

AGIS Project “Restorative justice: an agenda for Europe”

- RESTORATIVE JUSTICE IN EUROPE:
NEEDS AND POSSIBILITIES
 - Workshop session 1:
 - Restorative justice and the law

Which type of legal instruments? 1

- It is generally agreed that one of the main challenges in the implementation of restorative justice is the lack of a legal framework. But even if a legal framework exists, the way it has been drawn up can - in practice - create both opportunities and difficulties. Experience in some countries has shown that the way in which certain aspects are formulated, for example the access to mediation, the referral process or the definition of mediation, can create unwanted effects.

Which type of legal instruments? 2

When analysing the way restorative justice practices have been included in legislation in different countries, one can discern the different options taken, each of them with their own implications. Legislation in this area can be of a permissive, coercive or mandatory nature. Also, the degree in which practical aspects are regulated, amongst other things, varies to a great extent.

Which type of legal instruments? 3

- Most of the Southern European countries are in the process of defining the way in which restorative justice should be legislated upon. This raises a lot of questions: What effect should the law have? How far should the law go when defining the process of mediation and the principles to follow? Should the law be focused on restorative justice in criminal matters, or should it cover alternative dispute resolution in other areas? Knowing about options that are taken in other countries and their reasons and implications, will make it easier to deal with these questions.

TWO QUESTIONS: WHAT TO DO AND HOW TO DO IT?

- The purpose of law making is to give as close a degree of legal effect as is possible to the policy.
- So far as it is possible, it is necessary to determine as closely as possible in advance what are the limits to and impacts of legal action in any case covered by the law. This is especially so where the actors in question are public officials and the consequences of their actions affect the liberty of individuals.

WHAT DO WE WANT ?

System assumptions 1

- That the jurisdiction has identified respects in which the conventional arrangements are defective in some way and that these deficiencies are sufficiently prejudicial to the smooth running of the legal system that alternatives are both necessary and desirable.
- That the chosen alternatives are likely to produce
 - System benefits
 - Participant benefits
 - Social / Community benefits

WHAT DO WE WANT ?

System assumptions 2

- Areas to which the alternatives shall apply
 - Civil: family, employment and commercial disputes
 - Criminal
- No extant arrangements
- Accurate identification of factors within the legal culture that will affect the choice (and content) of the instrument
 - Domestic; functions of prosecutor, judge, trial
 - International: the impact of ECHR,
- General system values such as transparency, accountability, confidentiality and so on

WHAT DO WE WANT ?

Specific RJ and VOM choices 1: Scope

- Will the arrangements
 - extend to both adults and juveniles, and how will they fit within the existing arrangements for each target group
 - extend to all offences or only some
 - depending on the answers to the first two points, vary as between them (eg, a wider range of offences for adults than for juveniles)

WHAT DO WE WANT ?

Specific RJ and VOM choices 2: Entry Point

- Pre-, during, or post trial (during or post sentence), or all or some of these
- Gatekeeper: police, prosecutor, court, probation, prison officials, the parties, or all or some of these
- Gatekeeper's obligation
 - To permit the gatekeeper to refer the offender away the conventional response
 - To require the gatekeeper to consider such referral as a condition precedent to any decision to take further action in this case
 - To require the gatekeeper to refer the offender in any case which meets the criteria

WHAT DO WE WANT ?

Specific RJ and VOM choices 3:

- Organisational arrangements:
 - What bodies have what responsibilities for the implementation of the VOM or RJ arrangements
 - What conditions apply to these bodies by way of accreditation, establishment, funding and reporting

WHAT DO WE WANT ?

Specific RJ and VOM choices 4: Exit Point

- Some form of discontinuance or suspension (possibly conditional) either of charge, prosecution, trial, sentence imposition or implementation based on factors related to the VOM or RJ event
- Consideration of the willingness of the parties (especially but not only the offender) or outcome of the VOM or RJ event as bearing upon the offence.

WHAT DO WE WANT ?

The Consequences of Choices

- Suppose a referral system such that all young offenders on first appearance before a (youth) court are required, subject to some limitations, to be referred to another body for the purpose of working out an RJ or VOM response to the offence.
- Leaving aside such common matters as how the mediation etc is to be conducted, this choice requires:
 - All youth judges to have a clear understanding of the cases in which referrals will be automatic
 - A sufficiently resourced body that will assume responsibility for the referred offender
 - A clear national statement of the kind of methods that are approved
 - All of the procedures to date subject to some time limits
 - A clear reporting structure so that the court can make an informed decision on the next steps.

HOW DO WE ACHIEVE WHAT DO WE WANT ?
What legal instrument to choose?

- To restate an earlier point: the functions of legal rules are
 - to authorise, require or permit actions having enforceable (justiciable) legal effect
 - to set limits on the actions of public bodies and officials
 - to provide remedies

HOW DO WE ACHIEVE WHAT DO WE WANT ?

Types of law

- Primary legislation from whose authority subordinate or secondary forms of legislation may be derived
- Secondary legislation whose validity depends on its compliance with the primary legislation (vires), typically made by branches of the Executive
- Other forms of subordinate legislation that in turn derive from either of the above, and may be made by bodies specifically identified for the purpose (such as an NGO or a statutory agency); Codes of Practice are typical of this level.
- The legal effects of non-compliance with these forms of law making vary. In the case of primary and secondary legislation, the non-compliance typically invalidates the purported action, and may lead directly to some enforceable action. In the case of Codes of Practice, non-compliance tends to be a factor relevant to an enforceable action, but not enforceable per se

HOW DO WE ACHIEVE WHAT DO WE WANT ?

Primary and secondary rules of law 1

- Rules intended to establish a new set of arrangements should assume, at least as regards the main powers and obligations on public officials and rights, expectations and duties of citizens should be stated in primary legislation.
 - Impose duties on prosecutors or the court 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
 - Create a wholly new body having responsibility for the implementation of these arrangements, establishing its legal status, specifying its obligations under the primary legislation, giving it power to make and publish Codes of Practice.

HOW DO WE ACHIEVE WHAT DO WE WANT ?

Primary and secondary rules of law 2

- 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.
- Thus the 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.

HOW DO WE ACHIEVE WHAT DO WE WANT ?

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.

HOW DO WE ACHIEVE WHAT DO WE WANT ?

Detail: two options: option 2

- If this is not the case, then the jurisdiction should specify exactly what it wishes to happen, so far as this is now identifiable, reserving to itself (possibly in the shape of a Minister for Justice) authority to fix other cases to be included or excluded, or the manner in which they are dealt with.
- (Rules and discretion)
- Suppose the jurisdiction wants to ensure that its mediators comply with Point V of the Council of Europe's Recommendation R (85), which deals with the operation of mediation services. This specifies, inter alia, how individual cases should be handled.

HOW DO WE ACHIEVE WHAT DO WE WANT ?

Detail: example: 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 Recommendation on this point.
- 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.

HOW DO WE ACHIEVE WHAT DO WE WANT ?

Detail: example: option 2

- A jurisdiction that had Option 2 at its disposal might choose instead to specify exactly how the Recommendation is 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, requiring the mediator to intervene where the offender / victim raises his voice, or gesticulates at the other party, or to ensure that each side is able to speak without interruption, and so on.
- 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'.

HOW DO WE ACHIEVE WHAT DO WE WANT ?

What legal instrument?

- As a statement of the obvious, the chosen instrument must within the jurisdiction be lawfully made and be certain as it can be in its legal effect.
- Apart from that there is no single right answer
 - as to which instruments to choose
 - as to the level of generality chosen in the chosen instruments