

## THE POTENTIAL ROLE OF THE EU IN THE FURTHER DEVELOPMENT OF RESTORATIVE JUSTICE

### GENERAL REMARKS

The plenary presentation and the workshops provided a round-up of the respective AGIS project: After Jolien Willemsens' comprehensive overview on the 'Needs of the European restorative justice scene', the potential and the limitations of supra-national instruments for further promoting RJ was discussed in the contribution of Humbert de Biolley and Christoph Sajonz; the interplay of national and international legislation was the topic addressed by David Miers and Jolien Willemsens - mainly based on the results of a questionnaire and finally Anna Wergens has been talking about the recent CoE guidelines on the implementation of Recommendation on 'Mediation in Penal Matters' - focusing on the 'crime-victim paradigm'

Plenary session: *'The needs of the European restorative justice scene'*

Presented by: Jolien Willemsens (Belgium)

Chair: Inge Vanfraechem

The second part - on 'EU policies' - of the AGIS 3 project, had as its main objective to study the possible role of the European Union in the further development of restorative justice. Since restorative justice is a newly developing field, there are common needs and questions in all countries: Which cases are appropriate for mediation? How does the mediation process relate to the criminal justice procedure? How should the need for legal safeguards be met? What are the criteria for training and supervision of (volunteer) mediators? How to improve the cooperation between mediation services and judges, prosecutors and lawyers? Etc. Most countries are working on these issues in relative isolation, sometimes replicating the efforts of people in neighbouring countries. But, would it be possible to devise common instruments and strategies, and to adapt these to national circumstances? And, if so, does this belong to the field of competence of the European Union? And if so, what should be regulated, by which instruments and what should be the basic principles?

In the course of the research project, a number of different approaches have been used to answer these questions. Next to the analysis of the national legislation of all EU Member States, and the analysis of existing international regulations of the European Union, the Council of Europe, and the United Nations, a questionnaire has been launched on the needs of the European restorative justice scene. This presentation will focus mainly on the results of this questionnaire and what these results tell us about the need to take further initiatives at the international - or supranational - level.

*Jolien Willemsens is the Executive Officer of the European Forum for Restorative Justice and has acted as researcher and project manager in the AGIS 3 project.*

## The needs of the European restorative justice scene

The potential role of the EU in the further development of restorative justice in Europe



AGIS 2006

With financial support from the AGIS Programme  
European Commission - Directorate-General Justice, Freedom and Security

### Objective of this part of the project

- **General objective:** research what could be the potential role of the EU in the further development of RJ
- **More specifically:** identify whether there is a need for further regulation about RJ at the level of the EU

### How to reach the objective

- In order to find an answer to these questions, we were to:
  - 1) analyse the existing legislation on the national level in all EU Member States
  - 2) make an overview of the existing international regulations
  - 3) explore the main needs at national level which could have implications for EU policies
  - 4) study whether these needs require specific regulation or other initiative at the level of the EU
  - 5) study whether there is a legal basis and whether it is opportune to actually regulate these issues at the level of the EU
  - 6) if so, discuss the concrete forms, instruments and the content of the EU policies that are required.

### With whom?

- For this part of the project, a steering group was formed, consisting of:
  - Ivo Aertsen, K.U.Leuven
  - Michael Kilchling, Max-Planck-Institute
  - David Miers, Cardiff Law School
  - Cornelia Riehle, Academy of European Law in Trier (ERA)

## Focus of the presentation



- Two parts
  - 1) Preliminary results of the questionnaire
  - 2) Some thought on what is opportune in terms of EU action
- See also:
  - International regulation → workshop this afternoon by Humbert de Biolley and Christoph Sajonz
  - Needs in terms of research → workshop Friday afternoon by Michael Kilchling and Inge Vanfraechem
  - Interplay between national and international legislation → workshop Saturday morning by David Miers and myself

## Questionnaire



- 131 questions, based on 'needs' formulated in previous Forum projects, in the COST Action A21 + drawn from a number of policy documents (new CoE guidelines, EC Green Paper on approximation)
- Grouped around 7 topics: legislation; implementation and policy development; education, training and accreditation; development of good practice; cooperation and networking; communication and awareness raising; and research and data collection.

## Questionnaire



- In all topics, needs at both the national and international level were included.
- For most needs it was asked
  - to rate the importance of this need (not/relatively/very)
  - to indicate whether this need was already adequately met or not
- For others we asked about the importance, and whether action should be undertaken at national, at international or at national and international level combined.
- For a few topics the level of support for undertaking certain actions was asked for (no/average/strong support) and the questions that pertained specifically to needs in terms of EU regulation also asked about the binding force of such regulation (binding/non-binding)

## Questionnaire



- Sent out to:
  - The members of the European Forum
  - The members of COST Action A21 on 'Restorative justice developments in Europe'

## Questionnaire



- Responses:
  - 94 (after corrections)
  - from 28 European countries (21 member states of the EU)+ 4 country not identified
- Professional groups:
  - RJ practitioners/RJ service worker: 35
  - Legal practitioner: 5
  - Police: 1
  - Civil servant/policy maker: 6
  - Researcher: 35
  - Other (incl. trainers): 12

## Questionnaire - Legislation



- **National level**
  - Highest importance: need to formulate RJ as a right for victims and offenders in legislation
  - Lowest importance: need to change the legislative force of the legislative provisions concerning RJ
  - Comments: need to give a legal basis to the funding of RJ practices

## Questionnaire - Legislation



- Highest in terms of not being adequately met:
  - 73%: formulate RJ as a right for V and O
  - 70% expand the reach of RJ beyond diversion
  - 68% a more concrete legal basis that explicitly regulates RJ practices and their relation to the CJS.

## Questionnaire - Legislation



- **International level**
  - Clearly more difficult to answer
  - Highest importance: need for more regulation at the level of the EU concerning the MS' implementation of RJ → binding → not adequately met yet.
  - Followed by need for regulation
    - concerning the internal process of RJ practices
    - concerning the procedural treatment of dossiers
  - BUT: non-binding

### Questionnaire - Legislation



- Lowest importance: need to harmonise
  - the categories of offences that are amenable to RJ practices
  - the way in which mediation agreements can be recognised and executed in other countries
- Low support for binding legislation.

### Questionnaire – implementation and policy development



- **National level:**
  - High importance:
    - need for more stability in funding RJ programmes
    - need for a national strategic approach to the implementation of RJ
  - Low importance:
    - need to create a specific RJ unit in the competent ministries
    - need for the creation of a deontological commission
    - need to take steps to ensure that volunteers can play an active role in RJ practices

### Questionnaire – implementation and policy development



- Highest unmet: need for a strategic approach to the implementation of RJ
- **International level:**
  - High importance:
    - need for a network to exchange practical and theoretical questions, experiences and strategies for RJ between RJ stakeholders
    - need to work for a common understanding of the basic principles of RJ
    - need for more guidance from supranational/ international institutions in national policy developments concerning RJ

### Questionnaire – implementation and policy development



- Not adequately met at international level:
  - Need for European institutions to encourage countries to institutionalise public funding for RJ practices
  - Need for more guidance from supranational/ international institutions in national policy developments concerning RJ

### Questionnaire – education, training, accreditation



- **National level:**
  - Not adequately met are the needs for:
    - A stable national training system
    - National standards for training
    - National standards for accreditation
    - Including RJ in the education of referral agents and students more broadly

### Questionnaire – education, training, accreditation



- **International level:**
  - High 'no opinion' rate.
  - Average support for:
    - Developing common European standards for the training of RJ practitioners
    - Developing European recommendations concerning the training of referral agents

### Questionnaire – development of good practice



- **National level:**
  - A lot of work remains to be done, a.o.:
    - Developing data-sharing protocols with criminal justice agencies
    - Developing appropriate complaints and disciplinary procedures
    - Defining criteria that could be used as benchmarks for quality assessment
    - Etc.

### Questionnaire – development of good practice



- **International level:**
  - On average 20% of respondents 'no opinion'.
  - Very low support for harmonisation of, e.g., the status of RJ practitioner
  - Highest 'average' support: developing a European Code of Conduct for RJ practitioners

### Questionnaire – cooperation and networking



- **National level:**
- A huge amount of work remains to be done in terms of establishing effective cooperation with actors of the CJS, policy makers, legal practitioners, bar associations, etc.
- More time and funding needed!

### Questionnaire – cooperation and networking



- **International level:**
- A well-funded European organisation is needed.

### Questionnaire – communication and awareness raising



- **Both national and international level:**
- A lot of work remains to be done
- Public at large
- Judiciary
- Correctional authorities
- Etc.

### Questionnaire – research and data collection



- **At both national and international level:**
- Very high importance: very basic topics!
- Very important actions:
  - Develop appropriate evaluation schemes and criteria that are coherent with the principles and goals of RJ
  - Establish national data recording system
  - Make available more funding for international research

### The role of the EU in criminal justice/RJ



- Police and judicial cooperation in criminal matters: fastest developing policy area
- 1992 Maastricht Treaty: a number of matters of common interest
- 1997 Amsterdam Treaty: “Maintaining and developing the Union as an Area of Freedom, Security and Justice” as one of the objectives of the EU

### The role of the EU in criminal justice/RJ



- Mandate: Title VI Treaty on EU
- How can it be attained? By preventing and *combating* crime, organised or otherwise, and in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.
- Through: closer police, customs and judicial cooperation, but also approximation, *where necessary*, of the rules on criminal matters in MS.

### The role of the EU in criminal justice/RJ



- Common action in the field of judicial cooperation “shall include”:  
(c) Ensuring compatibility in rules applicable in the MS, as may be necessary to improve such cooperation.

### The role of the EU in criminal justice/RJ



- Main responsible body: the Council
- Initiative: the Commission or any of the MS
- How: unanimously
- Forms of action:
  - Common positions
  - Framework decisions
  - Decisions and measures implementing them
  - Conventions
  - But also: recommendations, resolutions and EU Council Conclusions

### The role of the EU in criminal justice/RJ



- Two principles that limit the action:
  - The principle of subsidiarity
  - The principle of proportionality
- Major stumbling block: unanimity = veto-right

### The role of the EU in criminal justice/RJ



- Treaty of Lisbon: major changes in the field of police and judicial cooperation
- More democratic (EP/national parliaments)
- Qualified majority voting in most areas
- Increased judicial overview by the European Court of Justice
- Etc.

### The role of the EU in criminal justice/RJ



- Changes under Lisbon: both positive and negative side:
  - Positive: easier to reach agreements
  - But: in issues related to the establishment of minimum rules in criminal law (except of matters concerning the principle of mutual recognition): 'emergency brake' and 'enhanced cooperation'
  - Instead of one area of FSJ, many areas of FSJ

### The role of the EU in criminal justice/RJ



- Is there a legal basis for the EU to act in the field of RJ? Yes, if countries are willing ...
- A binding legislative proposal will be heavily contested!
- ???? Would it not harm us more than we would profit from it ????

### The role of the EU in criminal justice/RJ



- Paper from Kelly Kollman (University of Glasgow) on same-sex union policy convergence in the EU
- Europe has had a far greater impact on national policy outcomes when its influence was felt through the informal process of norm diffusion and elite socialization than when it has tried to impose formal mandates through court decisions and EU Directives!
- The harder the norm, the more resistance!

### The role of the EU in criminal justice/RJ



- Some policies: first soft law norms and then hard law
- Also for RJ: imposing binding rules on states that have not internalised the core principles of the law is probably courting trouble!

### The role of the EU in criminal justice/RJ



- How can national debates be influenced?
  - 1) National agenda setting
  - 2) Elite learning
  - 3) Direct policy harmonisation – the least common.

### The role of the EU in criminal justice/RJ



- Towards conclusions:
  - 1) Art. 10 has put RJ on the EU agenda – difficult to do something more now ...???
  - 2) Continue to cooperate and support each other
  - 3) Invest in research
  - 4) Create opportunities for key legal practitioners and policy makers to learn from each other
  - 5) Support the Council of Europe and the EU in formulating non-legislation and help to disseminate

Thank you for your  
attention and enjoy  
the workshops!

*New Council of Europe guidelines for the implementation of RJ and cooperation with the EU*

Presented by: Humbert de Biolley and Christoph Sajonz (Belgium)

Chair: Ivo Aertsen (Belgium)

The Council of Europe, through the [CEPEJ](#)<sup>1</sup>, has recently issued [new guidelines](#) on the implementation of a series of existing recommendations addressed to the CoE member States in the field of mediation. These are:

- Recommendation Rec(98)1 on family mediation,
- Recommendation Rec(2002)10 on mediation in civil matters,
- Recommendation Rec(99)19 concerning mediation in penal matters,
- Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties,

The guidelines aim at supporting the Member States' efforts in concretely implementing the recommendations developed since the late nineties.

Particular attention will be given to Recommendation Rec(99)19 concerning mediation in penal matters. Since the adoption of the Recommendation, the concept and scope of mediation in penal matters has developed, and a broader concept of 'restorative justice' has emerged, including 'victim-offender mediation'<sup>2</sup>. Therefore, it was suggested that further work should be undertaken on updating the Recommendation. Before doing so, it was necessary to have a fuller evaluation of the impact of restorative justice in member states based on up-to-date and comparable data.

As it might be expected, there are considerable differences between member states in the way that victim-offender mediation has advanced, particularly because of the following obstacles:

- lack of awareness of restorative justice and mediation,
- lack of availability of victim-offender mediation before and after conviction,
- power to refer parties to mediation limited only to a single criminal justice institution,
- relatively high cost of mediation,
- lack of specialized training and disparities in qualifications of mediators.

In the light of these obstacles and in view of the fact that restorative justice processes may serve as an alternative to conventional justice, and as a tool for conflict management, but also in view of its potential to repair harm and to reduce re-offending, the CEPEJ has drawn up non-binding guidelines to help member states to implement the Recommendation concerning mediation in penal matters.

The conference, through the presentations and through the workshops discussions should help in two ways:

1- clearly identify what is expected from European organisations? The voice of researchers, practitioners and from civil society would be very useful in this regard;

2- identifying a few concrete and feasible actions that could be undertaken either jointly by the CoE and the EC or respectively by the two individual organisations.

<sup>1</sup> The working documents of the CEPEJ's working Group on mediation are available on: [http://www.coe.int/t/dg1/legalcooperation/cepej/mediation/default\\_en.asp](http://www.coe.int/t/dg1/legalcooperation/cepej/mediation/default_en.asp)

<sup>2</sup> See also UN Basic principles on the use of Restorative Justice Programmes in Criminal Matters ECOSOC Res 2000/14 and Res 2002/12. The term "offender" which is, for practical reasons, used throughout the recommendation and these guidelines would also cover the alleged offender, for example, the accused or any person charged with a criminal offence.

# Council of Europe Work in the field of Restorative Justice

5th Conference  
European forum for restorative justice

Verona 17-19 April 2008

Council of Europe

## I. COUNCIL OF EUROPE INSTRUMENTS

### 1.1 Conventions

1° European Convention on the compensation of victims of violent crimes (ETS 116, 1983);  
21 ratifications

2° Council of Europe Conventions adopted in 2005:

- Convention of the Council of Europe on the fight against trafficking in Human Beings (CETS 197, 2005) - 16 ratifications

- Convention of the Council of Europe on the prevention of terrorism (CETS 196, 2005) - Art 13  
- 11 ratifications

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## I. COUNCIL OF EUROPE INSTRUMENTS

### 1.2 Recommendations

1° Recommendation R(85)11 on the position of victims in criminal law and procedure

2° Recommendation R(2006)08 on assistance to crime victims

3° Four Recommendations on mediation:  
family mediation (1998), mediation in civil matters (2002), mediation in penal matters (1999), alternatives to litigations between administration and private parties (2001).

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## II. COUNCIL OF EUROPE RESOLUTIONS

Resolutions adopted by the Conference of the European Ministers of Justice

1° on the social mission of the criminal justice system-restorative justice (Helsinki – April 2005)

\*15. AGREE on the importance of promoting the restorative justice approach in their criminal justice systems;  
21. FURTHER INVITE the Committee of Ministers to support and develop cooperation programmes put in place to promote the widespread application of restorative justice in the member countries, on the basis of the Council of Europe's Recommendations in this field.\*

2° on victims of crimes (Yerevan, October 2006)

\*23. INVITE the Committee of Ministers to entrust the European Committee on Crime Problems (CDPC) to:

(1° - Assistance to crime victims)

(2° - Domestic violence, in particular violence against the partner)

3° - Crime prevention, restorative justice and mediation

taking into account the discussions of this Conference, envisage further activities dealing with the technical and legal aspects of the prevention of crime, in particular crime which targets vulnerable victims, as well as with restorative justice, including mediation (with a view notably to examining the implementation of the 1999 Recommendation on mediation in criminal matters No. R. (99) 19).\*

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## III. COUNCIL OF EUROPE

### Recent developments

#### 3.1 Three sets of Guidelines on the implementation of the CoE Recommendations (March 2008), concerning:

- **Mediation in penal matters**
  - 12. Member states are encouraged to recognise social authorities, victims support organisations and other organisations engaged in the criminal justice system, since they have an important role in promoting restorative justice and mediation. Where applicable, such bodies may invite victims and/or offenders to use mediation. They may for example have a role in conducting mediation, in offering different forms of restorative justice as well as in supporting the parties.
  - 39. Member states, NGO's and other mediation stakeholders should take appropriate measures to raise awareness of the benefits of the mediation among the general public.
- **Family mediation and mediation in civil matters**
- **Alternatives to litigation between administrative authorities and private parties**

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## III. COUNCIL OF EUROPE

### Recent developments

#### 3.2 The Guidelines

- Prepared by CEPEJ
- Committee of Ministers took note on 12 March 2008
- Completed by concrete proposals submitted (December 2007) to the Steering Committees, aiming at:
  - Improving the knowledge and the effective implementation of the Recommendations
  - Revising these existing instruments
  - Preparing practical tools to implement the key principles on mediation

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## III. COUNCIL OF EUROPE

### Recent developments

#### 3.3 Work in the penological field (PCCP)

- **European Prison rules (Rec(2006)02)**
  - "103.7 Prisoners who consent to do so may be involved in a programme of restorative justice and in making reparation for their offences."
  - Use of mediation in dealing with conflicts in prisons.
- **Under way:**
  - **Draft European rules for juvenile offenders deprived of their liberty or subject to community sanctions and measures**  
Mediation and the use of RJ envisaged among basic principles, as well as in the treatment of complaints
  - **Draft Recommendation on probation and aftercare**
  - **Updating of Recommendation Rec (99) 19 on mediation in penal matters**
  - **Updating recommendation Rec(85)11 on the place of victims in criminal law and procedure.**

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## VI. COUNCIL OF EUROPE

### Co-operation with Member States

**Objective:** assist new Member States to implement CoE standards in their legislation and their practice.

Project initiated upon request of the member State.  
Project conceived, implemented and monitored by the Council of Europe Secretariat, in close co-operation with the Member State (no subcontracting).

**Modus operandi:** publication of existing standards, legal expertise on legal texts (existing or draft new legislation), seminars, trainings and study visits on their implementation – involvement of qualified experts.

#### **Funding:**

- CoE budget (ex: Assistance in Albania, in the Russian Federation)
- Joint Project CoE-European Commission
  - Ex: JP on judicial reform in Ukraine (2M€, 18 months)
  - Ex: JP on judicial reform in Moldova (3M€, 3 years)

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## V. PERSPECTIVES

- **5.1 Implementation, implementation, implementation**
- **5.2 Cooperation, synergies, consultation, partnerships**
  - **With the civil society**
    - Ex: Role of the European forum for Restorative Justice
  - **With the European Union / European Commission**
    - Ex:
      - » needs analysis in the Member States
      - » Preparing tools (codes of conducts, training curricula)
      - » Training programmes

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## CONCLUSION

- Existing instruments constitute a collection of many useful norms, guidelines and tools for public authorities wishing to develop various aspects of restorative justice.
- Two recent developments reinforce this collection:
  - the recommendation R(2006)8 on the assistance to victims (including victims of terrorism);
  - The 3 guidelines on the implementation of the existing 4 Recommendations on mediation.
- Importance of co-operation with the EU/EC and with the European Forum in drafting these norms and in their **implementation (!)**.

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### More information on the Council of Europe:

<http://www.coe.int/cepej>

<http://www.coe.int/tcj>

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#### Workshop notes by Frauke Petzold

Humbert de Biolley talked in his workshop about the work of the Council of Europe in the field of Restorative Justice. In depth he spoke about the instruments, resolutions, recent developments, co-operation with member states and perspectives.

He pointed out, that CoE Recommendations are followed in a resolution by a clear commitment of the ministries of Justice in Europe. He made clear, that the guidelines are not replacing the recommendations, but that these guidelines are helping the ministries to implement the recommendations. Concerning the co-operation with the member states, he said, that they are invited to accede to the CoE standards. This helps countries to implement standards for the practice. Funding are mostly going to the Balkan states.

As perspectives he pointed out, what is important on the international level:

1. dissemination of the existing standards
2. implementing of what is already developed
3. no more new instruments

To do: together with the EU and EC, preparing of new tool (like training curricula), training programs which can be used in European countries. We have good instruments, which need to be used and implemented!!

Christoph Sajonz talked about four aspects:

1. Overview on legislation
2. Financial programmes
3. What could the EU do on implementation?
4. What should be done, what do we expect from the EU?

To 1. Concerning Art.10 it is not clarified by the EC, what is meant by promotion of mediation in criminal matters? The EC has to revise these initiatives. In the legislation of the last 10 years appeared only one article on mediation in criminal matters. In a questionnaire it was found that e.g. Germany says, they would not go after art. 10, others also rejected art 10...

To 2. New financial programmes are set up on the website every year. Conditions and deadlines can be found there.

To 3. An international crime prevention network gives access to reparation for victims. It should ensure, that a victim can get access to reparation in a member state country where he/she became a victim of crime. EC is working on that. Essential is, that every victim can get help in their language. CS said, that the EC is far from being able to set up a law which is valuable for all EU-countries. But he does not see the legal basis as the main problem.

To 4. Should the EC set up a binding paper? To what extent should the details be clarified?

#### Discussion

- Are we asking the right questions to the member states?
- The member states gave a lot of information regarding the punitive aspect
- Are member states obliged to disseminate information?
- To which degree are member states requested to inform the public about legislation?  
→ This is a real deficit! It is a question of budget. No money for translation.
- It is not only information; it is as well discussion and publishing.

Here we discussed different topics from the questionnaire:

- need for more regulation of the EU concerning the international process of RJ (e.g. working principles)
  - Importance: very important: 32,95%; relatively important: 38,64%; not important: 15,91%; no opinion: 12,50%
  - Legal force: binding: 24,68%; non-binding: 58,44%; no opinion: 16,88%
  - Already adequately met? No: 57,69%; Yes: 11,54%; no opinion: 30,77%

Report of the fifth conference of the European Forum for Restorative Justice, *Building restorative justice in Europe: cooperation between the public, policy makers, practitioners and researchers*, Verona, 17-19 April 2008

- develop a shared framework for quality control and accountability (level of support? Strong: 13,64%; Average: 37,50%; No: 21,59%; no opinion: 27,27%)
- develop a common European standard for the training of RJ practitioners (level of support? Strong: 21,59%; Average: 32,95%; No: 23,86%; no opinion: 21,59%)

Some outcomes:

- EU in many aspects only a joined body
- No training standards meaningful, because so many different conditions
- Standards yes, but not in detail (domestic violence as one example: for many member states not appropriate for RJ, for others yes).

***National and international legislation on RJ***

Presented by: David Miers (UK) and Jolien Willemsens (Belgium)

Chair: Michael Kilchling (Germany)

Based on the results of a questionnaire on the needs of the European restorative justice scene, and based on the work done in the framework of the COST Action A21, the presenters attempted to draw some conclusions on the interplay between national and international legislation on restorative justice.

*David Miers LL.B, LL.M. (Leeds), D.Jur. (Osgoode Hall, Toronto). David Miers was appointed Professor of Law in 1992. Between 1992-2000 he was Director of the Centre for Professional Legal Studies at Cardiff, and between 2000-2004 Deputy Head and 2004-2005 Acting Head of the Law school. He previously held appointments at the Queen's University, Belfast and in Cardiff. In 1981-82 he was Visiting Fellow at the Centre for Socio-Legal Studies, Wolfson College, Oxford. He has written extensively on the formulation and interpretation of legislation, and has been a member of the Editorial Board of the Statute Law Review for a number of years. Between 2001-2004 he held an AHRB award (rated 'outstanding') that supported Wales Legislation Online, a database run from Cardiff Law School that details the devolved functions of the National Assembly for Wales. He has given evidence to parliamentary select committees on the deregulation procedure, the procedural consequences of devolution, and on law-making. He is currently Chairman of the Study of Parliament Group.*

*David has a long-standing research interest in crime victim compensation and more generally in the place of the victim in the criminal justice system. He is an Editor of the International Review of Victimology, founded in 1989, and in 2001 completed two Home Office funded research projects on the use of restorative justice. He was one of the two UK national representatives on an EU COST Action researching restorative justice and victim offender mediation provision across Europe. He also writes on the legal regulation of commercial gambling. He has been Special Adviser to the Culture, Media and Sport Select Committee and to the Joint Committee on the Gambling Bill in 2003/04. His book, 'Regulating Commercial Gambling', published by OUP in 2004, has been described as 'magisterial' in its command of the subject. David has acted on a number of occasions as an academic reviewer for the Funding Councils, and more recently for the QAA. In 2001 he was accepted as a member of the Institute of Learning and Teaching in Higher Education.*

## **BUILDING RESTORATIVE JUSTICE IN EUROPE**

Co-operation between the public, policy makers,  
practitioners and researchers  
European Forum for Restorative Justice

National and international legislation on RJ  
Professor David Miers  
Cardiff Law School  
Verona, April 2008

Building RJ in Europe, Verona, April  
2008

## **COST Action A21: Background**

- *An International Review of Restorative Justice*. Home Office (2001; Crime Reduction Research Series, paper 10).
- *Mapping Restorative Justice: Developments in 25 European Countries* (with J. Willemsens) (2004; Leuven: European Forum for Victim-Offender Mediation and Restorative Justice).
- *COST Action A21 (2003): Regulating Restorative Justice: a comparative study of legislation*

Building RJ in Europe, Verona, April  
2008

## ***COST Action A21 (2003): Regulating Restorative Justice: a comparative study of legislation***

- study the different kinds of legislation used
- construct a common framework for analysis, to be able to compare legislation in the broad sense
- compare the presence of legislation in general on restorative justice
- study the lacunae in the legislative framework supporting restorative justice
- study the effect of the introduction of legislation on restorative justice practice
- map national legislation against international standards of a juridical or practical nature

Building RJ in Europe, Verona, April  
2008

## **The template 1: legislation**

### *Legal Description*

- Legal Base: Legislative position; codes of practice, departmental circulars and the like.
- Legal Scope: subjects (juveniles / adults); gate keepers; offence types; points of intervention
- Legal Organisation: agencies: establishment and structure; practice and intervention types; referral numbers and outcomes

Building RJ in Europe, Verona, April  
2008

## The template 2: political context

### *Analytical Account of the Political and Legal Understanding of Victim Offender Mediation and Restorative Justice*

- The social and political history within which RJ / VOM was developed
- The legal culture
- The conception of VOM and RJ as a means by which conflicts may be resolved

Building RJ in Europe, Verona, April  
2008

## The template 3: supranational values

### *An Evaluation of Practice*

- The degree to which the country's legal provisions meet supranational standards
- An evaluation of the extent to which the implementation of these legal provisions advance, inhibit or orient the implementation of a VOM / RJ agenda.

Building RJ in Europe, Verona, April  
2008

## Jurisdictions Surveyed (2006/07)

- Austria
- Belgium
- Bulgaria
- Finland
- France
- Germany
- Hungary
- Israel
- Poland
- Romania
- Slovenia
- Spain
- Turkey
- United Kingdom

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## The relationship between national and European 'legislation' 1 European Union 1

- EU Council's Framework Decision of March 2001 on the *Standing of Victims in Criminal Proceedings*. Article 10
- EU Green Paper COM(2004)134 Final: *on the approximation, mutual recognition and enforcement of criminal sanctions*

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European Union 2  
ECJ: *Pupino*: Case C-105/03

- preliminary ruling AA 2, 3 & 8 FD 2001: evidence of child WW: 'perfectly comprehensible' that TEU should extend ECJ remit to Title VI;
- difficult for EU to achieve objectives if the principle of MS' 'loyal co-operation' to take apt measures to meet their obligations did not also extend to Title VI
- Binding nature of F Decisions identical to binding nature of Directives
- National courts must 'as far as possible' interpret MS' law to attain objectives in the F Decision

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EU Framework Decision (2001) Article 10: 1

- EU Council's Framework Decision of March 2001 on the *Standing of Victims in Criminal Proceedings*. Article 10: minimalist; permissive; easy compliance with its three specifics:

1 RJ should be available at all stages of the criminal justice process: prior to or during criminal proceedings: all states reviewed meet this requirement

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EU Framework Decision (2001) Article 10: 2

- 2 M States' legislation should promote the use of mediation services for offences which the Member State considers appropriate. The text mentions guidelines and standards, with legislative authority when necessary (laws, regulations and administrative provisions). All states reviewed can meet the test of 'appropriateness'; the depth and extent of second order law is variable
- 3 Participation should not be used as evidence of admission of guilt in subsequent legal proceedings: all but the UK

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The EU Green Paper: q 15: is it necessary to take measures at EU level other than A10

to harmonise certain conditions and practical arrangements for mediation in criminal cases, to facilitate the recognition of measures and arrangements arising from mediation procedures and their implementation in another state? Should a minimum framework govern:

- The categories of offence concerned
- The mediation procedure
- The status of mediators, including the extent of their independence from the court, training and conditions of eligibility for mediators

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## The relationship between national and European 'legislation' 2: Council of Europe

- R(85)11: position of victims in criminal procedure
- R(2006)08: assistance to victims
- R(99)19: mediation in penal matters: demanding: clear gaps in practice across the EU
- Guidelines (Dec 2007 / March 2008): better implementation of mediation in penal matters:
  - availability, accessibility, awareness

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## Council of Europe Mediation in Penal Matters (R(99)19): scope 1

- Five broad areas within which there are many sub-headings; impossible to deal with all here
  - General principles
  - Legal basis and legal rights
  - The relationship with criminal justice
  - The operation of restorative justice services
  - Continuing development of restorative justice
- But can deal with one recommendation ....

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## Council of Europe Mediation in Penal Matters (R(99)19): scope 2

Within area 4 (the operation of restorative justice services) there are 11 sub-headings: the second of which is:

'standards should address, amongst others:-

- the conditions for the referral of cases
- the handling of cases afterwards
- the qualifications, procedures for the selection, training and assessment of facilitators
- the administration of services
- standards of competence and rules of conduct/ethical rules

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## CoE / EU: a common matter

CoE sub-heading 4 (the operation of restorative justice services), sub-sub-heading 2, second para: 'standards should address, amongst others' third clause:-

the qualifications, procedures for the selection, training and assessment of facilitators

EU: Green Paper q 15.3: the status of mediators... including training and conditions of eligibility for mediators

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## What law, at what level; EU?

How should these standards be met:

What type of EU prescription: binding, non-binding, supportive: prior conditions:

RJ sector speaks with one clear voice on any issue

MS agree to act

EU has legal competence to legislate: currently questionable; politically easier after Lisbon

Other options than legislation

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## What law, at what level: national?

How should these standards be met:

What type of domestic law:

Primary legislation

Secondary legislation

Other forms of subordinate legislation

The consequences of those choices

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## Choosing the legal instrument 1

Principle:

Rules intended to establish a new set of arrangements should, at least as regards the main powers and obligations on public officials and on the rights and the expectations and duties of citizens, be stated in primary legislation.

This should ..... (next slide)

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## Choosing the legal instrument 2

- State clearly the nature of the duties on prosecutors or the court or whoever is addressed by the law to act in certain ways according to criteria contained in the legislation
- Specify the legal effects of their actions, and of the relationship between those actions and existing legal requirements or effects .....or it may
- Create a wholly new body having responsibility for the implementation of these arrangements, establishing its legal status, specifying its obligations under the primary legislation

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### Choosing the legal instrument 3

- Rules relating to the implementation of VOM and RJ, for example as to the criteria for the management and delivery of VOM services, or for the kinds of action that will qualify as RJ, should be stated in secondary, or subordinate legislation.
- Primary legislation does not specify how VOM or RJ are to be delivered. Instead it makes provision for this to be specified in a Code of Practice or similar form of secondary or subordinate legislation, possibly made, as just noted by a statutory agency, by government, or by an approved NGO.

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### Choosing the legal instrument 4

#### Detail: two options: option 1

- If the jurisdiction is satisfied that there is a clear, settled and responsible legal culture in which the relevant CJ actors can be trusted to give effect to the purposes of the law and to conform to the applicable domestic and ECHR principles, then,
- unless there are specific issues on which the policy requires mandated direction or focus, the choice should be of a structure and method of implementation that enables the policy to be implemented with the minimum of rules and the maximum of bounded discretion.

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### Choosing the legal instrument 5

#### Detail: two options: option 2

- If not, then the jurisdiction should specify exactly what it wishes to happen, so far as this is now identifiable, reserving to itself authority to fix other cases to be included or excluded, or the manner in which they are dealt with.

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### Choosing the legal instrument 5

#### Detail: the CoE / EU common matter

- Suppose the jurisdiction wants to ensure that its mediators are trained and accredited etc comply with Point V of the Council of Europe's Recommendation R (99), which deals with the operation of mediation services, and in particular on training etc of mediators.
- Its national law will be structured broadly along the lines of option 1 or option 2 .....

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### Choosing the legal instrument 6 The CoE EU common matter option 1

- A jurisdiction that had Option 1 at its disposal might take the view that it would be sufficient to require the body providing the mediation service to determine for itself how exactly it would give effect to the standards on training etc.
- The jurisdiction might, for the sake of self-assurance, and to anticipate any legal challenge, require the body to copy its procedures to a responsible legal authority, and to publish it in a Code of Practice. It might further require some form of auditing in the future.

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### Choosing the legal instrument 7 The CoE EU common matter option 2

- A jurisdiction that had Option 2 at its disposal might choose instead to specify in primary law exactly how the standards on training are to be met, and require the body to obtain prior approval of any change it proposed to make.
- The content might be very detailed, for example, specifying rules on how much training, to what accredited standard, with a CPD requirement, auditing etc.

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### Choosing the legal instrument 8 current variation across the EU

- The detailed points in Option 2's laws may indeed be matters of practice in the Option 1 jurisdiction, but there they are not so mandated.
- They may not even appear in the body's Code of Practice, but, for example, appear as a factor in the mediators' 'operating manual'.

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### Choosing the legal instrument 9 Where law impedes the objective

- The design of the law:
  - Poland: initial law failed to achieve clarity in the obligations on prosecutors and in the extension of the limitation period for aspects of criminal procedure, with the result that the desired activity was compromised
  - Germany: the Federal Court of Appeal's arguably perverse interpretation of a Code provision has halted implementation
- The delivery of the law: competing legal paradigms
  - England and Wales: problems with the evidential status of confessions and admissions of guilt as a precondition to a conditional caution

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#### Workshop Notes by Isabella Pirolò

The presentation illustrates the results of the Cost Action project that studied national laws for the purpose of giving effect to the Council of Europe Recommendations. The first part of Cost Action focused on the legal descriptions of laws in different countries, in addition the political and social context of legislation in these countries was considered. The third template compared evaluation of practice and supranational values.

There are important legal instruments that help in implementing RJ, such as:

Recommendations of the Council of Europe R(85) 11, on the position of the victim, and R(99) 19. It was to establish a certain degree of similarity across the EU countries and to stimulate State legislation to promote the use of mediation services for offences within each country. The EU Council issued some guidelines between December 2007 and March 2008 in order to better implement mediation in penal matters. In these there are three main criteria: availability, accessibility and awareness.

A central theme is which kind of law, and at what level, should implement restorative proceedings. It is especially important to decide if it has to be binding or not. It is a shared opinion that there are at least two prior political conditions: The Restorative Justice sector should speak with one voice and Member States should agree to act. The EU competence in legislating is still questionable but after the Lisboa Treaty it could be politically easier. However, there are other options than legislating: for example there could be made some co-funding activities.

On a national basis, it is fundamental to decide which kind of domestic law could be used: primary or secondary. This depends also in the confidence of citizens towards their own judicial system. If it is a mature society that could be a case for using secondary legislation, on the other hand, if there is no trust in the judicial system, it will be better to implement restorative proceedings through primary legislation.

*Restorative Justice, the crime-victim paradigm and the COE guidelines for a better implementation of the Recommendation 'Mediation in Penal Matters'*

Presented by: Anna Wergens (Sweden)

Chair: Michael Kilchling (Germany)

The first part of the presentation commented on the role of crime victims in the course of mediation in penal matters from a Swedish perspective.

At first some basic facts about the current situation of mediation in penal matters were provided. From January 2008, new legislation stipulates that all municipalities are under an obligation to offer offenders below the age of 21, mediation in connection to crime.

The analysis took its point of departure from the essential principles on dignity and equality of the parties.

The presentation aimed to a cautious but not negative outlook on mediation in penal matters with the objective that the victim should not become 'the forgotten person' in the mediation process.

The main themes addressed in the presentation were the following:

- Restorative system vs. retributive system
- Mediation as a measure for crime prevention and/or victim assistance?
- Mediation as a conflict solution mechanism?

With regard to the first topic, the usefulness of a comparison between a restorative system and a retributive one was questioned. It was argued that when comparing both systems the legal positions of the crime victim and the attitudes of the criminal justice system are decisive.

Also the great variations between different countries in this respect were underlined. The needs of victims to be taken seriously and to obtain a 'sense of justice' were considered in relation to a comparative analysis between the above mentioned justice paradigms (retributive and restorative).

Some examples were provided on the efforts made in the framework of the Swedish judicial system to improve the information and treatment to victims. The presenter argued for attention and respect for the individuality of how victims' needs are experienced and fulfilled.

When focusing on the second topic, namely mediation as a measure for crime prevention and/or victim assistance, the Swedish policy on mediation and its evaluation was studied. In particular, it was discussed how a crime prevention emphasis in the mediation policy could impact crime victims and their approach to mediation.

With regard to the third topic, the issue of words and concepts such as 'conflict' and 'balance', which are used in the context of mediation, was brought up and especially their importance to victims as well as to offenders.

In the second part of the presentation, an effort was made to introduce the Council of Europe guidelines for a better implementation of the existing recommendation concerning mediation in penal matters.

The guidelines were adopted by the Commission for the Efficiency of Justice (CEPEJ) in December 2007 to supplement the Recommendation No. R (99) 19 concerning mediation in penal matters and secure a better implementation. The interpretation of a better implementation was discussed and it was claimed that the guidelines on penal matters are about implementing the idea of mediation by making mediation more accessible and

available but less about developing the principles of the Rec No. (99) 19 on mediation in penal matters.

The diversity of the restorative justice programmes in Europe was decisive for the development of these guidelines by means of a structure into three separate sections dealing with awareness, accessibility and availability.

The presentation outlined how the guidelines relate to the conference theme 'Co-operation between the public, policy matters, practitioners and researchers and the role of various professional groups in raising awareness on mediation.

It was analysed how the guidelines have gone beyond the Rec No. (99) 19.

The personal view of the presenter was that this has occurred by means of:

Highlighting the victim's aspect;

- more specific and detailed qualifications for mediators
- expanding the requirements on information
- some recommendations on concrete measures for raising awareness

The specific aspects related to victims in the guidelines were accounted for and analysed, in particular the section on quality which stresses the power imbalance between the victim and the offender following a crime and it recommends member states to be aware that the needs of the victim require special consideration before, during and after the mediation process.

A useful link is: [www.coe.int/cepej](http://www.coe.int/cepej).

*Anna Wergens is a lawyer working at the Swedish Crime Victim Compensation and Support Authority where she is responsible for international matters. She has led three projects on the situation of crime victims in the European Union. During 2007, Anna Wergens participated in the Council of Europe working-group CEPEJ-GT-MED which has developed guidelines for a better implementation of the existing recommendation concerning mediation in penal matters.*



RESTORATIVE JUSTICE AND  
THE CRIME VICTIM PARADIGM

Presentation for the 5th  
European Forum  
for  
Restorative Justice Conference

Anna Wergens  
The Crime Victim Compensation and  
Support Authority, Sweden



PART I MEDIATION IN PENAL MATTERS IN  
SWEDEN

From January 2008

The municipalities are under an  
obligation to offer all offenders below  
the age of 21, mediation in  
connection to crime



PART I THE PURPOSE OF MEDIATION IN  
PENAL MATTERS IN SWEDEN

To provide the offender with an  
understanding of the negative  
consequences of the crime and provide  
the victim with possibilities to work through  
his/her experiences

The Mediation Act, 3 §



PART I  
CHARACTERISTICS OF SWEDISH MEDIATION  
IN PENAL MATTERS

- Young offenders
- Legal persons as victims
- Shoplifting, thefts, assaults and vandalism
- Within the framework of the social services
  - Mediation may be considered in the  
criminal justice procedure



## THE RESTORATIVE SYSTEM VERSUS THE RETRIBUTIVE SYSTEM THE VICTIM IN VARIOUS ROLES

The crime victim as a party in the judicial procedure	The crime victim as a witness
Information in various forms directed to victims "Court training" For victims summoned to court	No information - no access to justice  No crime victim paradigm - no respect
Training in the judicial system on improved reception of victims Victims taken seriously	



## THE RESTORATIVE SYSTEM VERSUS THE RETRIBUTIVE SYSTEM

### Comparisons from a victim perspective in Sweden

- Active participation
- A sense of justice
- The need to be taken seriously



## Swedish mediation in penal matters

Victim empowerment and/or crime prevention?



## Mediation and the stakeholders

The National Council for Crime Prevention	The Crime Victim Compensation and Support Authority
Offenders	Victims
The criminal justice system The social services The Prison and Probation Service Non-governmental organisations	



PART I  
THE DIRECTION OF SWEDISH MEDIATION IN  
PENAL MATTERS

Promoter and evaluator:  
the National Council for Crime  
Prevention

The role of the social services  
and victims



MEDIATION IN PENAL MATTERS  
AS CONFLICT SOLUTION?

“Mediation should be performed in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. The mediator should always respect the dignity of the parties and ensure that the parties act with respect towards each other”



PART II COUNCIL OF EUROPE  
GUIDELINES

Council of Europe guidelines  
for a better implementation of the  
existing recommendation on  
mediation in penal matters  
adopted by  
the Commission on Efficiency of  
Justice (CEPEJ) in December 2007



TERMS OF REFERENCE  
CEPEJ-GT-MED:

” to enable a better implementation of  
recommendations on mediation and  
to recommend specific measures for  
facilitating effective implementation of  
the recommendation”



## PART II COUNCIL OF EUROPE GUIDELINES

“The interests of victims should be fully and carefully considered when deciding upon and during a mediation process. Due consideration should be given not only to the potential benefits but also to the potential risks for the victim.”

Recommendation Rec (2006) 8  
of the Committee of Ministers to member states  
on assistance to crime victims



## STRUCTURE OF THE GUIDELINES

- AVAILABILITY
- ACCESSIBILITY
- AWARENESS



## THE RECOMMENDATION AND THE GUIDELINES

- The victim perspective
- Qualifications for the mediator
  - Information
- Measures for awareness-raising



## PART II THE GUIDELINES QUALITY OF MEDIATION SCHEMES

“In view of the imbalance of power between the victim and the offender following a crime, member states should be aware that the needs of the victim require special consideration before, during and after the mediation.

For this reason, member states are recommended to carry out further research and developments in this matter.”



PART II THE GUIDELINES  
THE RIGHTS OF VICTIMS AND OFFENDERS

Accessibility:

In order to enable victims and offender to take part in mediation....

“Mediation requires the free and informed consent of both victims and offenders, and should never be used if there is a risk that mediation may disadvantage one of the parties. Due consideration should be given not only to the potential benefits but also to the potential risks of mediation for both parties and in particular for the victim.”



AWARENESS OF THE GENERAL PUBLIC

- Articles/information in the media,
- dissemination of information on mediation via leaflets/booklets, internet, posters,
- mediation telephone helpline,
- information and advice centres,
- focused awareness programmes such as “mediation weeks”, seminars and conferences,
- open days on mediation at courts and institutions which provide mediation services



COUNCIL OF EUROPE  
WEBSITE ON MEDIATION

<http://www.coe.int/>

Legal co-operation  
CEPEJ  
Work in progress



THE CEPEJ WEBSITE ON MEDIATION

- translated text of the Recommendation, its explanatory memorandum and other relevant texts of the Council of Europe concerning mediation,
- assessment of the impact in countries of the Recommendation,
- information on the monitoring and evaluation of mediation schemes and mediation pilot projects,
  - list of mediation providers in member states,
    - useful website links



PART II THE GUIDELINES  
SPECIFIC MEASURES TO ENSURE AN EFFECTIVE  
IMPLEMENTATION OF THE EXISTING  
RECOMMENDATION

- Further work on updating the recommendation,
- A special page on mediation on the website of CEPEJ,
- Identify good practices in order to establish specific guidelines on the participation of minors in mediation in penal matters,
- A special Code of Conduct on mediation in penal matters

**Discussion** (Notes by Isabella Pirolo)

The discussion focused on two different topics: how could RJ be further developed? Is a national legislation on RJ necessary? This is both a political and a legal question. The answer is not easy as in each country there are different situations and different needs, in fact binding legislation could be an obstacle and sometimes it is considered better to have just a framework-legislation. Every participant to the workshop then explained which kind of legislation will contribute best to the development of the RJ in his/her country: in Greece for example it will be better to have a framework-legislation, while in Hungary binding legislation is required.