

The existing international instruments on restorative justice

Restorative justice in Europe: Needs and possibilities, Lisbon, 10-12 May 2007



European Forum for Restorative Justice
Victims, offenders, community

The three main supra- and international institutions

- European Union
 - Council of Europe
 - United Nations
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Council of Europe

Council of Europe

- Rec. No. R (85) 11 on **the position of the victim in the framework of criminal law and procedure** recommends the governments to **examine the possible advantages** of mediation and conciliation schemes.
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Council of Europe

- Rec. No. R (87) 21 **on assistance to victims and the prevention of victimisation** encourages **experiments** in mediation and **evaluation of the results** with particular reference to how far the **interests of the victim** are served.
(replaced by Rec(2006)8 on assistance to crime victims)
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Council of Europe

- Rec. No. R (87) 20 **on social reactions to juvenile delinquency** calls on MS to:
 - 1) encourage the **development of diversion and mediation procedures** at public prosecutor level or at police level.
 - 2) **ensure that in such procedures** a) the **consent** of the minors and the **cooperation** of the parents are secured, and b) appropriate **attention** is paid **to the rights and interests** of the **minors**, but also of the **victims**.
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Council of Europe

- 3) give **preference** to alternative measures, particularly those that entail **reparation** for damage.
 - 4) promote and encourage **comparative research** in the field of juvenile delinquency, with emphasis on measures and procedures of **reconciliation** between young offenders and their victims.
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Council of Europe

- **Rec. No. R (88) 6 on social reactions to juvenile delinquency among young people coming from migrant families** asks MS to ensure that these young people can benefit to an equal extent from innovations such as diversion and mediation.
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Council of Europe

- In Rec. No. R (95) 12 **on the management of criminal justice**, mediation is mentioned as one **way** (next to decriminalisation, depenalisation and the simplification of criminal procedure) to tackle the **problems of the CJS**: increase in number and complexity of cases, delays, budgetary constraints, and increased expectations.
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Council of Europe

□ Rec. No. R (96) 8 **on crime policy in Europe in a time of change**

incorporates some of the ideas of RJ in an indirect way, eg:

- Limitations of custodial sanctions
 - Active participation by the public
 - Pay adequate attention to the needs of the victims
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Council of Europe

- Rec. No. R (99)19 **on mediation in penal matters** invites MS to draw on the **principles** set out in the appendix when developing mediation.
 - Mediation in penal matters: **any** process whereby the victim and the offender are enabled, if they **freely** consent, to participate **actively** in the resolution of matters arising from the crime through the help of an **impartial** third party.
 - Not limited to victim-offender mediation!
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Council of Europe

- Very **innovative** and complete document.
 - Deals with:
 - Basic restorative justice principles
 - The need for a good policy and legislative framework
 - The relation to the CJS and legal safeguards
 - Ensuring the quality of practice
 - Development of common understanding
 - Research and evaluation
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Council of Europe

- In Rec(2000)22 **on improving the implementation of the European rules on community sanctions and measures**, mediation is mentioned as an example of such measures.
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Council of Europe

- According to Rec(2003)20 concerning **new ways of dealing with juvenile delinquency and the role of juvenile justice**, MS should develop a broader spectrum of innovative and more effective community sanctions and measures to address **serious, violent and persistent** juvenile offending. Where possible and appropriate, they should deliver **mediation, restoration and reparation to the victim**.
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Council of Europe

- In Rec(2006)2 on the **European Prison Rules**, the potential role of restoration and mediation in dealing with conflicts in prison, both between prisoners and between prisoners and staff, is recognised.
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Council of Europe

- Rec(2006)8 on **assistance to crime victims** recognises the potential benefits of mediation for victims, but also warns that there are **potential risks**. Clear **standards** are needed to protect victim interests.
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Council of Europe

- Also a number of other initiatives besides recommendations.
 - **Integrated Project 'Responses to violence in everyday life in a democratic society'** (2002-2004). Developing the use of mediation was **one of the twelve policy priorities** which were formulated. The European Forum was also asked to write a **book** that could serve as a practical tool for people wanting to start up restorative justice practices (*Rebuilding community connections – mediation and restorative justice in Europe*, 2004).
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Council of Europe

- The 26th Conference of European Ministers of Justice (Helsinki, 2005) adopted a resolution on « **The Social Mission of the Criminal Justice System – Restorative Justice** ». In this, the Ministers of Justice agreed on the importance to **promote** restorative justice in their CJS. The Committee of Ministers was also invited to support and develop **cooperation programmes**.
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Council of Europe

- The resolution was formulated on the basis of the responses to a **questionnaire** drafted by the Finnish Ministry of Justice.
 - Deals with restorative justice, but also with victim support, the prevention of re-offending and reintegration of offenders.
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Council of Europe

- Responses brought together in a **report**:
 - Identifies **obstacles** to the further development (of a legislative and ideological nature, but also research needs)
 - Formulates **three groups of conclusions**:
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Council of Europe

- 1) The Council of Europe has an active and important role to play in promoting restorative justice (further recommendations, collecting and disseminating experiences, providing technical support, expertise and advice, promote bilateral and regional cooperation)
 - 2) MS should become more involved in learning from each other.
 - 3) MS may take a more active role in promoting restorative justice principles.
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Council of Europe

- At the end of the report important questions are formulated which are seen as subjects for joint international efforts, eg. '... what kind of measures could MS adopt to develop joint recommendations regarding the training of judges and prosecutors (in the field of RJ)?'
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Council of Europe

- In the resolution adopted by the 2006 Conference of European Ministers of Justice, mediation and restorative justice are also mentioned, although briefly. In point 23, the Committee of Ministers is invited to entrust the **European Committee on Crime Problems** to envisage further activities dealing with restorative justice, with a view notably to examining the **implementation** of the 1999 recommendation.
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Council of Europe

- Interesting: in many country reports, mediation (and sometimes restorative justice) was a returning issue.
 - The Austrian report contained a very encompassing guideline for further work by the Council of Europe in this area.
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Council of Europe

- A number of other initiatives within the framework of the Council of Europe:
 - Mediation was one of the subjects discussed at the 2006 Conference of Prosecutors General in Europe.
 - The Council of Europe has supported developments in specific countries or regions.
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Council of Europe

□ Conclusion:

- Rather balanced: sometimes dealt with from a victim perspective, sometimes from an offender perspective, and sometimes from the general need to provide a good system of justice.
 - Not only seen as a type of diversion, but as something useful even during or after imprisonment!
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Council of Europe

- Last initiatives: need to clarify concepts is becoming obvious, but there is considerable support and great potential.
 - Updating of the Rec. on penal matters????
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United Nations

United Nations

- The 1985 **Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power** states that « informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress to victims ».
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United Nations

- Although the 1990 **Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)** do not mention mediation and restorative justice specifically, these rules can be considered to apply to restorative justice practices. Some of the general principles of the Rules reflect basic restorative justice principles, eg. Promote greater community involvement, encourage the offender to take responsibility, etc.
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United Nations

- On 28 July 1999, ECOSOC adopted a resolution on the « **Development and implementation of mediation and restorative justice measures in criminal justice** ». Mediation and restorative justice were seen as an interesting response to **minor** crimes.
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United Nations

- On 24 July 2002, ECOSOC adopted a resolution encouraging MS that are implementing RJ programmes **to draw on a set of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.**
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United Nations

- The **Basic principles** resemble the Council of Europe Rec. a lot. The most obvious differences are that:
 - There is much more focus on the need for **training** in the Rec.
 - The Basic principles focus much more on the **steps to be taken to further develop** restorative justice.
 - It would be interesting to know why the Basic principles did not copy certain provisions from the Rec., eg. the need for **sufficient autonomy** for RJ services, and the requirement that it is a **generally available service**.
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United Nations

- Restorative justice was also on the agenda of the last two **Crime Congresses** (Vienna, 2000; Bangkok, 2005). In the declarations, restorative justice was focused on as a solution for - mainly - **minor** crime, and as a measure to divert – mainly **young** - offenders away from a failing CJS.
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United Nations

- This rather narrow view on restorative justice is not copied in the recently published **UN Handbook on Restorative Justice Programmes** (2006) which provides a good introduction to restorative justice.
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United Nations

- Conclusion:
 - You can feel that it is much more difficult to agree with 192 MS as compared to 46!
 - More difficult to adopt something that is taking into account the very diverse cultures.
 - Minimum agreement seems to be that it is useful for minor crimes and for young offenders especially.
 - Much remains to be done!
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European Union

European Union

- In 1999, the Eur. Commission formulated the **Communication on Crime Victims in the European Union – Reflections on Standards and Action**, in which it stated, a.o. that VOM could be an alternative solution to long and discouraging criminal procedures, as well as in the interest of the victims.
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European Union

The Commission suggested doing **additional research and experiments** with evaluation of the particular **interest of victims**, as well as practical arrangements for mediation.

European Union

- During the 1999 Tampere European Council, the EU leaders agreed on an Action Plan (1999-2004) to make progress in the achievement of an **area of freedom, security and justice**. Point 30 states that MS should create alternative, extra-judicial procedures.
 - The scoreboard shows that this was narrowed down to civil and commercial disputes, disputes in the field of financial services, and disputes caused by the misapplication of Internal Market law by public authorities.
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European Union

- Council Framework Decision of 15 March 2001 on **the standing of victims in criminal proceedings**, made on the initiative of the Portuguese Republic.
 - **Art. 1:** mediation in criminal cases = the search prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person.
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European Union

➤ **Art. 10:**

- MS are to seek to promote mediation for offences which they consider appropriate for this sort of measure.
- MS have to ensure that any agreement between the victim and the offender reached in the course of mediation can be taken into account.

➤ **Art. 17:** MS have to bring into force laws, regulations and administrative provisions to comply with article 10 before 22 March 2006.

European Union

- Art. 10 has been criticised for being too vague and too weak:
 - What is meant by « promoting » mediation?
 - What happens if a MS finds that mediation is not appropriate for any type of offences?
 - What does it mean to be « competent » to mediate?
 - What does it mean « to take into account » the result of mediation?
 - Enormous scope of discretion and interpretation! (framework decision)
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European Union

- The adoption of this framework decision was not self-evident.
 - European Parliament: **legal basis?**
 - Initiative: Art. 31(e) TEU only refers to « progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts ».
 - European Parliament: the initiative is not dealing with **substantive** criminal law, but with **procedural** criminal law!
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European Union

- How come it got accepted?????
 - According to Groenhuijsen and Reynaers (2006) it was the result of
 - 1) A kind of « **trick** »: approximation in criminal proceedings was needed in order to ensure an equal treatment of European citizens and tourists who became a victim of a crime in a MS of the EU other than their own.
 - 2) The MS did not think that it would have **many consequences** for them!
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European Union

Why was this article 10 there?????

- It is the odd one out, not a 'traditional' victim right.
 - In preamble no link between mediation and victim rights.
 - ??? Pressure of the Council of Europe and the UN already having acted in this field???
 - ??? Or, because restorative justice is just fashionable????
 - ??? Or, a conscious, but not well-elaborated policy option????
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European Union

- What **influence** did it have?

Not clear.

Report from the Commission which was due in March 2006 is not available yet.

European Union

- Initiative of the Kingdom of Belgium with a view to adopting a Council Decision setting up a **European network of national contact points for restorative justice** (2002).
 - A more permanent and institutionalised position for restorative justice at European level
 - Positive advise from the Eur. Parliament
 - Not dealt with by the Council
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European Union

- European Commission: interesting, but we cannot support it.
 - One reason: the European Crime Prevention Network is already dealing with it.
 - However, ...
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European Union

- The first and second work programme of the ECPN indeed mention restorative justice as a **top priority** subject to be studied in relation to **juvenile crime**.
 - But, the annual reports mention hardly any activity.
 - It was the subject of one meeting, and a study on restorative justice was asked from the European Commission, but was never done.
 - Since then, nothing.
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European Union

- With the **Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union** of 2004, the European Commission wanted to analyse whether the existence of different justice systems across the EU raises **problems for judicial cooperation** between the MS, and to identify barriers to the **implementation** of the **mutual recognition** principle.
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European Union

- The Green Paper deals with restorative justice under the heading of alternative sanctions.
 - The European Commission wonders:
 - which measures should be taken at European level to **promote** – or even to **impose** – alternative sanctions for certain offences?
 - which alternative sanctions should be **encouraged**?
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European Union

- With regard to **mediation**, the Green Paper wonders:
 - Is it necessary to take measures at EU level other than those laid down in Art. 10 FD, to **harmonise** certain **conditions** and **practical arrangements** for mediation, to **facilitate** the **recognition** of measures and arrangements arising from mediation procedures and their **implementation** in another MS.
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European Union

- Should a **minimum framework** govern:
 - o the **categories of offences** concerned?
 - o the mediation **procedure**?
 - o the **status** of mediators, including the extent of their **independence** from the courts?
 - o **training** and conditions of **eligibility** for mediators?
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European Union

- Also: What decisions should be eligible for **mutual recognition**?
 - According to the Commission: « the establishment of a genuine area of freedom, security and justice **demands** recognition of all criminal penalties, including alternative sanctions and measures and arrangements emerging from criminal mediation and settlement procedures. It would be quite unacceptable for alternative sanctions to be available in practice only for residents and not for people who live in another Member State ».
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European Union

- In all, **very few responses** came to the points relating to mediation.
 - The ones provided did not present a clear-cut image.
 - Some: no need to go beyond art. 10 (some because they feared that it would restrict the variety of existing approaches)
 - Others: yes, clear need but it cannot be done quickly and it is not a priority
 - Still others: not possible to go beyond art. 10 because of the principle of subsidiarity.
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European Union

- Opinion of the European Economic and Social Committee on the prevention of juvenile delinquency (15 March 2006).
 - Restorative justice is seen as an **ideal model** for the juvenile justice system!
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European Union

- ❑ Finally, the latest **funding programmes** in the area of freedom, security and justice have included restorative justice-related topics.
 - Several projects on restorative justice were awarded
 - To the Forum: AGIS 1, 2 and 3 and terrorism.
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European Union

□ Conclusion:

- The victim is the entry-point.
 - Is there a legal basis to act?
 - If so, what does it allow to regulate?
 - Through which instruments?
 - If so, do we want this? What are the needs of the restorative justice scene?
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See you in Rome (17-19 April 2008)
for an answer to these questions!

General conclusions

General conclusion

- ❑ A lot of initiatives have been taken, especially by the Council of Europe.
 - ❑ All but one of these initiatives are not binding, and the one that is binding is extremely vague and allows for everything and nothing.
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General conclusion

- ❑ Most of these call for the **promotion** of restorative justice in the national criminal justice systems.
 - ❑ They also stress the need to **exchange information** and to **provide assistance** to countries starting to implement practices.
 - ❑ But, what is done about this?
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General conclusion

- ❑ Christa Pelikan: These instruments only become useful when they are made use of!
 - ❑ So, let's use them!!!!
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General conclusion

Thank you!

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