

Implementing Restorative Justice Policies: Lessons from Abroad

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Sacro in partnership with Victim Support
Scotland

Ivo Aertsen
K.U.Leuven Institute of Criminology
European Forum for Restorative Justice

To start with enthusiastically ...

- Restorative Justice or Restorative Practices? – Preliminary thoughts on managing man made harm:
 - Criminalising harm: utility and futility
 - Evaluating harm: notions of justice
 - Marginalising harm: the fate of victims and offenders
- A too quick start?

Let's go back ...

- Differences in socio-legal contexts
 - Pragmatic, community oriented negotiation culture; privatisation of public functions; concrete-inductive reasoning in jurisprudence
 - 'Le culte de la loi'; highly centralised state structures; abstract-deductive reasoning
- Differences in crime control policies
- Differences in professional and organisational cultures

■ Criminal justice orientation vs community orientation/involvement: different sources of inspiration. Questions:

- Is VOM/FGC:
 - an alternative sanction/measure to be used or even to be imposed?
 - a service to provide?
 - a (legal) right to guarantee?
- For what types of crime?
- For offenders, for victims?
- For juveniles and/or adults?
- At which stages of the CJ procedure?
- Will it replace the CJS, probation, victim support?

■ Differences between European countries

➤ Nordic countries

- Community orientation
- Pragmatism, crime prevention, expert culture
- Lay judges - volunteers
- Social services local authorities (municipalities)

➤ France: 'justice de proximité', prevention, victim support and probation services

➤ England/Wales - Austria – Germany – Czech Rep.: NGOs, probation services, social/legal services courts, charities

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- Belgium – Portugal - Netherlands: victim support/concerns
 - Central and Eastern European countries: CJ reforms, rapid growth, pressure EU, top down
 - Southern countries (Italy – Spain): fragmentation, legality principle
 - Scotland?

Positioning R(J) practices

System based			Community based	
Public prosecutor (Penal mediation – Belgium)	Court social services (Germany)	Probation services (Austria, Czech Rep)	Local municipalities (Norway, Finland, Sweden)	NGOs (France, UK, Belgium)
Autonomy?			Co-operation?	
One-agency			Multi-agency	

■ Social work model

- Offender focus
- Objectives: rehabilitation, prevention, education
- Mediation style: more direct
- Professionalised

■ Independent mediation model

- Victim and offender focus
- Objective: equal, neutral service
- Mediation style: facilitation
- Working with volunteers

Guidance from the supranational level

- UN: Basic Principles on the use of Restorative Justice Programmes in criminal matters
(Commission on Crime Prevention and Criminal Justice, April 2002):
 - RJ programme
 - Restorative process
 - Restorative outcome

■ Council of Europe

- Recommendation R(99)19
- Oslo Resolution (2004): mediation
- 26th Conference of European Ministers of Justice (Helsinki, 7-8 April 2005): Resolution on the Social Mission of the Criminal Justice System – Restorative Justice
- Recommendation Rec(2006)8
- Conference of Prosecutors General of Europe (CPGE) – 7th Session, Moscow July 2006
- European Commission For The Efficiency of Justice - Guidelines for a Better Implementation of the Existing Recommendation Concerning Penal Mediation (CEPEJ, December 2007)

- CoE Rec (1999)19

Organisation:

- Art. 3: A generally available service
- Art. 4: At all stages of the criminal justice process
- Art. 5: Sufficient autonomy

The victim orientation

- Victim Support Europe: 'Statement on the position of the victim within the process of mediation' (2004)
- Why would victims participate?
 - What do we know from research?
 - How is the offer made to the victim?

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- Recommendation Rec(2006)8 on assistance to crime victims – art. 13 on ‘Mediation’:
 - Potential benefits – mediation to be considered where appropriate
 - The interests of victims should be fully and carefully considered – also potential risks for the victim
 - Adoption of clear standards to protect the interests of the victims (free consent, issues of confidentiality, access to independent advice, the possibility to withdraw from the process at any stage and the competence of mediators)

Guidelines for a Better Implementation (2007)

■ Obstacles

1. Lack of awareness of RJ and mediation
2. Lack of availability before and after conviction
3. Power to refer mediation limited only to a single criminal justice institution
4. Relatively high cost
5. Lack of specialised training and disparities in qualifications of mediators

1. Availability

- To expand equal availability ... at all stages of the criminal justice procedure ...
- Member states should recognise and promote existing and new schemes
- Role of judges, prosecutors and other criminal justice authorities:
 - To give information
 - Arrange information sessions
 - Invite victims and offenders
- Role of lawyers: in codes of conduct ...

■ Quality of mediation schemes

- Essential for authorities who refer cases and for the public in general
- Monitoring schemes continuously + external, independent evaluation
- Special consideration for the needs of victims (before, during and after mediation)

■ Confidentiality

- Binding for the mediator
- If exceptions: to be defined by law

■ Qualifications of mediators

- Provide adequate training programmes for mediators
- Items to be covered in training:
 - Principles and aims of mediation
 - Attitude and ethics of the mediator
 - Phases of the mediation process
 - Basic knowledge of criminal justice system
 - Relation CJ – mediation
 - Skills and techniques of communication
 - Role plays and other practical exercises
 - Specialist skills for mediation in cases of serious offences
 - Various methods of restorative justice
 - ...

- Participation and protections of minors

- Establishing adequate safeguards and procedural guarantees
- Developing specific guidelines

- Codes of conduct

- Uniformity of concepts, scope and guarantees
- By legislative measures and others

2. Accessibility

■ Rights of victims and offenders

- Ensure that their rights are protected and that they are fully aware of their rights (free and informed consent, potential benefits and risks, ...)
- Information about mediation: clear, complete, timely
- Information about possible consequences on judicial decision making procedure

■ Cost of mediation for the users

- Ensure direct financial support to mediation services
- Mediation to be covered by legal aid

3. Awareness

- Awareness of the general public
 - Measures to raise awareness
- Awareness of victims and offenders
 - Early information to be provided by all types of agencies
- Awareness of the police
- Awareness of the judiciary and prosecutors

■ Awareness of the lawyers

- To be included in curricula of initial and continuous training
- Bar Associations: lists of mediation programmes to be distributed
- Create legal fee structures that do not discourage lawyers from advising clients towards mediation

■ Awareness of social workers

Involving legal professionals

- Conference of Prosecutors General of Europe (CPGE) – 7th Session, Moscow July 2006
 - ‘The duties of the public prosecutor in the criminal field towards victims and witnesses’:
 - ‘Is the public prosecutor empowered to mediate in criminal cases?’
 - Conclusions:
 - ‘(...) The public prosecutor can play an active role ...’

Organisational models at national level

- Look at the following examples from the perspectives of:
 - Restorative justice or restorative practices?
 - Involvement of victim and/or offender organisations?
 - Room for sustaining policy development?

■ Austria

- Aussergerichtlicher Tätausgleich (ATA): VOM + community service
- Neustart:
 - Semi-autonomous organisation, officially established
 - Service delivery + co-ordination
 - Financed by ministry of Justice
- Similar model in Czech Republic

■ Germany

- Täter-Opfer Ausgleich
 - Federal legislation
 - Organisation and funding: Länder
- Central organisation
 - No official central structure
 - TOA Servicebüro (subsidised by federal ministry of Justice) (NGO)
 - National organisation of mediators (NGO)

■ France

- Inavem (NGO)
- Citoyens et Justice (NGO)
- National working group (end 2008: non-active)
- Lack of unifying force

■ UK

- Mediation UK (dissolved)
- Restorative Justice Consortium (national organisations supporting RJ) – no official status
- Restorative Justice Unit (England/Wales) (within Home Office)
- Regional organisations (Restorative Practices Scotland)
- Lack of political support (?)

■ Poland

- Early legislation in 90s
- Mediation by NGOs and private counselors/mediators
- Polish Centre for Mediation: training and exchange (NGO)

■ Bulgaria, Romania, Slovenia, Slovakia, Turkey, ...

A closer look: Norway

- ❑ Community model
 - Working with volunteers
 - 'Conflict councils': criminal + civil cases
 - Independent of probation and victim support
- ❑ Local organisation
 - Municipality level
 - Administration of the mediation service
 - Professional co-ordinators
 - Funding (infrastructure + managing national money)
- ❑ Central organisation
 - National Mediation Service
 - Funding (National Service, local staff, volunteers): ministry of Justice
- ❑ Encompassing legislation (Municipal Mediation Service Act 1991)

A closer look: Finland

- Act on Mediation in Criminal and Certain Civil Cases (2006) – objectives:
 - To extend mediation to cover the entire country
 - To ensure sufficient government funding
 - To organise the national management, supervision and monitoring
 - To make mediation procedures standardised
 - To ensure procedural rights and safeguards
- Mediation services are implemented independently of the CJS, but 90% of the cases referred by police and prosecutor
- Organisational responsibility: the 5 State Provinces (must ensure that all citizens have access, make agreements with local service providers - public or private); manage national budget

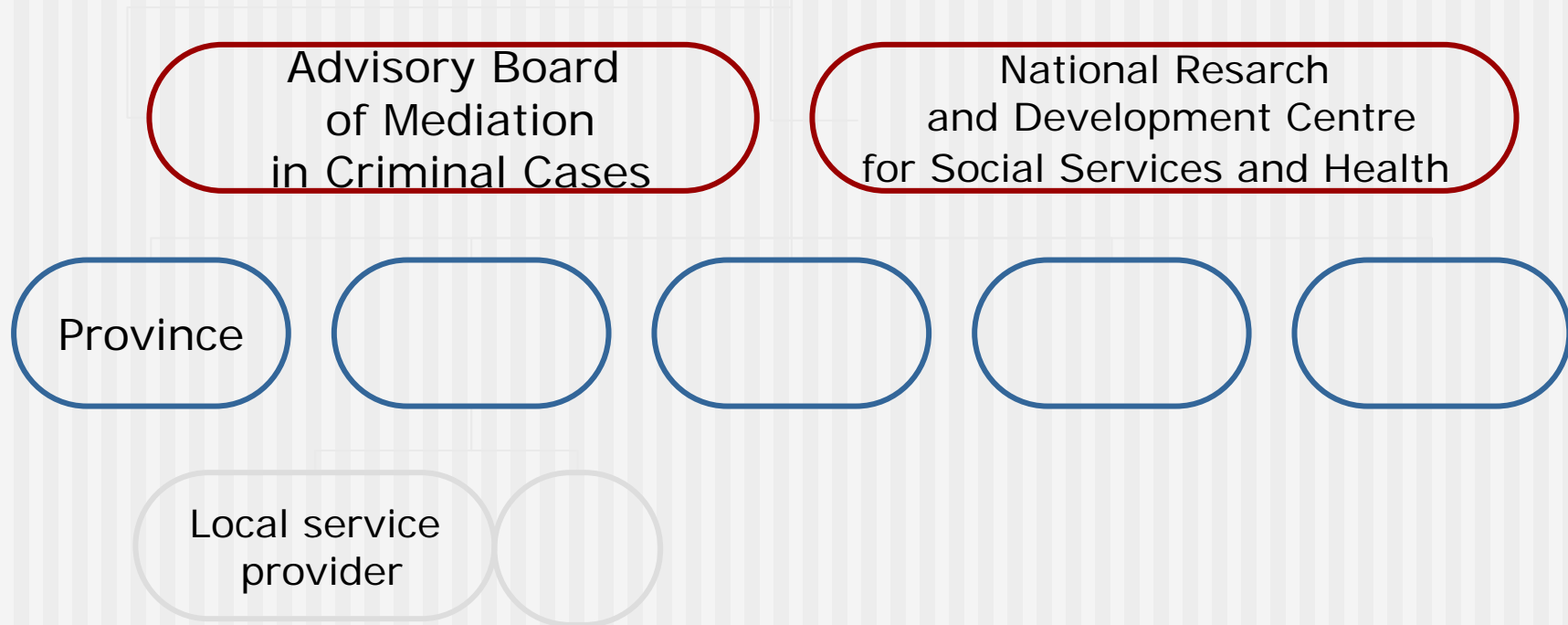
Ministry of Social Affairs and Health

Advisory Board
of Mediation
in Criminal Cases

National Research
and Development Centre
for Social Services and Health

Province

Local service
provider



■ Members Advisory Board:

- Ministry of Social Affairs and Health
- Ministry of Justice
- State Provincial Offices
- Police
- State Prosecutor's Office
- Municipalities
- District Courts
- Victim Support Services
- Service providers
- Mediators
- Research Institutes

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- In total 25 mediation offices; 90-100 coordinators
 - 900 volunteers (min. 5 cases a year; average 25 € reimbursement per case)
 - 9500 criminal cases per year (2% of all offences); 40% violent crime
 - Resources:
 - Annual budget 6.3 million € (Ministry of Social Affairs and Health)
 - 5 civil servants in Provincial Offices
 - 20.000 € for further training

A closer look: Belgium

- Mediation/conferencing in juvenile justice (Law 2006)
- Mediation in adult criminal law:
 - Penal mediation (Law 1994)
 - Restorative mediation (Law 2005)
- Restorative mediation:
 - For more serious crimes
 - Regulated and funded by Ministry of Justice
 - Administered by two recognised NGOs (Suggnomè and Médiante)
 - Local mediation services (one per judicial district)
 - Local steering committees (formal partnerships)
- Restorative Justice in prisons

The local level: most inspiring

- Setting up a RJ programme in a local partnership: a learning process
 - Local steering committees (the example of Flanders)
 - Multi- or inter-agency approach?
 - Mediation at the structural level
 - Nevertheless: support from national umbrella organisations needed (the example of the Netherlands)
- RJ: be aware of institutionalisation – Or how to keep neutrality at the organisational level?
- Do support restorative practices within organisations
- Stimulate job interchange

Role of the EU

- EU Council Framework Decision 15 March 2001 on the standing of victims in criminal proceedings

Art. 10:

- '1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure;*
- 2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.'*

- Further approximation/harmonisation?
- European Forum Research Project - Restorative Justice: An Agenda for Europe? (see next)

Restorative Justice: An Agenda for Europe?

- EU co-funded AGIS project, 2006-2008
- Researcher: Jolien Willemsens
- 2 parts:
 - The development of restorative justice in Southern Europe
 - The possible role of the EU in the further development of RJ
- 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

■ Research steps:

- 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.

■ Step 1: National legislation in all Member States

- Country reports of 25 MS (Latvia and Slovakia not)
- Except for Cyprus, Denmark, Lithuania and Malta, all EU MS have legal provisions allowing or, in a small number of cases, requiring the use of RJ practices
- No unnuanced positivism! In some countries (e.g. Greece and the Netherlands) there is a clear restorative deficit in the provisions
- Also, lack of comparable info about the practical implementation does not allow to say anything about the extent to which, and the quality with which, these provisions are implemented

■ Step 2: International regulations

➤ Council of Europe

- In the meanwhile 12 Recommendations that deal with or mention mediation
- Not only Recommendations
- Very balanced approach: advantages for victims, offenders, communities and the management of the criminal justice system seen as intertwined

➤ European Union:

- Tampere European Council Action Plan (1999-2004): MS should create alternative, extra-judicial procedures – in commercial, civil law, also in criminal law?
- Council Framework Decision of 15 March 2001
- Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the EU (2004) – now Framework Decision on non-custodial sanctions (November 2008)
- Opinion of the European Economic and Social Committee on the prevention of juvenile delinquency (15 March 2006): RJ seen as an ideal model for the juvenile justice system

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- Step 3: Exploring the main needs at national level which could have implications for EU policies
 - Survey: 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

■ 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

- Needs in the field of legislation:

- National: the need to formulate RJ as a right for victims and offenders and the need to expand the reach of RJ beyond diversion: very important and not met adequately yet
- International/supranational: Important to have more regulation at EU level concerning the MS' implementation of RJ: binding (65.4%), not met adequately (57.7%). There is more reluctance vis-à-vis EU regulation about the internal dynamics of restorative practices

- Needs in the field of policy development:

- National: A lot of work remains to be done to ensure a stable place for RJ. All needs scored between 63.9% and 88.2% in terms of not being met adequately. E.g. more stability in funding, a national strategic approach to the implementation of RJ programmes and the adoption of formal ethical rules for RJ practices
- International/supranational: Support for a network of international RJ stakeholders was very important and not adequately met yet (60.2%) (Forum – lack of funding). Also important: work for a common understanding of the basic principles of RJ

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- Needs on education and training:
 - National: Needs for national standards for training, national standards for accreditation, a stable national training system and training for referral agents are all considerable
 - International/supranational: Support for common European instruments and activities (e.g. European standards for training) is rather low

- Needs in the field of development of good practices:

- National: More than 50% said that the need to establish adequate procedural guarantees for the participation of minors in RJ practices, and the need to clarify mechanisms through which to protect the individual rights of the parties are not met adequately
- International/supranational: Divided support

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- Needs on cooperation and networking:
 - National: Considerable room for improvement, especially between RJ providers and actors of the CJS and related agencies. Most needs not met adequately by over 70% of respondents
 - International/supranational: The need for international exchange between the various stakeholders in RJ is very high

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- Needs on communication and awareness raising: Action at both national and international level highly needed
 - Research and data collection: Action at both national and international level needed. Most important: develop appropriate evaluation schemes and criteria, coherent with RJ principles and goals, and more funding for international research

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- The role of the EU: Is there a legal base to act?
 - Five possible entry points to establish a legal base:
 - Victim rights
 - Offender rights
 - Crime prevention
 - Mutual recognition and enforcement of decisions
 - Alternative dispute resolution as a general policy approach

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- Why should the EU act in the field of RJ?
 - RJ supports many of the underlying values of the EU
 - RJ can contribute to the *fairness* of the CJS, by *actively involving citizens* in the strive for *high quality and balanced justice*
 - Since RJ actively involves victims, offenders, their surroundings and society as a whole in the reaction to crime, it can be seen as fitting the idea of the promotion of an area of freedom, security and justice

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- Restorative practices help to decrease the distance between citizens and criminal justice, contributing to the democratisation of justice
 - RJ may help in securing better access to justice, in promoting active citizenship and in implementing the principle of subsidiarity (thereby minimising the use of expensive prison sentences and reducing backlogs in court)
 - RJ also offers an important perspective for crime prevention and for dealing with more serious and non-conventional crimes

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- What needs to be done by the EU?
 - Mainly support for non-binding and supportive initiatives!
 - Imposing top-down regulations would curtail creativity, but might also short-cut the necessary dialogue between RJ providers, the CJS and policy makers on how best to implement and regulate RJ within a country's specific economic, historical and cultural context
 - The common values and principles of RJ first need broad recognition

Development and implementation: some challenges

- Multiplying RJ applications, including new models: do we necessarily have to opt for one best model?
- Partnership approach at both local level *and* at central policy level; promoting bottom-up *and* top-down policies
- Active support from judicial system, but do not forget the community, including: public opinion and the role of the media
- Keeping the balance between confronting values: effectiveness/efficiency and participation/dialogue; promoting 'Justice': 'the political' and 'the ethical'; the informal and the formal