend sentence, as well as one of the circumstances relevant for the court in its decisions whether or not to substitute a sentence to a fine/imprisonment with community service. Community service can be imposed as a primary (standalone) or a substitute sanction, with the offender's consent being a necessary precondition in both cases. As a standalone sanction, community service can be imposed for offences punishable with a fine or imprisonment of up to three years. Additional legislative preconditions are connected to the offence (in that it needs to have been committed under mitigating circumstances) and to the offender (in that he/she has no previous convictions). Offenders can be required to deliver between 40 and 240 hours of community service that are to be fulfilled within no longer than 12 months. As a substitute sanction, if the court pronounces a fine of up to 90 day-fines or imprisonment for up to three months, it may simultaneously decide, on the request of the convicted, to substitute the fine or term of imprisonment with community service. In making this decision, the court will take into consideration the gravity of the crime, the level of criminal liability, previous convictions of the offender (or rather a lack thereof) and last but not least whether the offender has compensated the damages or alleviated other harmful consequences of the crime.

Property legal claim during criminal procedure – according to the CCP of 1997 the damaged party has the opportunity to lodge a property legal claim during the criminal procedure. This can be listed among restorative interventions in a very broad sense of the concept. A property legal claim may refer to damage

30 *Камбовски* 2004; 2011; *Каневчев* 2006; *Марјановиќ/Каневчев* 2010.

compensation, returning property or annulling certain legal matters. The court shall decide upon property legal claims. With the verdict that finds the defendant guilty, the court can decide fully or partially upon a property legal claim. If the evidence in the criminal procedure does not provide grounds for a full or partial decision concerning the property legal claim, or if their additional provision would lead to unjustified postponement of the criminal procedure, the court shall reach an additional verdict. An appeal can be filed against the additional verdict within 8 days as of its delivery. When the court reaches a verdict to acquit the charges against the defendant, to dismiss the indictment, when the criminal procedure is terminated with a determination, or the indictment is dismissed, the court shall instruct the damaged party to realize the property legal claim in civil litigation. By requests of the public prosecutor or the damaged party, temporary measures for securing the property legal claim can be determined during criminal procedure. The new CCP (2010) expanded the opportunities for appeal for the damaged party regarding property legal claim. By accepting the new grounds of appeal to the damaged party, property legal claim retains the status that it has in the first instance criminal procedure. The court's decision in respect of property legal claim is in favor of the damaged party only when the court completely decided upon it. In any other case the damaged party has the right to appeal the verdict and enable the appellate court to decide about property legal claim. In other words, after the damaged party has used the right of appeal and remains dissatisfied with the decision of the appellate court he/she can initiate civil litigation. This opportunity improves the position of damaged party within criminal procedure so that it avoids unnecessary exposure of the damaged party to additional costs and avoid any delay of compensation.

The CCP (2010) introduced *mediation* (art. 491-496) for adult offenders for offences prosecuted with private lawsuits. The consent of each party is a necessary precondition for the single judge to refer them to mediation. When mediation is successful the parties sign a written agreement where aside from the subject of the agreement, the deadline for the fulfillment of the agreed commitments is recorded. The deadline should not be longer than three months. If after the expiry of the deadline, the suspect does not show any proof for having fulfilled the obligations, the single judge shall set a date for the main hearing in accordance with the summary procedure provisions.

2.2.2 Juvenile justice

The juvenile judge may take the same decisions as the public prosecutor regarding *intermediation and reparation* after a juvenile criminal procedure was initiated. Equally, the parties can be referred to *mediation* by the juvenile judge. The conditions and proceeding are the same as mediation at a pre-court level when the public prosecutor refers the parties to mediation.

Pursuant to the conditions set out by the Law on juvenile justice, the following *alternative measures* toward criminally liable older juvenile (aged 16-18) can be pronounced:

a) *conditional sentence with protective supervision* – when the juvenile has been sentenced to imprisonment of up to three years or a fine. Protective supervision can consist of one or more commitments, but only two of them have a restorative nature: to apologize personally to the damaged person and to correct or compensate the damage caused by the crime. The apology should be given in the courtroom. The compensation (to pay a certain amount of money or to return stolen objects) is determined by the court decision;

b) *conditional termination of the proceeding* – the court may pronounce this alternative measure towards an older juvenile for an offence punishable with a fine or imprisonment of up to five years. The precondition is consent of the damaged party. The juvenile needs to expresses regrets for the committed act, eliminate the consequences from the act, compensate the damage or reconcile with the damaged party, who agrees with the termination of the proceeding, under the condition that within two years the juvenile does not commit another crime;

c) *community service* – for offences punishable with a fine or imprisonment of up to three years (5 to 100 hours). The purpose of the work within community service should be educationally valuable or "meaningful" and seek to contribute to changing the juvenile's behavior. At the same time, the work should be appropriate to the juvenile's age and maturity. If the juvenile does not fulfill the assigned obligations or fails to do so in an orderly fashion, the court shall substitute community service with a stint in a juvenile centre or with a measure with intensified supervision (supervision by parents, a foster family or by the Centre for social work), taking into consideration the share of community service that has already been fulfilled. The law gives no indication as to the type of work to be performed, and the victim has no influence in determining the form of work that the offender should deliver.

2.3 Restorative justice in the context of sentences to imprisonment

To date, no legislative provision has been made that seeks to explicitly incorporate notions or practices of restorative justice into the context of imprisonment or youth detention (for example as an element of sentence/rehabilitation planning). Likewise, there have as of yet been no localized experiences of mediation projects tying into the administration of prison sentences at the level of individual, local institutions, nor experiments that seek to utilize restorative practices as a means of reforming prison culture and climate.

3. Organizational structures, restorative procedures and delivery

3.1 Victim-offender mediation

The 2009 amendment of the Law on Mediation made mediation a possibility in criminal matters. Mediation was initially introduced into Macedonian legislation through the Law on juvenile justice. The Law on Mediation is applied in criminal matters for every issue that is not stipulated within the Law on Juvenile Justice.

Having in mind the specific interests and needs of juveniles, there are certain conditions for a person to be a mediator in juvenile cases. It is underlined that the mediator shall be a person who helps the parties to reach a settlement, without a right to impose an outcome to the dispute, in accordance with the principles of voluntariness, neutrality and impartiality, confidentiality, transparency of the mediation, equality of the parties, availability of the data regarding the mediation, as well as effectiveness and fairness. The mediator may be a person with a university degree in law, a social worker, pedagogue, psychologist or a person from another profession who has passed training to be a mediator for juveniles and who fulfills the following conditions: 1) higher education VII/1 level or acquired 300 credits in accordance with the European Credit Transfer System (ECTS); 2) has at least five years of working experience with juveniles after graduation; 3) has not been currently prohibited from performing a certain profession, activity or duty by court sentence; 4) has a certificate issued or acknowledged by the Ministry of Justice for completed training according to the Program for Mediator Training and 5) is registered in the Registry of Mediators.

Mediation is possible at the prosecutorial and court level. After reporting the act determined by law to be a crime punishable with imprisonment of up to five years, the public prosecutor, after receiving written consent from the juvenile and his legal representative, the attorney and the damaged party, may refer parties to mediation. Due to reasons of meaningfulness and with prior written consent from the juvenile and his legal representative, the attorney and the damaged party, before closing the main hearing, the juvenile judge may terminate the procedure and refer abovementioned persons to mediation.

Within three days of submitting their written consent, the parties have to agree upon a mediator from the register of mediators who shall conduct the mediation process. The time frame for completing mediation is 45 days. The mediator, in agreement with the clients, shall determine the date for conducting mediation. The presence of the clients during the mediation procedure shall be obligatory, but the mediator can communicate with the parties jointly or separately, i. e. they do not have to meet face to face. The mediation procedure can end for different reasons:

a) concluding a written agreement by the mediator and the parties that sets out the achieved consent for compensating the damage and repairing moral satisfaction (the parties come to an agreement);
b) it becomes clear that, upon consultation with the parties, mediation shall not be successful, which is communicated to the referring agency in the form of a written statement from the mediator; or
c) when the time limit of 45 days has expired.

The parties may withdraw their consent to participate in mediation at any time without stating reasons. Such withdrawal shall be considered a fact from the day the statement for withdrawal is submitted. The mediator shall terminate the mediation procedure if he/she considers that the reached settlement is illegal or unsuitable for execution. The public prosecutor, i. e. the court shall confirm the signed written settlement by an order, which simultaneously notes that the criminal procedure is stopped. If the public prosecutor, i. e. the court does not accept the settlement, when he/she assesses that the legal conditions for mediation and its purposes are not fulfilled, then the criminal procedure shall continue as normal.

Mediation for adults has been possible since the new CCP of 2010 came into force in 2011, and can be implemented for offences prosecuted through a private lawsuit, punishable with a fine or imprisonment up to five years for which a summary procedure is conducted. A single judge refers the parties to mediation at the reconciliation hearing as a pre-phase of summary procedure. Any consent shall be given by each party no later than three days from the day when the referral to mediation has been proposed. Within three days of consent being given, the parties shall jointly nominate one or more mediators from the Registry and notify the individual judge thereof. Until a written agreement has been signed, the mediation is conducted in accordance with the provisions of the Law on Mediation. Other than with a written agreement, mediation may also end on the following grounds:

a) it becomes clear that, upon consultation with the parties, mediation shall not be successful, which is communicated to the referring agency in the form of a written statement from the mediator;
b) after the expiry of 45 days;
c) when the parties withdraw from mediation (they can do this individually at any time without needing to justify it) and
d) when the mediator decides to abort mediation because he/she believes that the agreement reached is unlawful or inappropriate for enforcement. Agreements reached in the course of mediation are legally binding.

The subject of the agreement can be a claim for damages, performing certain duties by the defendant in favour of the damaged party, delivering an apology to the damaged party, returning objects or property, or any other commitment upon which the parties will reach an agreement. A very important element of the

written agreement is a deadline for fulfillment of the agreed commitments that can not be longer than three months. The suspect is obliged to provide evidence to the single judge that he/she has fulfilled the commitments before the deadline for fulfillment of the agreement has expired. Should such proof be delivered on time and to the satisfaction of the judge, he/she shall stop the criminal proceedings by order. However, should the offender fail to fulfill his/her obligations, the single judge shall set a trial date in accordance with the legal provisions governing summary procedure.

Since there are no specific conditions for being a mediator in adult criminal cases, the provisions of the Law on Mediation are applied. Mediators may be defense lawyers, graduates with a law degree or people from another profession and must meet the following requirements:

1) a university degree in higher education VII/I or 300 credits acquired under the European Credit Transfer System (ECTS);
2) have at least five years work experience after graduation;
3) have a certificate issued or recognized by the Ministry of Justice showing that he/she has completed training under the Program for the Training of Mediators and
4) he/she must be enrolled in the Registry of Mediators run and administered by the Chamber of Mediators.

Training for mediators is organized by the Ministry of Justice or another institution(s) authorized by the Minister of Justice, at least twice during one calendar year. The cost of training is borne by the candidate mediators.

There are 177 mediators in the Republic of Macedonia, of whom about 40 are mediators for juveniles. Several specialized trainings for juvenile mediation have been conducted. In 2009 and 2010 such training was organized by the Chamber of Mediators and different Macedonian NGOs. A total of 27 mediators passed basic and advanced training. Some of the trainings were held by experts from Albania (*Rasim Gjoka*) and from Norway (*Karen Paus*). Also, the Academy for Judges and Prosecutors held several seminars in the context of further vocational training programmes aimed at raising awareness among judges and prosecutors about juvenile justice and the advantages of mediation. In 2010 a total of 91 participants from courts and public prosecution offices attended these seminars. In 2009, in collaboration with UNICEF, the Academy held several trainings for a total of 106 representatives from the judiciary for the newly adopted Law on Juvenile Justice (including restorative proceedings, mediation etc.). Several seminars have been held in collaboration with the Association for Criminal Law and Criminology of the Republic of Macedonia that focused on mediation with adults and juveniles.

3.2 Diversion proceedings

3.2.1 Juveniles

*Intermediation and reparation***.** This is a form of diversion proceedings that the public prosecutor or the juvenile judge can institute for less serious offences committed by juveniles when it is assessed that the evidence in the case is clear enough. The committed offence needs to be punishable with a fine or imprisonment of up to three years. Intermediation and reparation is not possible if the crime resulted in someone's death. It can only be implemented with the consent of the juvenile and his/her legal representative, his/her attorney and the damaged party. In order to determine consent, the public prosecutor or the juvenile judge shall summon all mentioned persons to a meeting in the public prosecutor's office. Should any of the summoned parties fail to appear, such absence shall be regarded as a disagreement or lack of consent and intermediation and reparation is not possible. Before summoning all concerned parties, the public prosecutor or juvenile judge may request a report from the Centre for Social Work as well as a special report from the police regarding the circumstances of the committed offence. Intermediation and reparation can result in several different outcomes. The following criteria for the application of the principle of meaningfulness are relevant: the nature of the offence and its circumstances, the previous life and personal features of the juvenile, whether he/she is currently serving another sentence or correctional measure etc. To provide a sense of self-awareness and responsibility, the juvenile may be required not to reoffend within a probation period of six months, or to compensate or otherwise correct the harmful effects caused by the offence within that time frame. This conditional postponement of the prosecution or the juvenile criminal procedure shall be registered in the prosecutor or court records, and it shall be deleted from the records after expiry of the probation period. Compensation of the damaged party at the Center for Social Work within the procedure for determining measures for assistance and protection is a crucial fact for the public prosecutor not to initiate juvenile court procedure. This outcome is not necessarily connected with the implementation of a program for measures and activities toward the juvenile. It is important for the public prosecutor that the damage caused by the offence has already been compensated, and that other consequences from the offence do not justify criminal prosecution. The judge may also decide to terminate the procedure if damages caused by the offence are compensated. In accordance with the principle that sanctions toward juveniles must be determined only by the juvenile court, if the public prosecutor assesses that up to 30 hours of community service should be ordered, such a proposal will be submitted to the juvenile judge. If the judge does not accept the proposal, it is necessary to explain the reasons for not accepting the proposal. During the juvenile criminal procedure the judge may decide to impose community service of up to 30 hours as a criminal sanction.

3.2.2 Adults

Within principle of opportunity, there is a possibility for *conditional postponement of prosecution*. The prosecutor may impose certain instructions on the perpetrator instead of filing the indictment. One can call this a form of prosecutorial conference at the pre-court level. The prosecutor needs to assess the case in terms of the available evidence, the manner in which the offence was committed and the consequences resulting from the offence prior to making a decision to call the damaged party and the perpetrator to the prosecutor's office. The goal of this proceeding is to postpone prosecution instead of filing an indictment. Postponement is possible only for less serious crimes punishable with a fine or imprisonment for up to three years. There is one precondition for postponing the prosecution – consent given by damaged party for enforcement of this kind of procedure. This consent is not related to the specific instructions/ commitments, but only to the making of such instructions *per se*. Only public prosecutor can decide on the exact commitments and instructions that the offender shall be subjected to – the law makes no provision for the victims to be involved in selecting the commitments. However, it is important to emphasize that if the damaged party does not show any interest in responding to the prosecutor's notifications or disagrees with the proposal to receive compensation without filing the indictment, the prosecutor has to file an indictment to the competent basic court, and conditional postponement is thus not possible. It is not necessary for the prosecutor to have a meeting with both parties together at the same time – the meetings may be held separately. After damaged party has expressed consent, the prosecutor explains to the perpetrator all the consequences of postponement of prosecution. It is important for the perpetrator to express willingness to comply with different instructions that the public prosecutor imposes. The instructions encompass specified commitments that have the primary aim of reducing or eliminating the harmful consequences of the offence. The commitments are as follows:

a) removal or compensation of the damage done;
b) payment of a certain amount of money to the State Budget, an institution with public authority or to a charity, and
c) fulfillment of obligations related to family and child support.

The prosecutor can also postpone the prosecution when conditions for acquittal of the offender due to the removal of harmful consequences of the crime, stipulated in art. 43-a Criminal Code, are fulfilled. The public prosecutor determines the period of time within which the perpetrator must fulfill the commitments. This period of time must not exceed six months. There are benefits for both parties: on the one side, the damaged party can receive compensation without having to wait for the lengthy criminal procedure to be completed, while on the other side, if the perpetrator fulfills the commitments within the determined period of time, the public prosecutor shall dismiss the

criminal charge, so the perpetrator does not receive a criminal record for the offence.

In the new CCP (2010) there are several differences regarding conditional postponement of prosecution, in that the aims of the measure are broader. Aside from reducing or eliminating the harmful consequences of the criminal offence, among the aims, we can identify the stopping of the disturbances that have resulted from the criminal offence, as well as efforts for improving the prospects for an offender's successful reintegration. The 2010 CCP also states the following additional commitments: returning to the victim what has been taken from him/her (stolen); undergoing treatment for addictions; undergoing psychosocial therapy in order to eliminate any violent behaviour; prohibited visits or contacts with the victims of the crime as well as with third parties as determined by the public prosecutor for a period that shall not exceed six months; 40-120 hours of community service. The duration of treatment and therapy shall be determined after consultations with a specialized institution for treatment of addictions or with the Center for Social Work. The duration of conditional postponement shall not be longer than one year when treatment or therapy is ordered. In other cases, the postponement period shall not exceed six months.

3.3 Admitting responsibility

As far as *juveniles* are concerned, there is a kind of plea bargaining procedure that can be taken when conditions for punishing older juveniles have been fulfilled, which is termed *admitting responsibility and agreement upon a type of sentence*. This possibility can be applied after proposals made by the public prosecutor to the juvenile, his/her attorney and the family. It is necessary for the public prosecutor to assess the evidence in the particular criminal case which connects the juvenile and committed offence. The public prosecutor shall collect all necessary reports and other documents regarding the juvenile's personality from the Center for Social Work. If there is no doubt that the juvenile is the perpetrator of the offence, the public prosecutor must contact the damaged party who can agree with the proposal. Consent by the damaged party is a necessary precondition for initiating the procedure for admitting responsibility and agreement upon type of sentence. This procedure can be initiated before the request for a preliminary procedure is submitted. After receiving consent from the damaged party, the public prosecutor summons the juvenile, his/her defence attorney, the Centre for social work and damaged party for reaching an agreement. The subject of agreement is on the type and duration of the sentence. If the bargaining procedure is successful the parties shall sign the written agreement. The signed agreement is sent to the juvenile criminal council, which may approve the agreement and pass a judgment, or it can choose to not accept the agreement and return the case to the public prosecutor who is obliged to initiate a preliminary procedure.

When *adults* are concerned, in accordance with the CCP (2010), the damaged party has a certain role to play during the *sentence bargaining procedure*. There is an opportunity for the damaged party to be compensated in the context of this procedure. Although it is not usual for the damaged party to be involved in plea bargaining procedure, the public prosecutor shall contact the damaged person with the purpose of acquiring a written statement regarding their property legal claim. The Public Prosecutor is obliged along with the draft-plea agreement, and together with all the evidence, to enclose a written statement signed by the damaged party regarding the type and amount of any property legal claim. This needs to be done before the bargaining procedure begins. It is not necessary for the damaged party to submit the property legal claim, but he/she has to be notified of the forthcoming bargaining procedure. The property legal claim is not a mandatory subject of the bargaining. It can be part of the bargaining procedure only if the offender's defense lawyer consents to it. If this does not occur, the damaged party can initiate civil litigation. The damaged party shall receive a copy of the judgment made after accepting the draft-plea agreement without any delay. If the damaged party is dissatisfied with the type and amount of the property legal claim determined in the judgment, he or she may initiate civil litigation.

3.4 Alternative measures as criminal sanctions

Regarding the alternative measures as criminal sanctions elaborated earlier (community service, home confinement and conditional sentence with protective supervision), it should be mentioned that the Directorate for the Enforcement of Sanctions, as a body within the Ministry of Justice under Article 14 of the Law on the Execution of Sanctions, is responsible for organizing, implementing and supervising the execution of these alternative measures. Within the Directorate for the Execution of Sanctions there is a Department for the Execution of Alternative Measures. There are several signed contracts with institutions with public authority where community service can be implemented. The training was held and there are 28 trained and certified persons who function as inspectors for the implementation of alternative sanctions (community service). They are employees of the Centers for social work. Although the legislative process, enacting of by-laws as well as practical issues for implementation took a very long time, it can be concluded that all necessary conditions for imposing and implementing community service are fulfilled.

4. Research, evaluation and experiences with Restorative Justice

4.1 Data on the use of restorative justice measures

It needs to be highlighted that there is a major lack of statistical data, especially for juvenile offenders, that relates to how offending is responded to. It is thus difficult to ascertain the role that mediation and the other manifstations of restorative justice described in this report play in the practice of the criminal and juvenile justice systems of Macedonia. This is not least also due to the fact that the Law on Juvenile Justice for instance was only put into practice as recently as 2009, and that it has yet to be amended so as to adapt it to the new CCP of 2010. Accordingly, there have yet to be published evaluations on its functioning in practice. Overall, however, there is the overall impression that they are not being used to the degree that had been expected.

The only data available concern the *compensation of the damaged party in Centers for Social Work.* There have only been a few cases in which the damaged party was successfully compensated by the parents of the child. In 2009 there were only two such cases, one of which was successful in that it resulted in an agreement, while the second case did not result in an agreement on the reparation of damages suffered. In 2010, there were 11 such procedures, nine of which resulted in an agreement.

Furthermore, some data are available on the practice of *conditionally postponing prosecution*. Research into practical aspects of this intervention has shown that conditional postponement has not reached satisfactory levels of practical application in all public prosecutors' offices in Macedonia – there are in fact strong regional disparities.[31] During 10 years of implementation, it has most frequently been applied by the public prosecution office in Skopje. Prosecution was postponed in cases relating to crimes against the safety of people and property in traffic, frauds, thefts and non-payment of child support (accounting in total for 94.1%). Compensation of damages caused by the criminal offence is the most common commitment, which in practice has been in amounts ranging from 50 to 700 Euros.

4.2 Findings from research and evaluation

To date, there have been no studies or evaluations in Macedonia that have sought to investigate the effects of participation in restorative practices on desistence or recidivism. Likewise, research into the perceptions, views and levels of satisfaction among participants of restorative processes, or among

31 *Бужаровска-Лажетиќ* 2007.

justice system practitioners, has yet to be conducted in Macedonia. There is thus much room for improvement in this regard as well.

5. Summary and outlook

In order to improve the implementation of alternative measures there is a project for establishing a new Department for Probation within the Directorate for the Enforcement of Sanctions. Funds are provided through EU IPA Funds for 2010 and implementation began in 2012. Preparing a primary legislative basis, by-laws and establishing a probation service in Macedonia in practice are among the key objectives of this project.

Mediation in criminal matters is still at its absolute beginnings, since the first mediators were trained during 2010. What is problematic in the context of mediation is that public awareness is not at a satisfactory level, which is an important precondition for its successful implementation. While the legislative basis for mediation is already in place, Macedonian reality needs much more time to understand victim-offender mediation and what it implies, i. e. its emphasis on victim healing, fostering offender accountability and the restoration of damage and harm done. Probably the biggest practical obstacle for mediation at the moment is that most mediators are in fact defense lawyers, who in practice advise their clients to go to trial instead of mediation, because for the trial they charge their client nearly 70 Euros per hearing, while one hour at mediation is charged a fee of only 20 Euros.

The Centers for Social Work are responsible for the enforcement and supervision of alternative measures like community service. Even though the law gives these centers a wide scope of competencies, they are chronically under-staffed and underfunded. In turn, this reduces their capacities and thus the ability of decision-makers to resort to forms of intervention that fall within the Centers' responsibilities. Consequently, this closes the door to numerous alleys through which reparation can factor into the process.

Restorative justice is not being used to its full potential. The first obstacle had been the legislative framework (laws and bylaws), or the lack thereof. While first steps have been taken to alleviate this issue, other conditions still need to be fulfilled. The organizational structures are weak, poorly staffed and under-funded, and there is a problem with providing training and (in connection to this) raising awareness in the justice system and the general public as to the advantages of restorative interventions. Practice (or the lack thereof) shows that representatives of the judiciary are not always thrilled by legislative develop-ments that require them to learn something new, to adapt their way of thinking or their perception of their profession, their concept of "what is justice" as well as how they form their decisions. For this reason, new solutions and innovations face great difficulties from the outset where their application is in the hands of decision-makers whose work has always been based on a different paradigm.

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Montenegro

Milan Škulić

1. Origins, aims and theoretical background of restorative justice

Restorative justice or special restorative approaches to responding to offending and resolving conflicts between victims and offenders arising from that offending are most frequently associated with the application of diversionary mechanisms in that they can serve as conditions or grounds for non-prosecution.

Restorative justice is principally a very humane concept. It covers a range of activities all aimed at repairing the harm caused by crime and involving victims as well as offenders in the process. It includes such practices as victim-offender mediation, restorative conferencing, family group conferencing, victim-offender groups, victim awareness work and reparation to the victim.[1] The hallmarks or typical constants of restorative justice are as follows: victim support and healing are the priority; offenders take responsibility for what they have done; there is dialogue to achieve understanding; there is an attempt to put right the harm done; offenders look at how to avoid future offending; the community helps to re-integrate both victim and offender.[2]

In fact, restorative justice is not an entirely new concept. Even though "the term gained popularity in most of the western world only in the past decade, restorative decision-making in the form of victim-offender mediation programs has a 30-year history in the United States" and it is considered that "this history began in 1972 with an experimental program in the Minnesota Department of Corrections using victim-offender meetings as a component of a restitution program designed for adult inmates eligible for early release."[3] By the early

1 *Goldson* 2008, p. 301.

2 *Goldson* 2008, pp. 301 f.

3 *Bazemore/Schiff* 2005, p. 27.

1980s, a number of community-based victim-offender mediation programmes had taken hold primarily in juvenile courts and non-profit agencies and by the late 1990s some 300 such programmes had been identified.

The most commonly known practices that are associated with restorative justice are:

1) procedural-law mechanisms for victim support,
2) provisions for victim-offender mediation,
3) restorative conferencing,
4) healing and sentencing circles,
5) peace committees,
6) citizens' boards and
7) community service.[4]

However, not all of these measures can be found in Montenegro.

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

The concept of restorative justice first emerged in jurisdictions that are traditionally characterized by very weak legal possibilities for protecting and enforcing victims' rights in criminal proceedings. This is mostly the case in common-law systems where there are often no possibilities for criminal courts to make decisions about restitution and compensation claims – that is only possible in civil court proceedings and often occurs completely independent of the outcome of criminal proceedings. Also, in a typical Anglo-Saxon system, the injured party or victim of a crime can only appear as a witness and has no right to initiate criminal proceedings, to interrogate, question or examine witnesses etc. The injured party can never be or become authorized prosecutor in cases of offences for which prosecution is "official", i. e. the decision to prosecute lies in the hand of the police or prosecuting agencies. Basically, in these systems the possibilities for victims and injured parties to play an active procedural used to be pretty modest, i. e. very limited. This led to the development of a strong movement to improve the position of the victim. That movement played a strong role in the recent (re-)emergence of the concept of restorative justice in the context of criminal matters, and strongly tied into the concept of alleviating the "disenfranchisement" and "helplessness" of victims of criminal offences in criminal proceedings.

Contrary to that, the injured party or the victim[5] traditionally has a more important role in the Montenegrin system of criminal justice. The same applied

4 For more see *Walgrave* 2008, pp. 31 ff.

5 There is a difference between "victim" and "injured parties". While the victim is the passive subject of the crime – a person against whom a crime has been committed – the

to former Yugoslavian legislation. Therefore, long before the emergence of the restorative justice movement and its growth in popularity, in Montenegro the injured party has already had the following possibilities:[6]

- to file restitution claims in the criminal procedure;
- to examine witnesses and propose other evidence (active role in evidential procedure);
- to prosecute criminal offences themselves or through legal representation, either as a private or a subsidiary prosecutor.

In addition, the so-called "reconciliation hearing" – a particular form of victim-offender mediation initiated by the trial judge – has existed in Montenegrin law for the last few decades.

Apart from these long-standing measures, the overall popularization of the concept of restorative justice has brought some new procedural possibilities, like "conditional deferment of criminal prosecution", and alternative sanctions, like public community work.

1.2 Reform history

In the last decades, the concept of restorative justice has attracted the attention of legal scholars. Entry of this idea into Montenegrin legal thought is visible in the Code of Criminal Procedure from 2001 (CPC/2001) that was replaced in 2009 by the new CPC (CPC/2009). The 2001 CPC introduced the principle of conditional opportunity – criminal prosecution is conditionally dismissed if the suspect fulfils certain obligations set by the public prosecutor (Art. 272). This was a very important development, bearing in mind the strict principle of mandatory prosecution that had traditionally prevailed in Montenegro.

In addition, CPC/2009 introduced new institutes and provisions like plea-bargaining, protection of particularly vulnerable witnesses and victims, and so on. Although plea-bargaining is not a restorative measure as such, the particular way in which it has been regulated in Montenegro indeed strengthens the role of victims and gives them wide authority, thus permeating this measure with a strongly restorative spirit and in turn justifying a closer look at it in this report.

injured party is the person – natural or legal – whose rights have been breached by the crime. For example, in the case of murder, the victim is person who has been killed, while the injured party is his/her family. However, bearing in mind that this difference is not emphasized enough, especially in the common law literature (i. e. restorative justice instruments talk about victim-offender mediation etc.), in this paper, the terms "injured party" and "victim" are interchangably.

6 *Škulić* 2011a, pp. 110 ff.

1.3 Contextual factors and aims of the reforms

The introduction of certain restorative measures into the Montenegrin system of criminal justice has been primarily motivated by the general desire to improve the position of the victim without disregarding the rights and interests of the accused. As already noted above, the position of the victim has always been favourable in Yugoslavian and later Montenegrin Codes of Criminal Procedure. However, the problem has lain in legal practice, in the sense that some of the possibilities provided by the law are only reluctantly implemented, like reconciliation hearings for instance.

To summarize, there is the general overall aspiration to implement restorative justice more widely in Montenegro and to avoid traditional retributive concepts whenever possible, but the main problem lies in the fact that the laws are changed too quickly and frequently, which in turn fosters a certain degree of insecurity and fear among judges and other authorities responsible for their implementation.

1.4 Influence of international standards

Because Montenegro is seeking to harmonize its legal system as soon as possible with EU legal standards, some international instruments, like Council of Europe's recommendation on Mediation in Penal Matters, Rec. (1999) 20, are principally very significant, even though such normative instruments are so-called "soft law".[7]

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

2.1 Pre-court level (police and prosecution service)

2.1.1 Adult criminal justice

The main actors of the pre-trial procedure are the police, public prosecutor and investigative judge. Pre-trial procedure is divided into "preliminary procedure" and "investigation". The preliminary procedure precedes the formal initiation of the criminal procedure and its purpose is to identify suspects and collect evidence. In the pre-criminal procedure, public prosecutor and police, under his/her supervision, play the most important role.

Investigation is also the state prosecutor's responsibility. Bearing in mind the dominant role of the public prosecutor at this stage of the procedure, the fact

7 *Stojanović* 2012, pp. 29 f.

that he/she also plays such a dominant role in the implementation of restorative practices is not surprising.

As an alternative to criminal prosecution, the prosecutor can conditionally dismiss the case. This is an exception from the principle of mandatory prosecution, the foundation of the Montenegrin criminal procedure that obliges the public prosecutor to initiate and conduct criminal prosecution whenever there is sufficient evidence. This principle seeks to ensure the equal application of the criminal law by mandating its full enforcement and precludes the prosecutor from dismissing charges simply because he/she deems the case unimportant. For a long time, this principle did not allow any exceptions, which resulted in huge case-loads and a slow, inefficient judicial system. It also undermined any form of restorative justice for crimes prosecuted *ex officio*, since the public prosecutor – as the representative of the State – was obliged to initiate prosecution and bring the charge in all cases in which there was sufficient evidence to justify doing so.

This measure involves an agreement between the public prosecutor and the suspect, who obliges him/herself to fulfil certain obligations in exchange for non-prosecution. This is not a typical restorative measure as such, bearing in mind that the opinion of the victim is not always a condition that must be taken into account when ordering it. Instead, according to the law, the focus lies on the prosecutor-offender context, but in practice, the public prosecutor often considers the interests of the victim when deciding whether or not to divert the case from criminal prosecution. Nonetheless, one of the obligations that can be imposed – compensation to the victim – has strong restorative elements, which is why conditional dismissal (as a gateway into the system for restorative practices) is more closely looked at here.[8]

This procedure is applicable only to "minor" offences, regularly such that are prosecuted in a summary procedure, punishable by a fine or imprisonment for up to five years. In practice, these offences comprise the great majority of cases reported to the police. The law does not impose any other particular preconditions in the sense of offence type, criminal history, evidential requirements, etc., but consent of the suspected person is logically required. As the measure is based on mutual agreement, without consent of suspect, the measure could not be implemented.

The measure is available in the pre-criminal procedure, after having received the criminal report. According to Montenegrin law, criminal prosecution starts when an offence is charged or by the decision to investigate. The preliminary procedure is not formally a part of the criminal procedure. Therefore, if this measure is implemented successfully, the criminal prosecution will not start at all. Success of the measure depends on fulfilment of certain obligations by the suspected person. If he/she fulfils the obligations, the public prosecutor will

8 *Škulić* 2011a, p. 53.

reject the criminal report and the criminal procedure will not start. Otherwise, the prosecutor will initiate the procedure and charge the suspect.

In the case of "conditional dismissal of criminal prosecution", the suspect only has to have defence council in the cases in which such defence is mandatory:

- if the defendant is deaf, dumb or unable to conduct own defence because of some physical or mental defect;
- if the defendant is charged with a serious crime punishable by more than 10 years of imprisonment;
- in the case of detention;
- in the case of trial *in absentia*.

Conditional dismissal of criminal prosecution is possible only for minor crimes. Thus, mandatory defence is possible only in the first scenario listed above. Otherwise, he/she can represent him/herself during procedure of this measure. Since the measure is voluntary, the law provides no right to appeal.

Regarding the position of the victim, his/her consent is only required for certain obligations that can be imposed on the offender (community work or payment to charitable cause). The victim does not have a right to appeal and cannot initiate criminal prosecution if the suspect fulfils his/her obligations. All the victim can do is initiate civil litigation for compensation of damages, if said damages have not been fully compensated via the obligations that the offender has fulfilled.

Before issuing the decision about conditional dismissal of criminal prosecution, the state prosecutor may, assisted by specially trained mediators, carry out the procedure of mediation between the injured party and the suspect.

2.1.2 Juvenile criminal justice

In recent years there has been a dramatic growth in alternative responses to criminal offending, and one form of that alternative response is the use of mediation and restorative approaches, which have emerged as important innovations and have come to exert an increasingly strong influence in criminal justice systems across Europe.[9] The juvenile public prosecutor (JPP)[10] is the only authorized prosecuting agent in juvenile justice procedures. This implies that, contrary to adult offenders, victims cannot bring a charge as a private or subsidiary prosecutor. Rather, victims can only ask the JPP to initiate proceedings. If the JPP refuses that, the victim can demand a review of that decision by the juveniles' court.

9 *Doak/O'Mahony* 2011, p. 1,691.

10 These are specialised public prosecutors who have acquired special skills in the field of children's rights and juvenile delinquency.

In accordance the Article 4 of the Juvenile Justice Code of Montenegro, the treatment of juvenile criminal offenders shall be based on basic principles:

1. respect for human rights and fundamental freedoms;
2. respect for the best interest of juveniles;
3. prohibition of discrimination on any grounds;
4. comprehension of the language used, use of technology adapted to the age and developmental level of the juvenile;
5. respect for the juveniles' right to privacy in all stages of the proceedings;
6. respect for the right of juveniles to freely express their opinion;
7. an effort to avoid as far as possible the restriction of juveniles' personal freedom;
8. promotion of implementation of diversion measures and diversion treatment modalities for juveniles;
9. give precedence to criminal sanctions that are not enforced in institutional settings, and
10. give special consideration to training and specialisation through a multidisciplinary approach and institutional cooperation.

The principle of opportunity (non-mandatory prosecution) is more widely used in the juvenile criminal procedure.[11] Therefore, the JPP may decide not to instigate proceedings against a juvenile in the following cases.

1.) If the juvenile has committed a criminal offence punishable by no more than five years of imprisonment, the JPP may dismiss a criminal complaint if s/he finds that sentencing would not be fair, because the juvenile has fully compensated the damage through effective regret.
2.) Regarding the same offences (offences punishable by a fine or up to five years of imprisonment), the JPP may decide not to initiate the procedure, taking into consideration following circumstances:
   a) the nature of the criminal offence;
   b) the circumstances under which a criminal offence has been committed;
   c) previous living conditions of juvenile offenders;
   d) personal characteristics of the juvenile (Art. 68, § 1).

In order to verify these circumstances, the JPP may request information from the juvenile's parents or guardians and other persons and institutions. He/she can also ask for the guardianship authorities' (social workers) opinion about the appropriateness of further prosecution, or – following agreement with the guardianship authority – may refer the juvenile to a youth home or an educational institution for up to thirty days (Art. 68, § 2). If the JPP decides not

11 For more see *Škulić* 2011.

to initiate the procedure, he/she will require the juvenile to fulfil one or more "attendance orders".

When a juvenile is already serving a criminal sanction and commits another criminal offence punishable with up to five years of imprisonment, the JPP may decide not to press charges for that new offence, if he/she found that conducting proceedings and pronouncing a criminal sanction for that new offence would serve no purpose (Art. 69, § 3).

In the pre-trial procedure, the JPP is responsible for making decisions concerning attendance orders, and he/she can condition non-prosecution on fulfilment of that order. According to the Juvenile Justice Law, the "juvenile public prosecutor may decide not to initiate proceedings for criminal offences that carry a fine and/or up to five years in prison … rovided he/she passes a decision imposing one or more attendance orders" (Art. 69, § 1).

In selecting particular attendance orders, the JPP shall have particular regard to their congruence with the character of the juvenile and the circumstances in which s/he is living, taking into account his/her readiness to co-operate in their implementation (Art. 69, § 4).

If the juvenile fully complies with the imposed attendance order, the juvenile public prosecutor shall dismiss the criminal complaint and the procedure will not be initiated (Article 69, § 5). If the juvenile only partially complies with his/her attendance order, the JPP may still dismiss the criminal complaint, if s/he is convinced that initiating the procedure would not be fair in light of the nature of the criminal offence, the circumstances in which it was committed, the personality of the juvenile and reasons why s/he failed to fully comply with the attendance orders (Article 68, § 6). If the juvenile fails to comply with the imposed attendance orders, or only complies to a degree that justifies further proceedings, the juvenile prosecutor will initiate preliminary proceedings and charge the offender (Article 69, § 7).

The JPP shall notify the victim if s/he has decided to dismiss the criminal complaint. The victim has the right to request the juvenile judge to overturn that decision and charge the young suspect (Art. 69, § 9).

Attendance orders can also be ordered during the preliminary procedure under the same conditions, with one important difference: while during the investigation phase, before initiation of the criminal procedure and filing the charge, imposing attendance orders and dismissing the criminal complaint is only possible for criminal offences punishable by no more than 5 years of imprisonment, in the preliminary procedure it is also possible for more serious crimes punishable by 10 years of imprisonment. The other legal conditions are the same – the JPP decides whether further prosecution is suitable, having in mind the nature of offence, the circumstances of its commission and the personality of the juvenile. She/he can request information from the legal custodian of the juvenile, other persons, authorities and institutions, etc. If juvenile fulfils the

measure fully or to a large degree, the JPP will discontinue the preliminary procedure.

In general, diversion (especially such involving a restorative approach) in Montenegrin juvenile justice is implemented according to the following principles:

"1) Diversion is a meaningful and effective response (particularly) to juvenile first and second-time episodic offenders,
2) diversion by non-intervention should be given priority in most of these cases,
3) diversion combined with restorative or educational measures is sufficient in many of the more serious cases, and
4) juvenile court disposition should be reserved for persistent and/or more serious offenders."[12]

2.2 Court level

2.2.1 Adult offenders

When the case comes before the court, the application of restorative measures lies solely in the hands of the judge. The parties' initiative is an important factor in cases of mediation. Before we take a closer look at the available restorative measures, it is necessary to make some basic comments about the Montenegrin system of criminal justice, in order to boost our understanding of central restorative justice issues and their implementation in Montenegro. Criminal offences prescribed by the Montenegrin Criminal Code are divided into:

a) "*Official crimes*"-prosecution is in the hands of the public prosecutor. The vast majority, about 95% of all criminal offences, belong to this group. The public prosecutor, as a representative of the State who is obliged by the principle of mandatory prosecution, is primarily responsible for their prosecution. If the public prosecutor does not initiate prosecution, or dismisses it, the injured party could "step into his shoes" and become prosecutor. In such cases, the victim is referred to as the "subsidiary prosecutor". The principle of mandatory prosecution does not apply to the victim, which means that he/she can freely decide whether or not to take over the prosecution.

b) "*Private offences*"-prosecution is solely in the hands of the victim, who assumes the role of "private prosecutor". This category predominantly includes minor offences like minor bodily harm, minor theft, insults, defamation etc. that endanger private interests, but not the general public. Therefore, injured party (victim) freely decides about initiating criminal prosecution by submitting a private charge. Logically, this category of crimes leaves more space for various

12 *Dünkel/Pruin/Grzywa* 2011, p. 1,682.

restorative measures, and victim-offender mediation and reconciliation hearings are applicable only to this category of crimes.

Regarding procedural guarantees, general provisions related to defence council and attorney also apply here. This means that the victim or injured party is allowed to engage legal attorney in any case, regardless of whether the dispute is resolved via restorative measures or in regular criminal proceedings. The same applies to the accused. He/she is free to choose whether he/she wants legal counsel, except in the cases of mandatory defence stated earlier.

Restorative measures available at the court level are victim-offender mediation, reconciliation hearings, restitution orders and conditional dismissal of criminal prosecution as already described in *Section 2.1* above. Finally, "plea bargaining" entails some specific restorative elements.

Victim-offender mediation and reconciliation hearings are available only for "private offences". These crimes are usually minor, but the Criminal Code explicitly restricts mediation to crimes punishable by up three years of imprisonment or a fine. The law stipulates no other formal requirements, for instance in terms of offender age, prior convictions, confessions etc.

The Code of Criminal Procedure regulates *reconciliation hearings* (Art. 459), a special form of mediation before the trial-judge. This procedure is possible only for private offences, regardless of the prescribed punishment. *Ratio legis* of this measure is based on the *ultima ratio* character of the criminal law. Therefore, in cases of private offences, instead of the regular criminal trial, the court can initiate reconciliation of the parties. Where reconciliation is achieved, the private charge is withdrawn and the court passes a judgement of rejection. If the reconciliation is unsuccessful, the ordinary procedure will continue to the main hearing.

Another restorative measure that has traditionally formed the part of the Montenegrin criminal procedure is the *restitution claim*. The court is obliged to notify an injured party about his/her right to file a claim for restitution. This claim may relate to the compensation of damage, the returning of objects or the annulment of a certain legal transaction, and may be submitted until the end of the main hearing. The court will then decide about the restitution claim in its judgment. In this regard, courts have the following options. If the offender is found guilty, the court can either order the offender to fulfil the restitution claim, or refer the injured person to file the claim in civil litigation. Where an offender is found "not guilty", the court refers the injured person to file the claim in civil litigation. Therefore, a criminal court cannot refuse or turn down the claim for restitution. It always either imposes a restitution order on the offender, or refers the injured party to civil litigation.

The CPC/2009 (Criminal Procedure Code) in Montenegro introduced the common-law institute of *plea-bargaining*. Although plea-bargaining as such cannot be regarded as a restorative measure or process, the particular position that the injured person has in this procedure justifies its analysis in this

context.[13] This is an exceptionally novel institution in Montenegrin criminal procedure that is otherwise characteristic of Anglo-Saxon criminal procedure, and that is very widely accepted in numerous Continental-European criminal procedural legislations, where in theory there is even mention of a "*plea bargain infection*". This is a typical example of the convergence of two great world criminal procedural systems, where the modality which Montenegro has opted for in its legislation represents a fairly moderate option that we consider acceptable for the circumstances in Montenegro.

The main actors of plea-negotiations are the defendant (and his/her defence council) and the prosecutor, but the plea-agreement has to be confirmed by the court in order to take legal effect. The judge decides about the agreement in a special hearing to which the injured party is also invited. In making its decision, the judge is obliged, according to explicit CPC provision, to evaluate, among other factors, whether the agreement poses a threat to the rights of the injured party. If this is the case, the judge has to reject the agreement.

One more particular feature of the Montenegrin plea bargaining is the possibility to appeal a decision relating to the plea-agreement. After examining the agreement, the judge decides either to adopt or to refuse it. If the judge refuses the agreement, the parties (public prosecutor and defendant) can appeal that decision. Contrary, if the judge adopts the agreement, the injured party can appeal. Final verdict can be brought only after the decision to adopt agreement becomes final. Restorative elements in plea-bargaining can be found in the possibility to include some of the obligations that are related to conditional dismissal of criminal prosecution described in *Section 2.1* above (social or humanitarian work, etc.).

One of the obligations that can be included in the plea agreement is so-called "elimination of detrimental consequences or compensation of the damage caused by the criminal offence", which has a strong restorative nature given its focus on repairing harm.

The Criminal Code of Montenegro provides two different types of "warning": the suspended sentence, and court admonition. Within the general purpose of criminal sanctions (Art. 4, § 2 CCM),[14] the purpose of the suspended sentence and court admonition shall be that a sentence for minor criminal offences will be not imposed on the guilty offender when it can be expected that an admonition under the threat of punishment (suspended sentence) or an admonition alone (court admonition) will sufficiently influence the offender and deter him/her from committing criminal offences (Art. 52, § 2 CCM).

13 *Škulić* 2012, pp. 375 f.

14 The general purpose of prescribing and imposing criminal sanctions in the criminal justice system of Montenegro shall be the prevention of offences that violate or jeopardize the values protected by criminal legislation.

One of the criminal sanctions in the Criminal Code of Montenegro is the "suspended sentence with protective measures".[15] This version of the suspended sentence is a combination of elements of continental and Anglo-Saxon suspended sentences.[16] Some of these protective measures have a significant restorative nature.

If a suspended sentence prescribes a convicted person to fulfil certain obligations and she/he fails to do so within the deadline set forth in the judgment, the court may, within the probation period, extend the deadline for meeting the obligation or it can revoke the suspended sentence and pronounce the punishment set forth in the suspended sentence.

If the court establishes that the convicted person cannot fulfil the obligation for justified reasons, the court shall relieve him/her of that obligation or substitute it by other appropriate obligation provided by the law.

In accordance with Article 62 of the Criminal Code of Montenegro, protective supervision can comprise one or more of the following obligations:

1) reporting to a competent authority in charge of execution of protective supervision within the time limits specified by that authority;
2) training of the offender for a particular profession;
3) accepting a job appropriate to the skills and interests of the offender;
4) fulfilment of the obligation to support the family, care and upbringing of children and performing other family obligations;
5) refraining from visiting certain places, bars or events that could be an incentive for re-offending;
6) reporting in a timely fashion any change of residence, address or job;
7) refraining from drug and alcohol consumption;
8) medical treatment in an appropriate medical institution;
9) visiting particular professional and other counselling wards or institutions and following their instructions and
10) eliminating or mitigating the damage caused by the criminal offence in question, particularly reconciliation with the injured party.

Some of these obligations could have a restorative nature, especially the last obligation - eliminating or mitigating the damage caused by the criminal offence and reconciliation with the victim, i. e. injured party.

2.2.2 Juvenile offenders

After completion of the preliminary proceedings, the JPP will submit to the court a motion for the imposition of a criminal sanction. The juvenile judge will examine the motion and, if s/he disagrees with it, will require from the chamber

15 For more, see *Stojanović* 2010, pp. 225 f.

16 *Stojanović* 2008, p. 315.

for juveniles of the higher court to render a decision on the matter. In this stage, the court can schedule a trial or a hearing regarding the sanction that could be imposed on the juvenile. Juvenile imprisonment and institutional measures can only be issued against a juvenile following trial, while the other sanctions may be pronounced at the hearing. Therefore, the court procedure is mostly reserved to pronouncement of sentence, while the JPP is authorized to decide about restorative measures in the preliminary procedure. Only the JPP can pronounce attendance orders (Art. 13), while the court may impose special obligations, that are criminal sanctions, some of which have strong restorative connotations.

In accordance with Article 19 of Juvenile Justice Code, the court may order one or more "special obligations" if, according to the court's assessment, they are necessary to influence the juvenile and his behaviour.

The court may order the juvenile to:

- offer an apology to the victim or provide compensation to him/her in the form of juvenile work. Victim's consent is necessary for this obligation;
- go to school or work regularly or take vocational training, or to engage in sports activities;
- make a specific donation to a humanitarian organisation, fund, or a public institution or to do community or humanitarian work;
- to undergo a drug or alcohol addiction rehabilitation programme, or partake in individual or group therapy in a health institution, counselling service, or other organisation;
- not leave his/her place of permanent or temporary residence or to abstain from visiting certain places or having contact with certain persons.

When selecting an obligation, the court shall pay attention in particular to whether such measures are suitable for the juvenile and his/her living circumstances, as well as their willingness to cooperate in their implementation.

Some of the special obligations are time-limited, mostly to one year, and during this period they can be replaced by other special obligations, or be suspended. Community service or humanitarian work may not last more than 120 hours over a period of six months, and such work shall not interfere with the juvenile's education or employment.

Regarding compensation to the victim (the first obligation listed above), the court shall determine the amount of compensation and the way in which the juvenile will implement it through their work. Such work cannot interfere with the juvenile's education or employment and it is limited to 60 hours over a period of three months.

2.3 Restorative Justice in the context of prisons

Montenegrin law on the execution of criminal sanctions does not provide any elements of RJ in the context of serving prison sentences. Prisons are still considered strongly retributive institutions, in which traditional retributive approaches to conflict resolution are applied. There are merely local manifestations of RJ in juvenile correctional institutions that serve as experimental elements of pedagogic practice. However, to date no detailed evaluations or data have been published that could give some insight into such localized practices.

3. Organizational structures, restorative procedures and delivery

3.1 Conditional dismissal of criminal prosecution

Conditional dismissal of criminal prosecution (Art. 272 Criminal Procedure Code of Montenegro) is possible for criminal offences punishable by a fine or imprisonment for a term up to five years.[17] In practice, these offences comprise the great majority of cases reported to the police. The focus is on the agreement between public prosecutor and the suspected person, where the public prosecutor obliges not to initiate criminal prosecution, if the suspect fulfils certain obligations.

The state prosecutor decides whether is appropriate to conduct criminal proceedings bearing in mind the nature of the criminal offence and the circumstances of its commission, the offender's past and personal attributes. Obligations that could be imposed are:

- elimination of caused harm or compensation of the damage caused by the criminal offence;
- fulfilment of obligations determined by final judgment;
- payment for the benefit of a humanitarian organization, fund or public institution;
- performing community service or humanitarian work.

The first measure is restorative in nature, since it is in the interest of the victim and, perhaps more importantly still, seeks primarily to repair the harm caused by the offence. Interestingly, though, consent of the victim is required only in the case of the obligations related to charity payments or charity work, while in the other cases the victim's agreement is not explicitly prescribed as a condition. However, in practice, the state prosecutor will always take into account the interests of the victim and seek to achieve that he/she is satisfied fairly. In this regard, s/he is required to carry out the procedure of mediation

17 For more, see *Škulić* 2009, pp. 793 f.

between the injured party and the suspect, with assistance of a specially trained person (mediator), before actually officially ordering the measure.

The defendant is obliged to fulfil the obligation within a certain time limit that shall not exceed six months. The further course of the criminal procedure depends on whether and how the obligations are fulfilled. If the suspect fulfils the obligations satisfactorily and on time, the state prosecutor will reject the criminal report and the criminal procedure will not start at all. Otherwise, the state prosecutor will bring the charge.

3.2 Attendance orders (juvenile offenders)

Attendance orders are implemented by the JPP either in the pre-investigative or in the preliminary procedure. Their purpose is in the avoidance of formal criminal proceedings or, where proceedings have already been instigated, to dismiss the case i. e. to "divert" it.

Before proceedings have been initiated, attendance orders can be ordered against a juvenile offender for criminal offences punishable by a fine or imprisonment for up to five years (Art. 69 of the Law on Juveniles[18]), while in the preliminary proceedings their implementation is possible for crimes punishable by no more than 10 years of imprisonment. Montenegrin legislation allows an extensive application of attendance orders by this provision, which is optional, because not only may "petty" criminal offences fall under this provision, but also those falling under "medium criminality".

In selecting an attendance order, the JPP shall take into consideration the interests of the juvenile and the victim, the juvenile's willingness to cooperate and observe the attendance orders, and the juvenile's personally and living circumstances. As far as juveniles are concerned, an additional criterion must be taken into account – that attendance orders do not impede the juvenile's schooling or employment.

Attendance orders are selected and enforced in cooperation with the juvenile's parents, adoptive parents or guardians. Besides that, in selecting and implementing an attendance order, the juvenile state prosecutor shall cooperate with the guardianship authority, relevant institutions or organisations, mediators, special teachers, psychologists or other professional support staff who may offer relevant information on the juvenile and thus on the most appropriate attendance order. An attendance order may be implemented for no longer than six months. During that period it can be replaced by another attendance order or suspended. Attendance orders include a duty to:

18 For simplicity, hereinafter all Articles that state no legal source are contained in the Law on Juveniles.

1. settle with the victim;
2. attend school or go to work regularly;
3. engage in sports activities;
4. do community or charity work;
5. give a donation to a charity organisation, a fund or a public institution;
6. undergo examination and a drug or alcohol addiction rehabilitation programme;
7. join individual or group therapy in a health institution, counselling service, or other appropriate organisation;
8. attend vocational training courses or prepare for and take an examination;
9. observe restraining orders (with respect to a place or a person).

At the time of selecting an attendance order, the interests of the juvenile criminal offender will be assessed on the one hand, and the interests of the injured party/victim shall be considered on the other. The victim has been receiving increased attention in modern juvenile criminal law over the past decades. Settlement with the injured party is found today in a number of legal systems of European and oversees countries, and many authors find that it is the most valuable alternative to the repressive sanctions of the criminal law.[19]

3.3 Victim-offender mediation

In Montenegro, there is a dedicated Law on Mediation. Article 1 states that the provisions of the Law on mediation shall stipulate the rules for mediation procedure in civil disputes, commercial and other property legal relationships of natural and legal persons in which the parties can freely exercise their rights, as well as in employment litigations and labour law that are pending in the court, unless there is a special regulation that prescribes otherwise for some of these disputes.

The Law on Mediation cannot be formally applied in criminal matters and formally there is no special form of victim-offender mediation in Montenegro. It is possible only as part of a civil procedure (civil litigation), when the victim claims for restitution, e. g. compensation for the damage caused by a criminal offence. One form of mediation between victim and offender is the reconciliation hearing (Art. 459 of the Criminal Procedure Code of Montenegro). It is possible only in cases of "private offences", i. e. when prosecution is exclusively in the competence of the victim as a private prosecutor. These are mostly minor offences like minor thefts, minor bodily harm etc., that have harmed private interests but that pose no danger to the public interest.

19 *Perić* 2005, p. 30.

Before scheduling a main hearing for criminal offences subject to private prosecution, the judge may summon only the private prosecutor and the accused person to a hearing for the preliminary clarification of the matter if s/he considers it expedient for the prompt termination of the proceedings. Along with the summons, the accused person shall be served a written copy of the private complaint.

If reconciliation of the parties is unsuccessful and the private action is not withdrawn, the judge shall take statements from the parties and call on them to submit their motions regarding the evidence to be obtained. If the judge does not establish that conditions exist for the dismissal of the charge, he shall render a decision with regard to the evidence to be examined at the main hearing and shall, as a rule, immediately schedule the main hearing and notify the parties thereof.

If a private prosecutor and the accused person do not propose evidence, neither before appearing in court nor when they appear before the court, and the judge considers that obtaining evidence is not necessary and no other reasons exist for the explicit scheduling of the main hearing, s/he may immediately open the main hearing and, after presenting the available evidence, render a decision on the private action. The private prosecutor and the accused person shall explicitly be informed of this possibility in the summons.

3.4 Victim-offender settlement (juveniles)

Victim-offender settlement between juvenile perpetrators and their victims is provided for as a type of attendance order (Art. 12, § 1). Settlement has not been exercised to any significant degree in practice as a result of a lack of appropriate by-laws, and court practice in Montenegro seems relatively conservative, likely as a consequence thereof.

The Law on Juveniles provides another type of victim-offender settlement for criminal offences prosecuted by private action (Art. 67). The juvenile police officer, with the approval of the JPP, shall inform the juvenile and the victim of the possibility of settlement and shall entrust the settlement procedure to the mediator with their consent. The settlement procedure shall be conducted in accordance with the provisions of this act (the Law on Juveniles) on the implementation of the attendance order of victim-offender settlement. If they do not accept the settlement procedure, or do not complete it within 30 days, or fail to reach an agreement or if the juvenile fails to fulfil all or part of the obligations set forth in the agreement, the victim has the right to submit a motion to institute proceedings to the JPP.

3.5 Reconciliation hearing

The Code of Criminal Procedure regulates ***reconciliation hearings*** (Art. 459), a special form of mediation before the trial-judge. After reception of the private charge, and before a main hearing, the trial judge can invite the parties to a special hearing. The purpose of this hearing is to clarify the dispute and to try to achieve a peaceful resolution thereof.

Here, the trial judge acts as mediator, trying to support the parties in finding a mutually acceptable solution. If the private prosecutor (victim) does not attend this hearing, the judge will dismiss the case, presuming that the private prosecutor has dismissed the charge since he is not interesting in his own case. If the defendant fails to appear, he/she risks being condemned *in absentia*. In summary procedure, namely, the trial judge can hold the main hearing *in absentia* of the defendant under the following conditions: a) he/she was invited to the main hearing, but failed to appear; b) his/her presence is not necessary; c) he/she has already been heard.

According to CPC Art. 459, § 4, the main hearing can be immediately held if the reconciliation hearing is unsuccessful, and there is no need to collect further evidence. Therefore, if the defendant does not appear to the reconciliation hearing, there is a possibility that he/she will be sentenced *in absentia*.

The desired result of reconciliation hearings is mutual agreement between the parties and the withdrawal of the private charge. In that case, the costs of the procedure are also the matter of agreement. If reconciliation fails, the regular procedure will continue with evidentiary proposals and ordering of the main hearing, with the possibility of it being opening immediately.

4. Research, evaluation and experiences with restorative justice

Despite the fact that reconciliation hearings were introduced into Montenegrin law a long time ago, it is rarely used in practice. One of the reasons could be the fact that these restorative measures are limited to privately prosecuted crimes (complainant's crimes), and it is difficult to convince the victim, who has already decided to bring the criminal charge, to resort to some peaceful, restorative solution. Bearing in mind the very low implementation of these measures in practice, no statistical research into them has been conducted to date. Further still, there are no studies about recidivism, i. e. re-offending rates following mediation, or levels of participant satisfaction with mediation and the perceptions of criminal justice. There have, likewise, been no official cost-benefit-analyses. In short: research into the subject in Montenegro is very sparsely spread.

5. Summary and outlook

Implementing restorative justice ideas in Montenegro more widely and broadly would certainly be very beneficial not only for victims and offenders, but for the legal system and society as a whole. Through restorative measures, victims receive adequate satisfaction, while offenders avoid classical retributive criminal sanctions and at the same time can assume responsibility for their offence.

General society also has an interest in a wider implementation of restorative measures, since they create a better "climate" and improve dialogue and relations between victims and offenders which reduces recidivism-risk. The legal system also "wins", as restorative justice is more effective, quicker and cheaper than classical retributive proceedings, bearing in mind that personnel and technical potentials are more rationally used.

Montenegro has an adequate normative framework for implementing the restorative justice concept, especially in cases of minor crimes and juvenile offenders. The problem underlying the insufficient use of restorative possibilities lies in criminal justice practice. One of the reasons is that it can be difficult to alter or change ingrained habits and ways of thinking, a problem that is further exacerbated by a lack of precision in certain legal provisions. Therefore, there is a good excuse to choose not to use restorative measures. However, there are implications that this will be changed in the near future, since an apparent political will does seem to exist.

For example, although "probation with surveillance", i. e. the "suspended sentence with protective measures" (some of these measures have a significant restorative nature) has been set forth in the criminal law of Montenegro, i. e. in the former Yugoslavia, for decades, it has never been applied in an adequate fashion, since the required mechanisms have not been put in place in the social welfare system. In that respect, both in Montenegro and in former Yugoslavia, there has always been a huge discrepancy between some legal possibilities and practice, which are preconditions for applying legal possibilities in practice.

Judges, prosecutors and other legal actors are usually open to a wider implementation and use of restorative measures, but at the same time call attention to the problems they face. "Conditional dismissal of criminal prosecution", which can imply compensation to the victim, is sometimes considered in the public as favouring offenders. Therefore, this mechanism is very cautiously and rarely used in practice in cases of violent crimes.

Juvenile justice law also provides adequate normative possibilities for restorative ideas that are still insufficiently used in practice. According to juvenile judges and prosecutors, the basic problem is a lack of adequate administrative regulations, i. e. supplements to legal rules. This problem certainly exists, but is not crucial, bearing in mind that some juvenile courts and prosecutor's offices have nonetheless successfully implemented restorative measures for juveniles without supplementary regulation.

Restorative justice certainly has a future in Montenegro. The traditional system of Montenegrin criminal justice pays adequate attention to the interest of the victims and their protection, and there is a tendency that new procedural forms will contribute not only to a more efficient criminal procedure, but also to the reconciliation of the interests between victim and offender whenever possible. Thus, it should be expected in the forthcoming years that ideas of restorative justice will be used in Montenegro much more widely than is the case today.

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The Netherlands

Diane van Drie, Sanneke van Groningen, Ido Weijers

1. Origins, aims and theoretical background of restorative justice

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

In characterizing the current state of affairs of restorative justice in the Netherlands, the first thing that stands out is the wide variety of RJ interventions that are available. On the one hand, three dominant forms of RJ intervention or interventions 'with a restorative element' are offered everywhere in the Netherlands: victim-offender mediation, restorative group conferencing, and community reparation orders at the level of the police, the prosecutor and the court. Alongside these forms of restorative justice that have been implemented and made available nationwide, there exist local restorative initiatives in neighbourhoods and in schools, in youth detention centres, in prisons and in 2010 a small pilot at the court level started.

There has been an enormous rise of so-called 'alternative sanctions' in the Netherlands in the last three decades. First, since 1981, at the police level so-called *HALT*-disposals have been available for minors concerning minor non-violent offences like vandalism, requiring the delivery of some hours of community service. Secondly, in 1983 'alternative sanctions' were introduced in the Dutch criminal law at the level of the prosecutor and at the court level, implying community service and/or training. In the course of the 90's these sanctions lost their 'alternative' character. As '*taakstraffen*' (task-penalties) they

have become part of the standard set of sanctions, both for minors and adults.[1] In our opinion, this latter development has little to nothing to do with restorative justice, first, since generally these sanctions do not imply any form of victim-involvement, nor any restorative procedure or serious form of restoration towards victims, and second, since generally they are delivered without consent of the offender. HALT is exceptional at this regard, because such disposals involve making apologies to victims (writing a letter to the victim). For this reason this report covers HALT and leaves the 'taakstraffen' aside.

1.2 Reform history

A second characteristic of the situation in the Netherlands is that on the one hand a lot of its typical RJ interventions emerged 'bottom-up' in the nineties of the previous century, for example at local police offices, as a local initiative by probation officers, by municipalities, in a specific youth detention centre, etc. Almost all of these initiatives depended on one or two crucial persons, and the majority of the initiatives failed to survive into the 21st century. However, new local initiatives have emerged recently in new places.

One older experiment is worth mentioning here in particular – an early pilot in The Hague that started in 1997 and was financed by the Ministry of Justice until 1 January 2004. Almost all offenders were adults, only two or three were juveniles.[2] The experiment was initiated by the probation service (*José Frijns*) and the victim support service. Cases were referred to the project by the probation service, victim support or lawyers.[3] 85% of the requests came from offenders through the probation service, and the average annual intake was around 50 cases. The experiment had four mediators in total, all part-time and professionally and extensively trained by the Netherlands Mediation Institute (NMI). The cases dealt with usually involved (very) serious crimes. Due to the serious nature of the offences, there was a strong preference for organising the mediation session after the offender had been convicted and, therefore, outside the justice system. Despite very interesting experiences, funding for this pilot was stopped in 2004.[4]

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1 In the 21st century Halt has risen to about 20.000 sanctions a year and the *taakstraffen* for juveniles have risen to the same level, which meant that the overwhelming majority of all youth sanctions has become a form of 'diversion'.

2 *Frijns* 2003. In 2001 the town of Den Bosch became the second location for this experiment.

3 *Wolthuis* 2000.

4 A second project started from a neighbourhood justice office in Rotterdam, which organised VOM exclusively with juvenile offenders. This project started in 2002 and was financed by the Ministry of Justice. The cases generally involved petty offences.

Another important pilot was the Real Justice initiative, initiated by *Rob van Pagée*. Here in fact the Real Justice approach developed by *Terry O'Connel* and *Ben* and *Ted Wachtel* was copied.[5] In contrast to the Hague pilot, this Real Justice pilot focussed in particular on less serious cases, concerning for instance fights and rows in schools and neighbourhoods.[6] This initiative did not have a local, but rather a national focus. A third difference was that its mediators were not professionals but briefly instructed coordinators who adhered to a written script, known as the typical Real Justice script. This organization – known now as 'Eigen Kracht Centrale' – with its bottom-up start, has survived and grown now into a nationwide institute, offering 'Real Justice'-conferences in schools, youth homes and youth detention centres and other places, next to family group conferences in civil cases.[7] They are known now as (Families') Own Strength ('Eigen Kracht') Conferences.

From another perspective a second initiative can be discerned in the Netherlands, which began in the eighties as a typically local and bottom-up project and soon emerged to a national, and centrally funded organization: Halt (meaning 'The Alternative'). Halt started as a local initiative in Rotterdam, to confront young offenders with the consequences of graffiti and damage to public buildings and transport systems. It grew quickly because of overwhelming interest and popularity among other municipalities. While the main line of Halt was a focus on community service there was also a restorative element, like writing a letter of apology or making another restorative gesture. Halt is offered everywhere in the Netherlands as a police referral that is on a voluntary basis, that is, if the young person (and/or his parents) refuses the offer, he will be sent to the prosecutor.

Finally, since 2007 victim-offender mediation has been set up and implemented nationwide by the corporation 'Slachtoffer in Beeld' (SiB) as a typical top-down initiative, following a decision by the Ministry of Justice in 2006.[8] This means that since 2007 victim-offender mediation has been developed in the Netherlands as a national provision, a service first of all for

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This project has been stopped. A third project was Zeeland Restorative Mediation, which started in the province of Zeeland in 2001. The experiment was initiated by the probation service for juveniles and was financed partly by the Ministry of Justice and partly by the local provincial government. This project can not seem to be traced anymore, therefore it is assumed it has been cancelled as well.

5 *Hokwerda* 2004.

6 *Echt Recht* 2000.

7 For further information see *Hokwerda/Weijers* 2005.

8 At the same time, however, 'Slachtoffer in Beeld' itself had a history as a typical bottom-up organization, related to Victim Support (Slachtofferhulp Nederland), organizing and carrying out for years a special training for young offenders to confront them with the consequences of their wrongdoing.

victims, and secondly, for young offenders, and thirdly and more recently also for adult offenders. It is a provision, not something that can be enforced or imposed, but a service which both offenders and victims may use if they wish, voluntarily and confidentially. An initiative in this direction can be taken by either a victim or an offender. It is possible to choose, after a preparation phase, between a direct, mediated meeting with the other party, or indirect meetings via video links, letters or other forms of indirect communication. There can be some negotiation about compensation of harm, but SiB interventions are mainly concerned with emotional damage. This service is not about claim settlement, as there are special provisions for financial claims by victims (see para 1.3).[9]

So here again one can discern three dominant kinds of RJ interventions or interventions 'with a restorative element' offered everywhere in the Netherlands: victim offender mediation (SiB), Real Justice group conferencing (Eigen Kracht) and community reparation orders, implying the delivery of apologies to victims at the police level (Halt).[10] Alongside these three nationwide traditions there exist several (new) local initiatives towards restoration, which sometimes are connected to one or two of these dominant RJ interventions.

1.3 Contextual factors and aims of the reforms

For an adequate understanding of the development of restorative ideas and mediation practices in the Netherlands three relevant factors have to be kept in mind: the important role of diversion in Dutch criminal law, the relatively strong development of the role of the victim in Dutch law, and finally, a tradition of critical research and reflection on restorative ideas and practices worldwide, which has been partly inspired and developed by Dutch research in the field of victimology.

First of all, there has been a relatively strong development towards diversion for young offenders in particular in the Netherlands, and part of that development has meant that there has been some focus on restoration. This is the case for Halt (Police Referral) in particular, that is, for minor cases, and it also applies for the so called 'Taakstraffen', implying community service or training (Prosecutor and Court Referral). On the one hand this development might be considered as a kind of preparation of fully fledged RJ-procedures.

On the other hand, one consequence of having this possibility of a Halt-referral in the Netherlands at a relatively early stage (in the mid-eighties), which was meant as a lenient reaction for petty offences, may have been that there has been far less need for restorative initiatives for young offenders than in the

9 *van Wingerden et al.* 2007.

10 See *Weijers* 2005; 2012.

Anglo-Saxon world.[11] At the same time, it is clear that the process of diversion itself has not (yet) resulted in a reduction in the range of possible sanctions for juveniles. On the contrary, an expansion of sanctions or net-widening, in particular in the field of juvenile justice, has been characteristic of this development. In practice, Halt and Taakstraffen did not serve as alternatives to sentences to detention, but rather were merely added on top of them.[12] The visible net-widening effect plus the negative outcomes of a Halt effectiveness study[13] may have fostered reservations on behalf of practitioners, legislators, academics and other involved parties towards more restorative initiatives in reaction to petty offences.

Secondly, Dutch policy on the victims of crimes compares favourably with that of many other European countries.[14] This outcome needs to be seen against the background of the emancipation of the victim that started in the Netherlands about forty years ago. The setting up of women's refuges in the 1970s and early experiments with victim support in the 1980s started the trend. In the early days, victim support mainly consisted of groups of people who had experienced similar misfortunes. These became more professional as the years went by, developing into serious pressure groups,[15] while Victim Support Netherlands operates in a coordinating and supporting role. When the new Civil Code came into effect in 1992, this led to a switch from liability based on fault to liability based on risk.[16]

The 1992 Victim Assistance Act (Wet Terwee) brought about the most significant improvements in the criminal law for victims, by increasing the opportunities for them to be involved in the criminal proceedings. This law gave victims the right to submit a claim for compensation in the criminal proceedings, without this being subject to a maximum limit as it used to be. While victims used to have to appear in court in person to claim compensation, they can now

11 See for instance *Braithwaite/Mugford*, 1994.

12 *van der Laan* 2005.

13 *Ferwerda et al.* 2006.

14 Comparative research has shown that the Netherlands have gone furthest in implementing the guidelines of the 1985 Recommendation on the Position of Victims in the Framework of Criminal Law and Procedure of the Council of Europe and has not been content merely to pay lip service to victims' rights on paper (Brienen/Hoegen 2000).

15 Such as the *Association of Road Accident Victims*, the *Association for the Parents of Murdered Children* and the *Association for the Relatives of Missing Persons*.

16 Traffic law in the Netherlands, in particular, has increasingly developed in the direction of victim-based law. In the new traffic law, the motorist is in principle held liable with respect to weaker road users such as pedestrians and cyclists, unless he can prove that an accident was caused by circumstances beyond his control. In civil cases, Dutch courts have also increasingly been taking the side of the victim in recent years. *Heslinga* 2001.

do so in writing without having to face the offender in court. This law also gave judges the power to impose a compensation measure. If the offender failed to pay, he would be sentenced to detention, but in 80 to 90% of cases the victims did get their money.[17] As well as material compensation, emotional damages can also be awarded to victims.

The Victim Assistance Act requires the police and lawyers to treat victims properly and, where necessary, to refer them to Victim Support, to provide them with information about the progress of the criminal investigation and to promote the interests of victims in compensation claims. Some public prosecutor's offices hold special third-party consulting hours in which the judicial officers help victims by checking whether their claims have been drawn up properly and victims can almost always go to the public prosecutor's office to obtain information about the progress of their case. Since 1994, the option to take a class-action suit (where several people take legal action together) in response to a disaster has also been available in The Netherlands.

Since 2000, we have also been experimenting with written Victim Impact Statements, which have been evaluated by researchers.[18] Victims reported all the consequences that they had experienced as a result of the crime. In 2002, parliament passed a bill that gave victims the right to be heard in court.[19] Recently, the new Dutch government has proposed a new, typical populist version of victim's rights in the courtroom, which should give them the right to present their opinion on the sanction.

In 1976 a special fund for victims of violent offences was founded. This fund is an independent national organisation, part of the Ministry of Justice as a result of the Law (*Wet schadefonds geweldsmisdrijven*). It can offer financial support to people who have become victims of a violent offence resulting in serious physical and/ or mental injury, for medical costs, vindictive damage, etc.[20] Since the beginning of 2012 a new Law for victims of violent offences is in operation, which offers relatives better possibilities for making claims and which makes lodging such claims at local courts easier.[21]

Thirdly, for several years now a tradition of critical research and reflection on restorative ideas and practices has been developing in the Netherlands. On the one hand, there have been strong initiatives in the Netherlands since the middle of the nineties towards the promotion of RJ ideas and practices – prominent examples being the founding of a special journal, *Tijdschrift voor*

17 *Heslinga* 2001, p. 13.

18 *Kool/Moerings* 2001; *Kool/Moerings/Zandbergen* 2002.

19 This however is limited to crimes punishable by eight years' imprisonment or more and crimes against public decency, threats and abuse.

20 *van Wingerden et al*. 2007.

21 *Https://schadefonds.nl/.*

Herstelrecht, and of a 'Platform for Mediation in Penal Matters' (*Platform Mediation in Strafzaken*). These intiatives have been coordinated by a small group of pioneers, who originally had been strongly inspired by the Dutch tradition of Abolitionism in the seventies (*Bianchi* and *Hulsman*). A strong recent plea for integrating RJ in criminal justice procedures, particularly in juvenile justice, originated from this perspective (*Wolthuis* 2012).

On the other hand, however, in the Netherlands a clear interest emerged in the vicissitudes of the victim in judicial procedures, related to the emerging new role of the victim in Dutch law. This trend resulted among other things in the establishment of 'Intervict', the International Victimology Institute of the University of Tilburg, bringing together specialists like the well-known criminologist *Jan van Dijk*, criminal law Professor *Marc Groenhuijsen* and psychologist *Frans Willem Winkel*. Victim studies made clear that there are strong doubts about the desirability of RJ procedures for several categories of victims, most prominently victims of serious crimes and traumatised victims.[22] At the same time, there were clear doubts about the foundations and justifications of restorative justice among a lot of Dutch leading academics, both in the field of law and the field of the social sciences.[23]

This has resulted in a critical and intellectual reflection on the principles, benefits, downsides and risks (like further net-widening) of restorative procedures and outcomes. The dominant principles in the Netherlands concerning restorative justice up to now seem to be:

1. Restorative justice in the Netherlands is not about financial claims or monetary reimbursement; there is a standard practice for serious claims, a national fund that makes decisions independently of whether both parties agree.
2. Restorative justice is (mainly) independent of the criminal justice system, standing next to it or 'in its shadow'.
3. Participation in these procedures is voluntary.
4. The meeting is confidential as is the outcome resulting from it (unless both parties agree to communicate the outcomes of their conversation to the prosecutor or the judge).

1.4 Influence of international standards

One step has been important in particular for the involvement of the Dutch government in restorative practices. This was the position adopted by the Board of Procurators General in 2002. The position of the Public Prosecution Service

22 See *Pemberton* 2012; compare *Daly* 2006.

23 See among others *Hildebrandt* 2003; *Cleiren* 2001; and several contributions to *van Stokkom* 2004.

on policy relating to RJ practices in criminal cases means that the relationship between criminal law and RJ is determined since 2002 by the following rules:

- "Provided that voluntariness and transparency are guaranteed, the public prosecutor and the judge will be willing to take the outcomes of restorative justice into account. Agreements cannot be made in advance about the way this will be implemented;
- It may be decided that for a defined category of cases, specified time and resources will be made available to achieve restorative justice, if it is clear that this has a chance of success;
- The Public Prosecution Service does not adopt a leading and organising role for itself in restorative justice. It is willing to enter into working arrangements with organisations in which it has sufficient confidence in their professional practice."[24]

From an international perspective, two things have been important. First, the Council of Europe's recommendation on Mediation in Penal Matters, Rec (1999) 20 played a role in the Dutch debate on victim-offender mediation. However, the Council Framework Decision of 15 March 2001 on the standing of victims in penal proceedings seems to have played an even more pivotal role. The common opinion is that this Decision has been decisive for the implementation of victim-offender mediation nationwide by 'Slachtoffer in Beeld' (SiB) by Minister *Donner* in 2006, in order to harmonise Dutch law to European recommendations.

What is fascinating in this decision, firstly, is the fact that the Dutch government has opted for a clear victim orientation: there had to be a realistic possibility for all victims if they want to make use of mediation with their offender. Secondly, it is striking that the government has chosen explicitly for a possibility for mediation *next* to criminal law, and to stress voluntary participation. The government has assumed the position that victim-offender mediation should be a service first and foremost for victims, independent of and supplementary to the criminal law procedure. In principle, that leaves room for the public prosecutor and for the judge to reckon with some positive outcomes of mediation, but there is no obligation whatsoever to tune these two procedures to each other.

What is very important here is that in the Netherlands there is a sharp awareness that victims of serious offences may not be interested in anything like conversation or mediation with the persons who have victimised them, at least not in the early stages of proceedings or before the trial. Normally, they are both frightened and furious about what has happened to them.[25] These ideas in a way are confirmed by the fact that by far the most enthusiasm and applications for

24 *Berghuis* 2002, p. 29.

25 *Pemberton* 2012; *Daly* 2012.

mediation come from offenders.[26] This attitude has played and still plays an important role in the caution towards giving more room and general rules and regulations towards victim-offender mediation.

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

Considering the legal framework, it is important to stress that generally, victim-offender mediation and conferences are independent of the criminal procedure. If both parties agree to inform the court about the results of a restorative meeting between both parties and do so in a timely fashion, it is up to the judge to consider this as a relevant factor and to decide what weight this may have for a criminal trial.[27] There is no rule though that the judge has to consider this. The legislative framework thus makes no provision for the delivery of symbolic or material reparation or for participation in restorative processes to have any effect on the course or outcome of criminal proceedings. The different forms of mediation and conferencing that are not linked to the criminal process, of which some however are available nationwide and play an important role in restorative justice practice, can thus not be presented in a chapter on the legislative basis for restorative justice, as in essence they do not have one. Instead they are presented in *Section 3* below.

The only exceptions to this general rule are the Halt disposal at the police level for juveniles (*Section 2.1*), so-called "settlements" in offence-cases involving adult offenders (*Section 2.2*), and a recent, local Victim-Offender Mediation project called "*Mediation naast het strafrecht*" (Mediation next to the criminal law) available in the Amsterdam Youth Court (*Section 2.3*). Therefore, only these measures shall be described in *Section 2* of this report.

While no legislative provision is made regarding the use of Restorative Justice in prisons or detention centres, localized experiments with restorative justice (both conferencing and Victim-Offender Mediation) during detention have been running in select prisons and youth detention centres for several years. Since they are localised and are not enshrined in legislation, and have no bearing on considerations for early release and are not mandatory elements of sentence planning, they are presented in *Section 3.4* below.

2.1 HALT-Disposals for juvenile offenders

The HALT-settlement has had a legal basis since 1995 (Art. 77e Sr) and it has been elaborated since then regularly in the *Staatsblad* titled *Besluit aanwijzing*

26 See for instance *Zebel* 2012.

27 *Wolthuis/Vandenbroucke* 2009, p. 39.

Halt-feiten. HALT is a pedagogical intervention, which comes in the place of a legal case. The name stands for 'the alternative' (*Het ALTernatief*). Juveniles who have been arrested because of for example vandalism, shoplifting, causing trouble with fireworks or truancy can be given the choice of whether to go to the public prosecution, or to HALT.

The procedure for a HALT-settlement consists of the police sending a shortened *procès-verbal* to Bureau HALT. This implies that HALT is not entirely voluntary: when a juvenile refuses to go to HALT, normally a criminal record will be the consequence. What is important here is that the contents of HALT do hold restorative elements, such as apologising to the victim and damage compensation.

When the Halt-settlement goes according to plan, Bureau Halt notifies the police about it, who in turn send a letter to the people involved and to the Public Prosecution. With this action, the Public Prosecution's right to punish (strafvordering) becomes invalid.[28] Only youngsters between twelve and eighteen years of age can be considered for participation in a Halt-settlement.[29] The process of HALT is described in more detail under *Section 3.3.2* below.

2.2 "Settlements" between victims and adult offenders

There have been nationwide experiments with settlement since 1990. In these experiments settlement provided perpetrators and victims with a chance of reaching an agreement through negotiation with help of a lawyer, thereby preventing going to court. It did not just concern damage compensation, but rather it gave citizens the opportunity to solve cases by themselves. To participate in this project, victims and perpetrators did not have to meet in person; they could leave the negotiations up to their lawyers. When an agreement had been reached, the case was dismissed from legal prosecution. Following up on the agreement for both parties became a civil matter. At the end of that decade most settlements resulted in a combination of damage compensation, a letter of apology and other arrangements, among which several contact- and restraining orders.[30] These projects ended, though, towards the end of the last century. Only one local project, at the public prosecution department of Maastricht, carried on with this kind of victim-offender mediation. This project is addressed again in *Section 3.3.1* below.

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28 In case the suspect denies a Halt-settlement or if the Halt-settlement fails, the police sends a full *procès-verbal* to the Public Prosecution. This means that when a youngster finishes a Halt-settlement as planned, he prevents getting a criminal record. *Ferwerda et al.* 2006.

29 Website *Halt Nederland*.

30 *Spapens/Rebel* 1999.

2.3 The Victim-Offender-Mediation Project "Mediation naast het strafrecht" in Amsterdam Youth Court

Another, typically local and experimental initiative is taken recently by the youth court of Amsterdam. In October 2010 this particular court started a very small pilot that enabled victims and offenders to meet with each other with the central goals of restoring damage and alleviating the suffering of the victim. The meetings demanded an active input from both parties: victim as well as offender had to participate actively. The aim of mediation processes in this project was to reach an agreement between the parties in which apologies by offenders to their victims were recorded, as well as any agreements about the nature of future contact between victim and offender. The pilot has addressed cases with adult offenders, but focussed mainly on cases involving juveniles. There are no differences between the adult and youth cases.

In this pilot, most cases are referred by the prosecutor, a magistrate and a hopper.[31] It is an experiment without a sound legal basis.[32] The selection criteria for potential mediation cases are: an admitting suspect; the suspect wants to contribute to restoring the damage done; the parties involved will encounter each other in the future; material damage was done; immaterial damage was done, harm was caused; it was a case of violence against people at work as for example ambulance personnel. Apart from these criteria the victim has to participate voluntarily as well. The Mediation Bureau of the court in Amsterdam then selects the referred cases.

Within the pilot, altogether 26 cases have been processed. During the conversations the offender, the victim and a mediator were present. The mediators involved in the pilot either took the Class to become Mediator in Criminal Cases at the Centre for Conflictmanagement in Haarlem, or are experienced in mediation through 'Real Justice'-conferences. The project is funded by the Board for Legal aid and payment was possible only to mediators listed with this Board.[33]

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31 The term 'hopper' has been diverted of the two function names, i. e. *Hulpofficier* (*van politie*) and *Parketsecretaris* (the 'right hand' of the public prosecution officer). As post of the public prosecution at the police office, on behalf of the public prosecution, they make decisions in legal cases about what the next steps should be and have summons (*dagvaardingen*) issued to suspects before they leave the police station. Source: website of the Public Prosecution Service in the Netherlands (*http://www.om.nl/organisatie/item_144364/item144365/de_hopper*).

32 See *Weijers* 2012b.

33 *Verberk* 2011.

3. Organisational structures, restorative procedures and delivery

3.1 Victim-offender mediation

3.1.1 Victim in Sight (Slachtoffer in Beeld/SiB), national

As of 2007, the organisation SiB has been responsible for a uniform, national development and implementation of victim-offender discourses in the Netherlands. Before 2007 seven different projects dealt with mediation between offenders and victims. An evaluation of these projects led to the conclusion that the parties involved were satisfied with their mediation experience, but also that the variety of service-providers led to differences in procedures and selection criteria. Therefore, the Ministry of Justice decided to give the responsibility for national development, implementation and realisation to one organisation so as to achieve a steady and consistent procedure and service. This organisation had to be neutral. As of 2007 victim-offender mediation therefore officially became the task of the SiB organisation.[34] Principally, this organisation focuses on juvenile perpetrators, but since 2009 it has also been possible for employees of the Dutch probation services to sign up adult perpetrators for a victim-offender discourse.

Probation officers, staff of the national organisation for victim support (*Slachtofferhulp Nederland*), staff of the Board for Youth Protection, lawyers, police, prosecutors and judges have been informed during the past years about this service. They point this possibility out to their clients. Contact between victim and offender can take place in different manners. Actual victim-offender meetings consist of a one-time conversation between the victim and the offender under supervision of a mediator. Another manner is a Real-Justice conference, in the context of which the social networks (for example family, friends or social workers) of both the offender and the victim are present at the conversation as well. Shuttle mediation (*pendelbemiddeling*) (in which the mediator goes back and forth between victim and offender to deliver oral messages), and correspondence by letters, are also possibilities. The mediator from SiB will discuss the desired manner of contact with the people involved. An outcome, by means of a plan or a contract, is not obligatory. Nor is an offender obliged to apologize to the victim. During the conversation, it is important that the victim can ask questions, can explain the consequences of the incident and can adjust his or her view of the offender. In turn, the confrontation with the victim may teach the offender to take responsibility.[35]

34 Website *Slachtoffer in Beeld* 2011.

35 *Ibid.*

About forty mediators, who work throughout the whole country, carry out the mediations. SiB provides the mediators with their own training. It is not necessary for these mediators to have finished an official mediator education, however, at the moment, more than half of the mediators have done so. About one third of the mediators have a professional background in offender-specific social work and about one third of the mediators have a professional background in victim-specific social work. The training consists of eight modules that focus on three main-subjects: victims, offenders and mediation. The modules each last for one day. Next to these modules, the new mediators are accompanied by more experienced mediators for six months and they attend meetings where they can discuss their experiences *(intervisie)*, they attend extra training sessions and they have to write reflection-reports.

Expertise meetings and meetings where mediators can discuss their experiences (*intervisie*) are being organised to add to the knowledge gained from the training. To be able to guarantee the quality of these activities, several instructions and protocols have been developed. These have been consolidated in a manual and a book with instructions.[36] SiB is funded by the Ministry of Justice and Safety[37] – first on a project basis, since 2013 structurally – and organizes over 1,000 meetings a year.[38]

A victim-offender meeting organised by the national organisation Slacht-offer in Beeld (SiB), is separated in principle from the criminal law. This means first of all, that a meeting is voluntary. Furthermore, to the judge, participation in a discourse is officially no counting factor in the trial. A victim-offender meeting can take place both before and after the trial. When a meeting takes place before the trial, the Department of Justice is informed about the meeting by means of a short, factual report. This only states whether the mediation has indeed led to contact and in which manner the contact took place (for example through a conversation or through an exchange of letters). On the other hand though, it is important to note that, when both parties agree, a concise report may be sent by SiB to the judge or the prosecutor. Because of the voluntary nature of the discourses, the possible success of the victim-offender mediation is not followed by any consequences, though it may have some consequences when the judge asks for information about the meeting and when both parties agree to inform the judge about it.

The only condition for participation is that it is voluntary, for both the victim and the offender[39]. Victims, offenders and organisations can sign a case up for a

36 *Jaarverslag* 2009, *Slachtoffer in Beeld*.

37 E-mail correspondence with *M. Elbersen* 2011.

38 *Zebel* 2012. Since 2007 12,000 victims and offenders have participated in a victim-offender meeting (*Nieuwsbrief SiB* February 2013).

39 Website *Slachtoffer in Beeld* 2011.

victim-offender mediation. Most are entered through an organisation in the field, such as the National Board for Child Protection, Victim-Support Netherlands, Youth Probation and the Youth-Care Office.[40]

3.1.2 Restorative mediation by Spirit!, Amsterdam

Since 2001 the municipality of Amsterdam has been running a local initiative for young people causing trouble, called *Spirit!* It has organised and facilitated restorative meetings for youngsters between the ages of 10 and 23 years. In the context of this programme, restorative mediation can be requested by various parties, for example Youthcare Bureaux (*Bureau Jeugdzorg*) and schools.[41] These organisations discuss a case and decide whether to sign it up with Spirit!. At Spirit! the case is considered and an estimation is made whether restorative mediation is indeed suitable for the persons involved. The municipality of Amsterdam pays for the costs.

In principle, both sides and some people from their social networks gather for a restorative meeting, coordinated by an employee of Spirit! restorative mediation.[42] Prior to the meeting this employee has spoken with all involved as to what is intended with the conversation and what is expected of everybody. Furthermore, it is important that the offender takes responsibility for his or her misdemeanour/crime. No further demands are made considering participation, except of course that the victim is also willing to participate.

The outcome of the conversation(s) takes the form of a restorative plan, also referred to as a "plan of attack" or "action plan", in which agreements are registered based on what is needed, according to the victim and the people otherwise involved, to restore what happened. The plan is signed by all present.[43] Next to the plan, no 'rewards' are tied to participation in a restorative discourse. For example, there is no influence on the legal case.[44]

40 *Jaarverslag* 2009, *Slachtoffer in Beeld.*

41 *Spirit!* in general is less oriented towards offences than SiB. Rather, its main focus is on quarrels, fighting and harassment in schools and public places.

42 Conversation with *Mr. Magouz* 2011.

43 Website *Spirit!* 2007.

44 Conversation with *Mr. Magouz* 2011.

3.2 Group conferencing

3.2.1 Own Strength Conferences, national

"Real Justice" Conferences, also referred to as "Eigen Kracht" or "Own Strength" Conferences, have been available since the mid-nineties.[45] They can be requested by several organisations and persons, for example municipality officials, social workers, schools, and so forth. Conferences are also often requested by citizens themselves; perpetrators, victims or people otherwise involved, such as family members. These conferences are being employed in various situations, for example in schools, within families or in cases of neighbourhood quarrels. Relevant to this report is the variant in which the focus lies on restoration of the relationship between offenders and victims. They aim to decrease damage after a misdemeanour/crime, prevent the offender's isolation or marginalisation and diminish the likelihood of reoffending.[46]

No direct set of demands for participation is in place; in principal anyone involved in a conflict can sign up for a conference. Because no age boundaries are set for participation in Own Strength Conferences, these conferences can also be used with youngsters. The procedures for minors and adults are the same. Furthermore, there are no limitations in terms of the types of misdemeanours/ crimes that are eligible. The only true precondition is that both victim and perpetrator are willing to participate voluntarily. In this regard, it is again important to stress that the Own Strength Conferences exist completely independently of the criminal law – conference outcomes usually have no bearing on the penal process. No promises about consequences for the penal process are made in order to secure the voluntariness and own initiative of the perpetrator.[47]

An Own Strength Conference consists of three phases. During the first phase, information is given to the parties involved by a professional of the Own Strength Station. After this, a second phase follows in which the involved people independently deliberate and make a plan. In the third phase of the conference, the plan is presented to the professionals. The result of the conference is a plan, which the people concerned will work on next. Four weeks after the conference, the coordinator approaches the people involved to check how the realisation of the plan is coming along. Finally, a moment of evaluation has been included in the plan.

Coordinators undergo an internal six day training programme. Further training in mediation is not obligatory. The coordinator is not a social worker and as such only has a facilitating task during the conference. The coordinators

45 *van Hoek/Slump* 2011, p. 2.

46 Website *Eigen Kracht Centrale* 2011.

47 Conversation with *Mr. van Pagee* 2011.

receive support and coaching by district managers. They regularly meet with colleague coordinators from their district, together with the district manager.

Since 2001, about 700 restorative conferences have been held, organised from the headquarters in Zwolle. The costs for an Own Strength Conference are about € 3.600,- per conference. Most of this amount is covered by provincial or municipal resources, however, it also occurs that organisations for social work or the concerned people themselves pay for the costs.[48]

3.2.2 Neighbourhood mediation, national

So-called "neighbourhood mediation" was first made available in the mid-nineties, and since then coverage has spread to about one third of the municipalities of the Netherlands. In these mediations, the focus lies on mediating between people who live near each other and who are in conflict with each other. Neighbourhood mediation is mostly implemented in cases of irritations back and forth or conflicts concerning daily issues, which are not severe enough for the police or the public prosecution to act upon. Examples are noise annoyances, bullying and property boundaries. Neighbourhood mediation is put forth to prevent escalation and criminal or civil procedures.[49] Usually, mediation is initiated by municipalities, police, welfare organisations or housing corporations.[50] Neighbourhood mediation takes place independent of the criminal law.[51]

Within the partaking municipalities steering committees have been set up, representing several parties, such as housing corporations, welfare organisations/ social work, municipality and the police. A 'neighbourhood mediation project coordinator', a paid job, is in place in the municipalities as well. Entries for neighbourhood mediation enter the system through this project coordinator. When a complaint is suitable, the coordinator selects an appropriate team of mediators, made up of two mediators. The mediators are volunteers who have completed a compulsory, basic training.[52]

A national contact point for neighbourhood mediation, the Centre for Crime prevention and Safety (CCV: *Centrum voor Criminaliteitspreventie en Veiligheid*) spreads and promotes best practices in neighbourhood mediation, safeguards the

48 Website *Eigen Kracht Centrale* 2011.

49 They train volunteers who carry out the mediation. A central, national organisation tests whether this training the volunteers are provided with, meets with certain quality standards. This organisation is called the CCV (Centrum voor Criminaliteitspreventie en Veiligheid – Centre for Crime prevention and Safety). Website *CCV* 2011.

50 *van Hoek/Slump* 2011, p. 9.

51 Website *CVV* 2011.

52 '*Handboek Buurtbemiddeling'*, *CCV* 2009.

quality, supports existing projects and concerns itself with developing the instrument. Neighbourhood mediation is free. Financing for the mediation comes from local sources, the housing corporations and the municipality. The welfare organisations usually provide the facilitating support, by means of space to work in and other required resources.[53]

There is also a special adaptation of neighbourhood mediation for conflicts involving youngsters. These can be conflicts between youth groups and local residents, but also conflicts between youth groups or between individuals. Noise pollution, vandalism, trash on a place where youngsters hang out or feelings of unsafety may play a role. The specific point of neighbourhood mediation for youngsters is that youngsters themselves are being asked as mediators, which enables them to help with a solution.[54] The idea behind this is that youngsters are better than adults at approaching and addressing other youngsters.

3.3 Reparation, restitution orders etc.

3.3.1 Settlement

Settlement and conflict mediation in legal cases between persons at the public prosecution department of Maastricht, as briefly described in *Section 2.2* above, can be implemented until the point of the actual trial, but ideally the switch to mediation is made as soon as possible. The people involved can choose to get support from an employee from the organisation Victim Aid, but others (for example from the social networks) are not allowed to be present at the meeting. When one of the parties is a minor, a parent can come as support, provided that he or she remains impartial during the conversation.

The coordination of the mediation is organized by the office of the public prosecutor Maastricht. A police officer (parketsecretaris) is usually the one who refers people who fall under the jurisdiction of the Maastricht department, to a mediator for damage- and conflict mediation in legal cases. Mediation falls under the responsibilities of the senior officer of Justice (*Hoofdofficier van Justitie*). All criminal law cases concerning persons, in which settlement is an option, can in principle be considered for mediation. Examples of cases are (simple) maltreatment, vandalism, threatening, insulting and public violence. Cases in which a perpetrator is held in preliminary custody (*voorlopige hechtenis*) are also considered, provided that no severe injury or irreparable damage has been caused.

When a mediation has been successful, an agreement between victim and perpetrator is made up. The mediator monitors whether the agreement fits the

53 '*Handboek Buurtbemiddeling*', *CCV* 2009.

54 Website *CCV* 2011.

misdemeanour/crime. When the agreement is broken or not fully executed, within two years the legal case will be opened again and a summoning (dagvaarding) will follow.[55] Most settlements are finished within six weeks after signing up. The public prosecution service Maastricht pays for the costs arising from the settlement procedure.[56]

Mediators are trained by the 'Merlijn Group'. The Merlijn Group training consists of three days training in legal aspects of several relevant laws, knowledge of process policies and awareness of the governing factors concerned. Subjects such as confidentiality, representation of the governing authority and the end results of mediation are discussed. Skills improvement is the most important issue during the training.[57]

3.3.2 HALT

As already in *Section 2.1* stated above, juveniles aged 12 to 18 who have committed certain minor forms of property crime can be offered to participate in HALT, which implies the delivery of reparation, apologies or work by the offender, as grounds for non-prosecution.

Once a case has been referred to HALT by the police, a regular HALT settlement follows this scheme: a first conversation with a parent/caretaker, by phone; an intake with the juvenile and a parent/caretaker; writing a letter of apology or an essay about the already offered apologies; doing a learning assignment (related to the offence); a next conversation, in which will be practiced how to apologise, amongst other things; offering apologies; arranging a damage compensation (if relevant); doing a work assignment, in case the Halt settlement is over 8 hours; evaluation and final conversation. HALT does not imply face-to-face contact between victim and offender. The procedure of HALT is officially elaborated in the 'Instruction HALT Settlement' (*Aanwijzing HALT Afdoening)*. 'Instructions' are guidelines for the Public Prosecution Service (Openbaar Ministerie). The Instructions are determined by the highest institution of the Public Prosecution Service, the 'College van Procureurs Generaal'.[58]

HALT employees do have different professional backgrounds. Most of them have a (hbo) grade or followed some courses in social work or other civil studies. New employees are offered a training of four days, to familiarise quickly with the different tasks involved when working at Halt. The training covers the following subjects: basic competences; communication; prevention

55 *van Hoek/Slump* 2011, p. 21.

56 Conversation with *Mr. W. Erens*, 2011.

57 The Merlijn Group is an organisation for mediation- and communication-training. See Website *Merlijn Group* 2012.

58 Website *Halt Nederland* 2012.

education and basic juridical knowledge. These different days of training are provided by trainers from different organisations, by Halt employees, but also by trainers from other organisations. Halt employees get a basic training. Halt Netherlands also provides follow up courses in which specific themes are being studied more in-depth and further training is available for employees. The costs for realisation of the Halt-settlement are paid in full by the Ministry of Safety and Justice.[59]

3.4 Restorative measures in prison

3.4.1 Juvenile detention centres

As of 2002 several juvenile detention centres in the Netherlands experiment with restorative procedures. It started with a short pilot with conferencing in juvenile detention centre 'Eikenstein'. Eikenstein is an institute where young delinquent girls between the ages of 12 and 24 with severe conduct problems are treated. During the pilot conferences were organised in which the offender and the victim met each other for a restorative discourse. Since the national transfer of victim-offender mediation to the organisation SiB, one can request restorative discourses for youngsters staying in Eikenstein through SiB, (*see 2.2.2.1*).

Another example of a juvenile detention centre that focuses on restorative justice is Teylingereind. Teylingereind is a private, closed juvenile detention centre for boys between the ages of 12 and 24 years old. In 2004, Teylingereind participated in a pilot about the realisation of restorative justice in juvenile detention centres. However, the government decided in 2008 not to go on with restorative education. There had to be first of all serious research and evaluation of the design and realisation of the intervention. Within Teylingereind different kinds of restorative procedures are available. For example, victim-offender conversations can be requested via SiB. The requesting and coordination are in hands of the restoration consultant.[60]

3.4.2 Prisons

In 2003 a restorative detention project was started in the Netherlands.[61] An example is the pilot 'detention towards restoration' of the prison in Nieuwegein. From 2006 to 2008, 79 convicts participated in this pilot. During this pilot the eight day course 'debris removal' was offered, central to this course were

59 Website *Halt Nederland* 2011.

60 Further, in cooperation with Prisoner Care Netherlands, the course 'S.O.S.' is offered, meaning 'Speaking about Guilt, Victims and Society'.

61 *Jansen-van Driel* 2011, pp. 1-2.

getting awareness and dealing with guilt as to let the convict take responsibility for his or her criminal behaviour. This pilot was not as much a restorative innovation, as it was a new project within this specific prison, offering new possibilities to the inmates. The goal of the project being the investigation whether restorative justice would be fruitful in these circumstances.

Two other restorative projects are: giving the option of victim-offender mediation via the organisation SiB and special meetings for muslim detainees, also organised by SiB. This project constantly connects certain themes to religious (Islamic) statements and stories. Next to these projects in the prison of Nieuwegein it's possible to request a restorative meeting between the offender and his or her network. Lastly, there is a so called 'stories project', through which the detained fathers can read stories aloud, this is recorded and sent to their children.[62]

Another example of a restorative component within prisons, are the S.O.S. courses, based on the 'Sycamore Tree Project' from Prison Fellowship International. For this procedure Prisoner Care Netherlands refers to SiB. The Sycamore Tree Project is an intensive 5-8 week in-prison programme that brings groups of crime victims into prison to meet with groups of unrelated offenders. They talk about the effects of crime, the harms it causes, and how to make things right.[63] S.O.S. stands for 'speaking of victims, guilt and society' (Spreken Over Slachtoffers, Schuld en Samenleving). The aim of the course is to provide participants with more insight in their own responsibility and the consequences of crime for all involved. The course consists of eight meetings and is lead by a course leader and volunteers. When a course is completed, the participants are being handed out a certificate.[64]

4. Research, evaluation and experiences with Restorative Justice

4.1 Statistical data on the use of restorative justice measures

Only few reliable figures about the use of restorative justice in the Netherlands are available. *Van Hoek & Slump*[65] try to show by means of an estimation, how often restorative justice is being implemented. It is important to keep in mind that this concerns an estimation only and that several projects are not included,

62 *Jansen-van Driel* 2011.

63 *Http://www.pfi.org/cjr/stp/*.

64 *www.gevangenenzorg.nl/zorgaanbod/herstelgesprekken/sos-cursusvolwassenenjeugd*.

65 *van Hoek/Slump* 2011, pp. 38-41.

because no information is available. They present the following table (*Table 1*) about restorative justice *outside* the domain of criminal law:

Table 1: Number of restorative mediations outside the domain of criminal law (estimations)

Number of mediations	**2001-2005**	**2006-2010**
A) Youth care		
Eigen Kracht Conferences	300	2.100
B) Schools		
Eigen Kracht Conferences at schools	30	100
(Peer) Mediation at schools	> 1.000	> 5.000
C) Neighbourhoods and areas		
Neighbourhood mediation	> 1.000	> 10.000
Neighbourhood mediation for youngsters	40	60
Eigen Kracht Conferences in neighbourhoods	50	250
Spirit! Neighbourhood troubles mediation	-	50

Source: *van Hoek/Slump* 2011, p. 38.

Although this is just an estimate, it is clear that the number of restorative mediations outside the domain of criminal law is growing. It was also tried to fill a table with figures about restorative mediation within the domain of criminal law i. e. in the context of victim-offender-relationships. However, this is not easy, as many figures are missing. Underneath a table is shown with the number of mediations carried out by SiB, Restorative conferences (Eigen Kracht) and the number of Halt-settlements.

Table 2: Number of restorative mediations per phase of the legal procedure and per type of restorative options (rounded figures)

	2000-05	2006	2007	2008	2009	2010	Total
SiB (finished meetings)	-	-	400	900	1.050	1.150	3.500
Eigen Kracht conferences	280	50	50	50	60	60	550
Halt-settle-ments	111.000	22.184	24.025	22.096	21.122	17.315	> 150k

Source: *van Hoek/Slump* 2011, p. 40. Less Halt settlements were used during the years, because youngsters seem to have committed less and less crimes and offences.[66]

4.2 Findings from implementation research and evaluation

The majority of the restorative justice projects presented above have been the subject of evaluations and studies, which are briefly summarized below. One exception is restorative mediation by Spirit! Amsterdam, which has not yet been evaluated. Own Strength Conferences another exception – while several studies have been conducted on this practice, none of them have focused on conferences involving a "victim-offender-relationship".

4.2.1 Mediation by SiB

Several studies have been done to investigate the effects of victim-offender discourses organised by SiB. One of the most recent studies is the study by *Sven Zebel*.[67] *Zebel* interviewed 111 victims and 133 offenders. Since not all respondents could be interviewed twice (before and after meditation), his study in the end focused on 59 victims and 63 offenders. A comparison between the interviewed victims and offenders made clear that this group was representative for the complete group of registered victims and offenders and that there were no deviations of background characteristics between interviewed and registered victims and offenders. From this meticulously designed scientific study, three main outcomes came to the fore.

66 See *http://www.halt.nl*.

67 *Zebel* 2012.

First, a large majority of both victims (88%) and offenders (81%) think that the mediation contact has been valuable for them and they feel satisfied with their participation in it. In general both victims and offenders respond that they think the mediation helped them to cope with the offence. There is a wide variety here, though: 29% of the victims state that they have not been helped or just a little bit in dealing with the offence, 33% answer that they have been reasonably helped and 37% think it helped them a lot. Among the offenders 19% answered that they have not been helped or just a little bit in dealing with the offence, 21% answer that they have been reasonably helped and 60% think it helped them a lot. So, there is a striking difference between the two groups of participants on this point. Concerning the procedure a great majority of both groups is very positive (86% of the victims; 85% of the offenders). The same holds for their opinion about the mediator (92,5% of the victims; 81,5% of the offenders).

Second, victims experience less fear and anger towards the offender after a victim-offender mediation. The first interviews made clear that all victims have some kind of feelings of fear and some feelings of anger at the start. The second interviews after the mediation made clear that these feelings of fear have lessened, while they remained the same among the respondents who did not engage in a mediation.

Thirdly, Zebel found that the victim-offender mediation provides the offenders with some extra insights, concerning the consequences for the victim in particular, which affects the offender personally. Offenders seem to be more open and empathetic towards the consequences for the victims. All different kinds of offences where covered in this evaluation, acts of violence, but also vandalism, sexual offences and property crimes. The offences were not studied separately however, so nothing can be said as to if different offences evoked different levels of response.

4.2.2 Pilot 'Mediation next to criminal law'

This form of mediation led to agreements between offender and victim in almost two thirds of the cases (17 out of 26). Usually these agreements record how the participants will interact in the future. In most cases, mediation led to apologies of the offender. As will be clear, in this pilot both the prosecutor and the judge have taken into account the outcomes of the mediation and they state that their decision-making in most cases has been influenced by the procedure. This implied that many cases did not end up in a trial.[68]

68 *Verberk* 2011.

4.2.3 Neighbourhood mediation

In 2010, the Centre of Crime Prevention and Safety carried out an evaluation of the practical success of neighbourhood mediation. From this evaluation, it appeared that neighbourhood mediation is a successful instrument: two out of every three conflicts are solved. The evaluators used the registrations of the neighbourhood mediators to confirm their conclusion. The neighbourhood mediators themselves state a conflict has been solved when residents claim they are satisfied with the results of the mediation in a (after care) conversation with the mediators after the mediation process has been finished. The added value of neighbourhood mediation to the independence of the residents and the welfare of the area are harder to demonstrate. The main reason for this is that it depends on too many other factors.[69]

4.2.4 Settlement

After the Justice in the Neighbourhood (JiB,) projects were stopped, only the public prosecution in Maastricht kept on facilitating settlement possibilities pre- and during trial, under responsibility of the chief officer of justice (*hoofdofficier van justitie*). On a yearly basis, around 300 cases were processed in Maastricht.[70] The old JiB settlement that stopped everywhere in the country, is now being implemented again under a different name. It's part of the ZSM ('Zo Snel Mogelijk' – 'as quickly as possible') – project of the public prosecution. Settlement has just been started about two months ago in cities such as 's Hertogenbosch and Amsterdam. They have not been evaluated yet.

4.2.5 Halt

The effects of the Halt-settlement on recidivism have been studied in 2006.[71] It turned out that six months after being in touch with Halt there is no difference in self-reported offences between the group youngsters who got a Halt-settlement and a control group. In both groups 76,7% of the youngsters committed another offence within six months. There was no significant difference between both groups on the crime score that was constructed for the study: a measure in which the severity of all reported offences and the frequency with which they have

69 *Jansen/Meijer/Bongers* 2010.

70 *Dierx* 2010. According to the only person who worked at it all the time it existed, the old projects ended with positive results. However, the results have never been evaluated.

71 *Ferwerda et al.* 2006.

been committed, are combined. Finally, a Halt intervention turns out not to lead to a decrease of the frequency and severity of the committed offences.[72]

4.2.6 Prisons and Juvenile detention centres

No evaluation research about the restorative projects in adult detention centres has been found. In 2008 a project- and plan evaluation has been carried out in the prison of Nieuwegein, but in this evaluation, no information is given about the possible effects of restorative justice.[73]

Juvenile detention centre Teylingereind carried out a first evaluation of working with a restorative attitude within a juvenile detention centre. It appeared that some of the goals of the course are achieved: youngsters find it less hard to talk about their offence, they feel more responsible for the offence and they understand the impact of the offence on the victim. Participating in the course, though, doesn't have this influence on the attitude towards and opinion of the offenders about their victim (Wolthuis & Vandenbroucke, 2009). Concerning the experience with external restorative mediation carried out by SiB it can be concluded that the most important goals of the restorative mediation are realised: youngsters get insight in the experiences of others, and victim and offender relate to each other in a different manner. More than half of the youngsters are positive about the restorative mediation. This study didn't involve any victims, though; therefore nothing can be said about the degree of satisfaction of the victims with this kind of restorative mediation.[74]

5. Summary and outlook

5.1 Key findings

As stated at the beginning of this report, typical for the situation in the Netherlands is first of all the wide variety of kinds of RJ interventions. Three dominant kinds of RJ interventions are offered everywhere in the country: Restorative Group Conferencing offered from a typical Real Justice-background, now known as 'Eigen Kracht'-conferences; Victim-Offender Mediation offered by SiB; and community reparation orders at police level, in the context of the HALT-Disposal. Next to these nationally implemented forms of RJ interventions or interventions 'with restorative elements', several small and local initiatives towards restoration exist at the court level, in prisons and in youth detention centres, in neighbourhoods and in schools.

72 *Ferwerda et al*. 2006.

73 *Jansen/Hissel/Homburg* 2008.

74 *Wolthuis/Vandenbroucke* 2009.

Three factors have been discerned that have influenced the development, organisation and delivery of RJ procedures in the Netherlands and that will have influence on the course of restorative justice in this country. Firstly, a relatively strong development towards diversion, particularly for young offenders. Part of that development has meant that there has been some focus on restoration (Halt/ Police Referral; and Taakstraffen, implying community service or training - Prosecutor and Court Referral). It has been striking that the process of diversion actually has not resulted in a reduction of sanctions. On the contrary, net-widening, in particular in the field of juvenile justice, has been characteristic of this development. Apart from that HALT appeared to be not effective. These findings have contributed to reservations about further developing HALT as a RJ-procedure.

Secondly, as we have observed, Dutch policy on the victims of crime is relatively well developed. Victim Support Netherlands (Slachtofferhulp Nederland/SHN) plays a nationwide coordinating and supporting role and there is strong support in Dutch politics for this approach. Since 2000, written Victim Impact Statements have been operational; victims can be heard in court since 2002; the Fund for Violent Offences has been operational since 1976 and has been strengthened very recently with wide political support. This implies that victims of serious injury can claim and receive compensation, independently of any direct contact or agreement with their aggressor.

Thirdly, parallel to the development of a strong victims' movement great interest in victim studies has emerged in the Netherlands. These studies have made clear that there are doubts about the desirability of RJ procedures for several categories of victims, in particular for traumatised victims and victims of serious offences. Several studies have shown that while procedural justice[75] of RJ procedures may be highly satisfying for both victims and offenders, it appeared much harder to find evidence of restoration.[76]

The Recommendations of the Council of Europe begin with the statement *"Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation*." Similarly, Article 7 of the UN-Basic Principles in RJ Programmes (2002) states: "*Restorative processes should be used only […] with the free and voluntary consent of the victim and the offender.*" These statements are important, but they presuppose that victims have a clear view on their best interest and on the psychological outcomes of RJ procedures. Victim studies have shown however, that seriously traumatised victims do not easily resist against participating. They appear to be seduced to participate in a mediation or

75 See *Tyler* 1990.

76 See *Pemberton* 2012; *Daly* 2006.

conferencing procedure relatively easily.[77] By doing this, there exist serious risks that they get hurt, if for instance they suffer from depression or post traumatic stress syndrome.[78] These victims need something quite different, and that is professional help.[79]

Victim studies have made clear also, that victims in most cases, first and foremost, do not want to be put in the position of a "judge" or tob e given a judge-like role – they want to be taken seriously and they do not want to decide but to get recognition for what has been done to them and that this is expressed in the decision of the court.[80] Secondly, victims want to know the motives of their offender and an answer to their questions 'why?' and 'why me?'.[81] Third, victims of petty offences are normally only interested in getting their things back or restitution.[82]

5.2 Reforms

Two things have been very important for the involvement of the Dutch Government in restorative practices: the European Council Framework Decision of 15 March 2001 on the standing of victims in penal proceedings, and the position adopted by the Board of Procurators General in 2002. These decisions seem to have been decisive for the implementation of Victim Offender Mediation nationwide by 'Slachtoffer in Beeld' by government order in 2006, in order to harmonise Dutch law to European recommendations. And here again, the orientation towards victims has been clear. One might conclude that in the Netherlands the concept of *Nils Christie* in his famous lecture on 'Conflicts as property' has been put into practice: restorative justice should be first of all *a victim oriented organisation*.[83]

At the moment there are no reforms planned or prepared in this field. This has partly to do with cutbacks. There was an important renewal of the Dutch juvenile justice system in 1995, and a new adaptation of the juvenile justice system into a more punitive and repressive direction is being prepared at the moment. At the same time the victim-movement is gaining strong support in the Parliament and from the Government. This, however, does not lead to more enthusiasm for RJ procedures.

77 *Acorn* 2004.

78 *Waldman* 2007.

79 See *Pemberton* 2012.

80 *Cretney/Davis* 1995; *Richards* 2009.

81 *Cunneen* 2010.

82 *Wittebrood* 2006.

83 *Christie* 1977.

5.3 Current climate and near future

With a right wing government and a populist party in a rather strong position (Wilders), the current political climate in the Netherlands is in favour on the one hand of victims' rights and provisions, and on the other hand of an extra emphasis on punishment. As already stated above, this does not directly lead to more enthusiasm for RJ procedures. On the other hand, there remains a certain fascination and enthusiasm for restorative practices, for young offenders in particular. Victim studies will offer more insights into the possibilities and risks concerning their role in RJ procedures.

This means that it seems safe to predict that, first, the emphasis on a victim-perspective concerning restorative justice will remain. Second, for the near future the existing dominant kinds of restorative practices will continue. Restorative Group Conferencing is prospering now in child protection cases, since the Parliament has decided in 2012 that a Family Group Conference has to be tried before the judge may decide about an intervention in a child protection case. This popularity makes it plausible that conferencing will survive also in juvenile justice in this decade. Victim-Offender Mediation by SiB has recently obtained structural subsidy. The number of VOM's by SiB has been greatly enlarged in the last couple of years, so it seems realistic to expect that this practice will expand further, become more and more professionalised and develop more elaborated relations with the courts. It seems likely that this will become the main and most typical RJ procedure in the Netherlands in the years to come. At the same time, the communalities will try to bail out HALT, so it seems likely that HALT, with its restorative elements for young minor offenders, will survive in the near future. Finally, local initiatives towards restoration at court level, in prisons and youth detention centres will also continue and maybe expand further, and hopefully produce new insights.

Some will view the Dutch situation as typical for not using the full potential of restorative justice. Others might point to the stimulating diversity of concepts and practical experiences and the provoking contributions from the field of victim studies and criminology. There is much variety and much discussion on this question in the Netherlands, which we think is positive. In the end, it might be fortunate that the Netherlands has not opted for one kind of RJ, let alone for a model that is primarily oriented towards the (young) offender, or that makes RJ a division of the criminal law system. One might conclude that in the Netherlands there is a reasonably good provision of RJ procedures, which may grow further in the coming years. But the strong thing is that RJ is something of the participants; they are the owners of their meeting and they decide what might be its consequences and implications, as the founding fathers would have it. That is what characterises Restorative Group Conferencing by Eigen Kracht and Victim-Offender Mediation by SiB, and that is the typical leading idea in the implementation of RJ in the Netherlands.

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E-mail-conversations with:

M. Elbersen (Slachtoffer in Beeld)

M. Erens (Mediator Parket Maastricht)

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Reihenübersicht

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

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