

News from the EFRJ team

Dear Members,

Another year has passed and it is nice to look back at our achievements and moments of joy in 2017. This year, we have decided to address you as a EFRJ team, represented by the Chair and Director of the EFRJ, to reflect the fact that all that we achieved as the EFRJ was the result of many heads and hands, including those ones of our committees, working groups and all of you, our members, dreamers and activists in the field.



Director Edit Törzs



Chair Tim Chapman

Since the beginning of the year, we (Board and Staff) have participated in about 70 events across Europe and beyond. The EFRJ team has often been asked to represent the RJ field on different occasions, as experts on new developments in research, practice and training. We have been to Paris, Bucharest, Florence, Trento, Berlin, Fribourg, Budapest, Dublin, The Hague, Zagreb, Glasgow, Rome, Barcelona, Lesbos, Kiev, Strasbourg, Vienna, Sarajevo, Leeds... and many other places. This shows the many seeds that we have planted in the past years across Europe are now starting to flourish and the EFRJ is recognised as a centre of knowledge in RJ and related areas. We are really proud of the work you are all doing in the field, often as pioneers in your own area.

The EFRJ was also invited to share its expertise on restorative justice by the Council for Penological Co-operation of the Council of Europe, which is working on a new recommendation on restorative justice and by the UNODC, which is reviewing the 2002 UN Basic Principles on restorative justice. As we try to seek synergies with the work of other international bodies and organisations we are proud that we collaborated this year with IJJO, EFUS, the OSCE ODIHR, Penal Reform International, Victim Support Europe, EQUINET and the European Family Justice Center Alliance.

As the EFRJ, we have also been busy with our own activities. We started the year with a seminar on the implementation of the EU Victims' Directive organised in Brussels together with our colleagues in the Criminal Justice Platform Europe (CJPE, composed of by CEP, Europris and the EFRJ). On this occasion, about 70 experts in the field of RJ, prison, probation and victim support gathered together to discuss how training and cooperation can be further developed to ensure victims' rights in Europe. A policy paper and practice guide on RJ and the EU Victims' Directive was launched at the event and are now available on the EFRJ website.

We continued the year with the Annual General Meeting followed by a seminar on RJ in intercultural conflicts in Berlin together with a German member of the EFRJ, TOA- Servicebureau for Victim-Offender Mediation and Conflict Settlement. About 50 participants →

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attended the seminar during which, among other interesting presentations, we spoke about one of our largest projects of recent years, *ALTERNATIVE*, which looked at justice and security in Europe through restorative lenses. In Berlin we also organised the first meeting of the newly-established EFRJ Working Group on Values and Standards for RJ (photo below).



The summer started with two successful highlights of the year. The first edition of the Criminal Justice Summer Courses organized with CJPE in Barcelona on three themes (radicalisation, desistance and encouraging offenders to change) brought together about 80 experts in probation, prison and RJ. The seventh edition of our own Summer School dealt with RJ in cases of serious crime and it was organized in Como in collaboration with the research centre on RJ and mediation CESGREM within the University of Insubria. Given the success of both events, these experiences will continue in 2018: the CJPE Summer Courses will be in Barcelona on 3-6 July; an intense pre-conference Course on RJ and serious crime will take place in Tirana on 12-13 June, given by senior mediator and trainer Kristel Buntinx.

In the same period, we also launched the call for proposals for our 10th conference in Tirana (14-16 June 2018): almost 80 abstracts arrived before the deadline! Still, we extended it until 7 January to give a chance to those ones who could not be on time. The main theme is *'Expanding the restorative imagination'* because we welcome new ideas, innovative projects, inspiring talks on the intersections between RJ and criminal justice, juvenile justice and social movements. Registrations are open until half May.

Autumn arrived and we organized, together with the International Juvenile Justice Observatory and KU Leuven, a training on the use of RJ in cases involving child victims. While all these activities were taking place, the RJ Week was approaching. This year we prepared two initiatives throughout the whole year. The first one has been the new EFRJ publication *'Restorative Imagination: Artistic Pathways'*, a collection of 36 articles

including reflections, dreams, actual projects, real experiences bringing together arts and restorative justice either as potential for dialogue or as forms for awareness raising. The booklet is available for free on the EFRJ website and printed copies can be ordered at the Secretariat.

The second initiative was the film *'A Conversation'* based on a theatre play where two families meet after being involved in a case of rape and murder. It has been a successful example of international cooperation between our members. Originally from Australia, the script was adapted to a European context by the English director Peter Harris and the Norwegian group No Theatre. Sponsors from Spain supported the EFRJ to coordinate the making of the film (i.e. Ministry of Public Administration and Justice of the Basque country and Ministry of Justice of Catalonia). Our Hungarian member Foresee Research Group assisted in finalizing some technical aspects of the DVD making, subtitles were translated in 15 different languages by our membership and during the RJ Week it was finally screened in 69 different venues in 26 countries worldwide for an audience of about 3000 people. This remains a tribute to the director Peter Harris who passed away last August.

We will finish the year with another beautiful occasion to bring us together once more in 2017. We invited all of you to join us in Leuven on 18 December for a consultation meeting following the Forum 15 project. We received more than 50 applications from experts within our membership and finally 35 will actively participate in this meeting.

This is, in short, what kept us busy in the year 2017. And you, what were you up to? We are looking forward to hearing from each of our members and to advertise your own projects, events, publications on our regular Newsflash, which now reaches about 2300 recipients. If you wish to dedicate more time in explaining your own achievements, our editorial committee always looks forward to new articles to be published in one of our quarterly Newsletters. For now, enjoy reading this last Newsletter of the year, which includes four articles received by EFRJ members reflecting on new legislation (France), researching on domestic violence (Poland), leading an organisation (Nepal) and participating in an international conference (UK).

We wish you a great 2018, full of success and inspirations for further developing RJ in your country.

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France: a progressive legal recognition of Restorative Justice

To begin with, during 1993, both mediation (Mbanzoulou, 2012) in criminal cases for adults and reparation in criminal cases for minors were introduced in France. However, as has been remarked (Cario, 2016), these two French practices respect only exceptionally the basic principles of RJ. More specifically, mediation in criminal cases is only used as an alternative to prosecution, in which the prosecutor's role is decisive both concerning the choice to resort to mediation and regarding the validation of the agreement of the participants.

In addition, in order to participate in a mediation programme, French law, as it is actually set out, expressly demands only the consent of the victim and not that of the offender. Moreover, reparation (Baste Morand, 2014) in criminal cases reserved to minors is closer to the idea of restoration, conserving at the same time an educational teaching for the juvenile offender. However, it does not fully respect the basic principles of RJ because, to avoid delays in bringing justice, in the case of a refusal of the victim to participate in reparation, the juvenile offender can still participate alone in a reparation program by taking part in several activities for the benefit of society. Nevertheless, the number of those who participate in these two practices (mediation and reparation) remains in the minority in France, compared with the number of convictions by the more conservative courts (Cario, 2010).

Influenced by the adoption of the fundamental principles by the General Assembly of the United Nations in 2002, and several comparative researches, the French National Council for Victim Support (Conseil National de l'aide aux victimes) created, in 2006, a working group charged with researching and proposing ways to introduce RJ in France. One year later, this group published its report (Groupe de travail, 2007). Furthermore, during the consensus conference on the prevention of recidivism (Tulkens et al., 2013), which took place in 2013, it was recognised that recidivism is the visible mark of the limits of the criminal justice system that cannot alone give a satisfying 'answer' regarding criminal behaviour. During this conference the principles and conception of RJ were also discussed; consequently, the report of this conference was a determinant for the official introduction of RJ into the French legal system (Cario, 2014).

Likewise, after the European Directive 2012/29/EU 'establishing minimum standards on the rights, support and protection of victims of crime,' the French legislature finally intervened in 2014 with a new criminal law (Law n° 2014-896 of 15 August 2014), also known as 'Taubira Law,' aspiring to reform the philosophy of the whole French criminal justice policy concerning, especially, recidivism, by reducing the number of victims whilst guaranteeing the rehabilitation of those sentenced. Among the changes introduced by this law, a new Article dedicated to RJ was added for the first time to the French Code of Criminal Procedure (Code de procédure pénale). By the introduction of Article 10-1 entitled 'On Restorative Justice' within the preliminary chapter of the first Book of the Code de procédure pénale devoted to the fundamental principles governing all criminal proceedings, the 'Taubira Law' contains a symbolic value and constitutes a major step in the official recognition of RJ in France.

The French legislature introduced in this article the concept of RJ in a general way, specifying that it addresses the needs of both the victim and the offender; it concerns all criminal conflicts and it can take place during all the stages of French criminal procedure, even during the execution of the sanction. This article also enshrines the complementarity between restorative process and criminal procedure, considering that its objectives are in harmony and in a real convergence with the objectives of the criminal sanction as they are listed in article 130-1 of the French Criminal Code. Furthermore, the French legislature requires respect for two sets of ethical principles when exercising restorative practices (Sayous and Cario, 2014).

The first set of principles requires the following conditions for recourse to a measure of RJ: the 'recognition of the facts,' the 'information-preparation' of the two protagonists and their 'consent.' Regarding 'recognition of the facts,' whilst a confession is not necessary, the absence of a denial is certainly required and must be formally expressed. Likewise, a full 'information-preparation' of the participants is required concerning the principles and the progress of the restorative process, formulated in a pedagogical way.

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Moreover, the content of the ‘consent’ of both the two protagonists-participants (that has to be expressed during the whole restorative process and can be revoked any time) should contain the following three conditions:

- participation in a RJ measure,
- choice of a specific RJ measure and
- the practical modalities of the progress of the RJ process (Sayous and Cario, 2014, p. 463).

The second set of ethical principles required includes the implementation of a RJ process by an ‘independent facilitator’ specially trained for this purpose, the control of RJ measures by a judicial authority and respect for confidentiality. Indeed, beyond basic training, the ‘facilitator’ has to possess listening and interviewing skills as well as a deep knowledge of the implementation and monitoring protocols of restorative measures. This special training is already provided by the French Institute for Restorative Justice (IFJR) in partnership with the National Institute for Victim Support and Mediation (France Victimes). However, it is regrettable that French academic institutions (universities) do not yet provide facilitators with this kind of special education. Furthermore, the ‘judicial authority’ is considered the only guarantor for the respect of individual liberties, of human rights and of the general principles of criminal justice; so the general modalities regarding the progress of a restorative process are under its control. Nevertheless, the principle of ‘confidentiality’ also has to be respected by the coordinators and the facilitators, as well as the participants. Indeed, it is forbidden to use information provided during a RJ measure (even in the case of a failure of this measure) during a subsequent criminal proceeding.

In 2015, the French legislature introduced a new disposition (art.10-2-1°) in the Code de procédure pénale relating to the rights, the support and the protection of the victims of criminality, in which is included as means of their reparation, the resort to a RJ measure. But is the introduction of two articles in the Code of Criminal Procedure enough to introduce RJ in France also in practice? Indeed, the actual French legal framework is considered satisfactory regarding the integration of basic RJ principles. Nevertheless, it is certain that the legislature will have to intervene anew in order to enrich the legal arsenal by better specifying the modalities for the implementation of RJ in France. In relation to the specifications for RJ implementation, research and experimentation will be more than useful.

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References

- Baste Morand, L. (2014). La réparation pénale: un embryon français de justice restaurative. *Les Cahiers Dynamiques* (59):61–67.
- Cario, R. (2010). *Justice restaurative: principes et promesses*. 2nd ed. Paris: l'Harmattan.
- Cario, R. (2014). L'article 10-1 de la loi du 15 août 2014. « De la justice restaurative ». *Revue juridique de l'Océan Indien* (21):215ff.
- Cario, R. (2016). Ruptures et promesses de la justice restaurative. In: J. Motte dit Falisse (ed.) *Le sens de la peine*. Paris: l'Harmattan.
- Groupe de travail (2007). *La justice restaurative, rapport du groupe de travail*. Paris: Conseil national de l'aide aux victimes.
- Mbanzoulou, P. (2012). *La médiation pénale*. 2nd ed. Paris: l'Harmattan.
- Sayous, B. and Cario, R. (2014). La justice restaurative dans la réforme pénale: de nouveaux droits pour les victimes et les auteurs d'infractions pénales. *AJ Pénal*(10):461–468.
- Tulkens, F. et al. (2013). *Conférence de consensus: Pour une nouvelle politique publique de prévention de la récidive: principes d'action et méthodes*. Paris: Jury de consensus.

Notes

- 1 Art. 41-1-5° Fr. C.C.P as modified by the French Law of 9 mars 2004 (Loi «Perben II»).
- 2 Art. 12-1 Decree for minors of 1945
- 3 By the French Law n°93-2 of 4 January 1993
- 4 According to this article: “On the occasion of criminal proceedings and at all stages of the proceedings, including during the execution of the sentence, the victim and the offender, provided that the facts were known, can be offered a measure of restorative justice. As a measure of restorative justice is considered, any measure allowing a victim as well as the offender to participate actively in the resolution of problems resulting from the offense, including the repair of damages of any kind resulting from its commission. This measure can only occur when the victim and the perpetrator have received comprehensive information about it and have expressly consented to participate. It is implemented by an independent party formed for this purpose under the control of the judicial authority or, at the request of the latter, the prison administration. It is confidential, unless the parties agree otherwise and except where a higher interest linked to the need to prevent or repress offenses justifies information about the progress of the measure to be brought to the attention of the prosecutor.”
- 5 See also art. 707-IV of the Fr. C.C.P.
- 6 According to this article: “In order to ensure the protection of society, to prevent the commission of further offenses and to restore social equilibrium, respecting at the same time the interests of the victim, the penalty aims; to punish the offender; to promote its amendment, insertion or reintegration”
- 7 In accordance with the international texts: Resolution (E/2002/30) of the Social and Economic Council of the United Nations relating to the fundamental principles on the recourse to restorative justice programs in criminal cases; The 2nd Resolution (MJU-26 2005) of the 26th Conference of the European Ministers of Justice of the member states of the Council of Europe relating to the social mission of the penal justice-restorative justice system; Directive (2012/29/UE) of the European Parliament and of the Council about the minimal standards for the rights, the support and the protection of the victims of criminal offences etc.
- 8 Ibid.
- 9 Law n° 2015-993 of 17 August 2015 adapting the criminal procedure to the law of the European Union

Restorative Justice in Domestic Violence Cases A Polish Study

Background to the study

The European Union is committed to the establishment and protection of minimum standards with regard to victims of crime. Directive 2012/29/EU of the European Parliament and Council (2012) established minimum standards on the rights, protection and support of victims of crime. In addition, the Council of Europe *Convention on Preventing and Combating Violence against Women and Domestic Violence* (2011) is the European legal instrument to create a comprehensive legal framework to protect women, children and elderly people exposed to domestic violence. The Directive builds upon the key principle of the 'role of the victim in the relevant criminal justice system,' so that any victim can rely on the same basic level of rights, regardless of their nationality and country in the EU in which the crime took place.

The core objective of this Directive is to assume an individual approach to victims' needs and protection for victims of certain crimes due to, in particular, the risk of secondary victimisation. Protecting crime victims against the risk of secondary victimisation is especially important in domestic violence cases. The notion of secondary victimisation is defined as additional suffering of a crime victim, taking place after the occurrence of the offence, which is not its direct effect but rather a consequence of the victim's negative feelings related to the operation of (for example) agendas of the justice system during the process of enforcing the victim's rights violated by the offence. It is generally accepted that secondary victimisation must be avoided when applying restorative justice services, such as mediation, particularly in cases of domestic violence.

The Preamble to the Directive 2012/29/EU states that 'primary consideration are the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm' (European Parliament and Council, 2012, pp. 57ff). Victims have a whole range of needs that should be addressed to help them recover:

1. to be recognised and treated with respect and

dignity;

2. to be protected and supported;
3. to have access to justice; and
4. to obtain compensation and restoration.

Two contradictory positions exist on the application of mediation to domestic violence cases. On the one hand, it is regarded as a 'consensus of the parties, provided it is a result of a voluntary settlement based on ethical standards, which usually offers greater assurance than a court ruling of a permanent resolution of the conflict between the parties. Furthermore, it increases the chance of fulfilling the provisions agreed upon, obviating the need for the involvement of the enforcement apparatus' (Rekas, 2012, p. 38). On the other hand, 'the mediation process is one more additional opportunity for the perpetrator, while this solution does not benefit the victim' (Rekas, 2012, p. 39).

This article presents the findings of research conducted on the implementation of mediation in domestic violence cases in Poland. The key purpose of the project was to consider mediation from the perspective of the victim, in particular with respect of the consequences of the mediation settlement and the procedural safeguards as to its performance by the perpetrator. Mediation is a complete success only when the offender has fulfilled the obligations of the mediation settlement, and the victim has obtained the redress for the wrong incurred. When the offender refuses to meet the provisions of the mediation settlement, the entire essence of restorative justice is lost and there is a risk of secondary victimisation. This is especially important with respect to victims of domestic violence, due to the unique characteristics of the offences and the close relations with the perpetrators.

The research study

In the research project I conducted in Poland, I focused on the problem of enforcement of settlements reached in the presence of a mediator in domestic violence cases.

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The research consisted of the following:

1. an investigation of the provisions of Polish civil and criminal procedure related to mediation,
2. an evaluation of the regulations of the European Union and the Council of Europe related to restorative justice,
3. an exploration of legal regulations of selected European states related to mediation,
4. the identification and analysis of Polish and international literature,
5. an empirical approach in the form of quantitative and qualitative research, composed of:
 - A. the study of files of cases referred to mediation in court proceedings and preliminary proceedings, and
 - B. a questionnaire.

The study used files in courts and prosecution authorities of Łódź appellate jurisdiction, and randomly selected cases where the parties were referred to mediation in the period 2008–2013, irrespective of the mediation process outcome. The study included 231 criminal cases, including 125 domestic violence cases and 356 civil cases. Questionnaires were limited to judges and prosecutors of Łódź appellate jurisdiction, notaries public of the Chamber of Notaries Public in Łódź and mediators entered on the lists of permanent mediators in Łódź appellate jurisdiction. Quantitative studies were carried out in 2014. The questionnaires were filled out by 151 notaries, 139 judges, 93 prosecutors and 51 mediators.

My research found that in criminal cases the victim does not enjoy the legal guarantees of sanctions that are imposed within a court. For the most part, this was due to the fact that, once the offender and the victim had agreed to participate in mediation, the court considered the case as closed. In other words, the successful resolution of the case was not dependent on the offender fulfilling the contents of the agreement that was secured in the mediation process. As such, this represented an acute problem given that the process benefited offenders to the detriment of their victims.

The research findings indicate that a number of key issues should be taken into consideration when referring a case to mediation and in conducting a restorative justice process. These include: the nature and severity of the crime, the ensuing degree of

trauma, the repeat violation of a victim's physical, sexual, or psychological integrity, power imbalances and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice. This is especially important in mediation cases of domestic violence, where the victims have a close relationship with the perpetrator, those involving elderly people or where there is a history of longer-term domestic violence. Mediation in such cases should take place with a maximum degree of caution, making both parties to the mediation process equal and with the use of measures preventing secondary victimisation, not only directly during the mediation process, but also after the parties have concluded the mediation settlement, prior to the perpetrator's performance of its provisions.

The effectiveness of mediation depends on the real cause of the conflict and on the real expectations of the parties, especially in domestic violence cases. The victim is not always interested in the direct punishment of the offender. Sometimes the victim wants to exert pressure on the offender to enforce a change of conduct or to obtain other tangible benefits, like the consent to the proposed property division during divorce proceedings or the acquisition of child support. Mediation settlements concluded in cases of this type are not always directed at obtaining financial recompense from the perpetrator. Sometimes it is more important for the victim to receive an apology and a promise of a change of conduct. Provisions of this type in mediation settlements cannot be enforced by bailiffs.

Therefore, it is worthwhile considering, as in other states, the introduction of a time period between the conclusion of the mediation settlement and the perpetrator's obtaining beneficial procedural effects such as: the suspension of a sanction, its reduction or provisional discontinuation of the proceedings. During this period, the offender could be given the opportunity to fulfil the obligations and the closing of the case should be contingent on his or her performance of the mediation settlement.

The research found that the court's decision to refer a domestic violence case to mediation is not always informed by the best interest of the victim. Sometimes the court's decision depends on the complexity of the case, the judge's difficulties in communicating with the parties or the desire to close the case as soon as possible. →

This is especially evident in domestic violence cases referred to mediation on the court's initiative, when communication with the parties is hampered and the victim and the perpetrator cannot express themselves or define their expectations. Sometimes there are also additional aggravating factors such as an alcohol problem, another addiction or the victim's old age.

Sometimes, arguably, the criminal justice system and the offender can be perceived to be the real beneficiaries of terminating the criminal proceedings as an outcome of a mediation agreement. In Poland, when the beneficial procedural effects for the perpetrator are not contingent on his or her performance of the mediation settlement, the problem is quite frequent. Under the current legal regulation, neither the justice system, nor the mediator are interested in verifying the performance of the mediation settlement. The perpetrator gains procedural benefits already at the moment of concluding the settlement. It is also when the mediation process finishes for the mediator and the court, since the parties have entered into a mediation settlement, may issue the final ruling. A case is recorded in statistical data and the proceedings are efficiently and quickly concluded. Since in domestic violence cases we often deal with authorised representatives appointed by law, also from their perspective because of the time devoted to the case, such a solution is advantageous.

When the mediation agreement is not performed, there is a risk of secondary victimisation of the victim, especially in domestic violence cases. The victim, when notifying the justice system about domestic violence, has taken a huge risk. Often the victim relies on the perpetrator for housing or is, in another way, psychologically or economically, dependent on the perpetrator. To take part in the mediation process requires renewed trust in the offender. In such a situation, the perpetrator's refusal to fulfil the provisions of the mediation settlement is all the more acutely felt by the victim and may intensify his or her problems in relations with the perpetrator of violence.

The character of settlements ('wishful settlements', for example, which include promises to change behaviour or treatment or 'quasi-civil settlements,' for example, compensation for damages or redress) reached during victim-offender mediation determines whether there is a real possibility of securing their performance by the offender. This study demonstrated that not all mediation settlements, because of the nature of their

provisions, may be successfully executed by bailiffs. Even if the mediation settlement contains provisions of a civil nature which as of 1.07.2015 have been enforceable, the victim may not always be able to apply for such execution, and even if they do, it may turn out that there is no property against which the claim can be settled.

The accepted changes to the criminal procedure in mediation institutions through a possibility of issuing a writ of enforcement may appear to be insufficient from the victim's perspective because of the content of the settlements reached, especially in domestic violence cases. The perpetrator's non-performance of the mediation settlement provisions, with his or her simultaneous obtaining procedural benefits arising from the very fact of concluding a mediation settlement, may result in the victim's secondary victimisation.

Based on the research presented, the Public Advisory Council on Alternative Dispute Resolution at the Polish Ministry of Justice on June 22, 2017 adopted Recommendation No. 5/2017 on Amendments to the Law on Mediation in Criminal Matters. In the Recommendation, the Council identified the victim as the principal beneficiary of mediation, her security, her interest in remedying the damage and the prevention of secondary victimisation. In addition, the obligation for the Law Enforcement and Judicial Authorities to check whether the settlement concluded before the mediator has been or is being performed by the perpetrator before the judgement giving rise to the case. This recommendation is the first step to change the law.

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References

- Council of Europe (2011). Convention on preventing and combating violence against women and domestic violence. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008481d> Istanbul Convention.
- European Parliament and Council (2012). Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA..
- Rekas, A. (2012). Mediacja w prawie karnym. In: W. Broński and P. Stanisław (eds.) Mediacje i negocjacje prawnicze. Skrypt dla uczestników studiów podyplomowych w zakresie mediacji i negocjacji prawniczych. Lublin.

Restorative Justice in Nepal: Hopes and hiccups

Restorative justice in its modern manifestation is a fairly new concept in Nepal. Before the advent of the national constitution and laws in the 1950s, many communities in Nepal had their own non-adversarial justice systems informed by the needs and interests of communities in which the conflicts or crimes took place. With the introduction of more adversarial laws and the professionalisation of justice in the following decades, these communities have been gradually disempowered, and even traditional mediation practices have been usurped by formal bureaucratic processes. The courts and the formal criminal justice system are promoted as the main drivers of justice, and they are considered to have a duty to deliver 'justice' to people.

This increased top-down bureaucratisation of justice, and other nascent problems of prison overcrowding, increased crime rates and re-offending and staggering state expenditure in prison and jail administration, has made it obvious that the statist justice system is heading in the wrong direction. Likewise, seen from the real stakeholders of crime — the victims, offenders and community — there is apparently no room for empowering or putting them at the heart of the justice system. All of this has made it loud and clear that Nepal needs a shift in re-imagining justice in formal spheres, and this is where restorative justice comes in handy.

Nepal experienced a decade-long civil conflict from 1996 perpetuated by long standing social, cultural, ethnic and economic factors. The conflict, which took more than 13,000 lives, left communities with divisions and brought to the fore various historical harms endured by the different socio-cultural groups. Although the conflict formally ended in 2006, no significant steps have been taken to address the structural causes or the lasting consequences of the conflict. At the national level, the Truth and Reconciliation Commission was formed after nine years (in 2015), but the body is again plagued with top-down bureaucratic approaches, and has alienated the real stakeholders in conflicts. Because of this professionalisation, again there have been apparently

no opportunities or efforts thereof for dialogue, healing, truth-telling or reconciliation. In this context of serious harms and divisions engulfing communities, restorative justice still holds big promises in giving a better — and humane — way out of the current muddles of injustice and hopelessness.

Against this backdrop of outstanding calls for restorative efforts in formal and community spheres, one can however see light at the end of the tunnel. For instance, the current Constitution of Nepal (2015), for the first time in Nepal's history, has included fundamental rights of (crime) victims, assuring the right to information about the proceedings of the case, and a right to social rehabilitation and compensation. This provision of social rehabilitation and compensation can be extrapolated to include rights to social reintegration and emotional-psychological compensation, thus addressing more holistic needs of the victims. Likewise, Nepal has recently passed new laws on crime and sentencing, which also introduce probation and parole as a part of sentencing for the first time in Nepal's history.

Drawing on the judicial mode of punishment, the new laws also allow judges to use discretion in sanctioning offenders by considering their age, economic status, occupation, social backgrounds, and so on. In addition to this, there are provisions related to correcting offenders and rehabilitating victims. And although clarity on how these ends will be met is absent, the new penal codes do mark a significant shift in Nepal's legal-judicial history. Now it is the time for the judiciary to commit to the new challenges in implementing these corrective ideals of justice as espoused in the criminal laws. It may take decades for us to see the actual restorative outcomes within the judicial and legal confines, since it requires concomitant preparedness such as forming by-laws and regulations, reshuffling bureaucratic-judicial structures, sensitising the officials through training and practice, and perhaps most importantly, gaining trust from the victims (or the public generally).

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Instead, what has given restorative justice a real opportunity in Nepal is its potential for its use in community contexts. Nepal has a community mediation system in place contained within the Mediation Act of 2011. Most of the conflicts are settled in communities but because of the deeper structural biases towards a certain gender, ethnicity or religion, such community practices have traditionally tended to reinforce those imbalances leaving the aggrieved parties worse off. Recognising this, restorative justice has recently been introduced into community mediation. Aligning with restorative justice principles, these mediators are taught to identify harms in what looked like disputes on the surface, and are trained to refer to relevant organisations which work on healing harms or, if they are trained themselves, to organise healing or harm circles. This approach to restorative justice is slowly gaining ground.

Very recently, some organisations such as the Nepal Institute of Justice (NIJ), The Asia Foundation and Sambad Samuha (Dialogue Fora) have joined forces in introducing restorative justice in addressing community-level conflicts which have strong elements of emotional harms, and which can also require the harming party to acknowledge that and take responsibility. Such community-led, community-driven initiatives are the greatest carriers of the whole restorative justice movement in Nepal. Moreover, in conflict-ravaged communities, restorative justice has also been introduced (albeit, in a handful of cases) to organise peacemaking and healing circles based on restorative justice values.

Likewise organisations such as the Nepal Institute of Justice have been established to promote restorative and community justice in Nepal. NIJ also hosts a Restorative Justice Resource Center, a stock of resources on restorative justice available to the public interested in the subject. Likewise, it also has a Restorative Justice Conferencing Center which has started organising conferencing among parties to conflict and harms. A few intermittent conferences focused exclusively on restorative justice have also been organised, and discussions and training have occurred sporadically. These efforts have, to some extent, helped to promote restorative justice within the wider public space in Nepal. Yet, the success of the restorative justice movement in Nepal is predicated on two main factors. First, the judicial system and community people should recognise that restorative justice has important applications in contexts of both crime and conflict, and in both formal and informal justice systems. Second, upholding the values of dialogue and inclusion espoused by restorative justice, the formal and community justice systems should complement each other, rather than territorialising justice, only to defeat the values of restorative justice itself.

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First Nepal Conference on Restorative and Community Justice (Kathmandu, 24-25 November 2017)



New Advances in Restorative Justice Theory and Practice

Conference Review 'New Advances in Restorative Justice Theory and Practice', Centre for Criminal Justice Studies International Conference, University of Leeds, Weetwood Hall, 18-19 September 2017

The conference, held to celebrate the CCJS 30th anniversary, brought together a number of international experts, scholars and practitioners to debate new directions in restorative justice research and practice. Professor Adam Crawford, Director of the Centre, opened the conference. He began by acknowledging that the relationship between restorative justice academics and practitioners has not always been an easy one. A further continuing challenge is that despite all the innovation that has taken place over the last quarter of a decade restorative justice remains marginalised within the criminal justice system. It has an evidence-base but exists within the realms of politics that evidence-bases alone do not bring about change. So how do we foster cultural transformation and change? One approach is through events like this where we can explore new domains of restorative justice. His hope for the conference was that the relationship between theory and practice and perhaps a way forward or at least a new dialogue might emerge.

The first day focused on the use of restorative justice in the resolution of inter-personal conflicts (primarily in the UK). Presenters included: Dr Kerry Clamp (University of Nottingham); Ian Marder (University of Leeds); Dr Meredith Rossner (London School of Economics); Professors Clare McGlynn and Nicola Westmarland (University of Durham); Professor Joana Shapland and Dr Emily Gray (University of Sheffield); Professor Adam Crawford and Daniel Burn (University of Leeds); Brenda Morrison (Simon Fraser University) and Professor Jennifer Llewellyn (Dalhousie University).

Kerry Clamp was the first to present. She argued that the way that we define and perceive restorative justice is important. Challenging Kathy Daly's (2016) assertion that restorative justice should be strictly

viewed as a justice mechanism, she outlined how viewing restorative justice as a framework for transforming the way we view crime, our responses to it and reducing social distance could actually result in the transformation of policing and the deliberate stimulation of social capital. Taking a different angle, Ian Marder, a PhD candidate from the University of Leeds, reflected on the findings of his research on the implementation of restorative policing in Durham and Gloucestershire. His research indicated the myriad of issues that arise in the implementation of restorative policing at a large-scale within these forces.

Meredith Rossner asked if restorative justice could go mainstream, if we could become more creative in where we use it and where we apply it. She identified three restorative justice mechanisms: 1) making a powerful/effective ritual, 2) the role of emotions in rituals, and 3) the transformative power of apology/forgiveness. Ultimately, restorative justice should be about making criminal justice civil. Clare McGlynn and Nicola Westmarland suggested that some caution was needed with regard to the use of restorative justice in cases of domestic violence and rape given that most scholarship was based on theorising rather than empirical research.

Joana Shapland, Emily Gray, Adam Crawford and Daniel Burn presented on the findings of their research project on the implementation of restorative policing across a number of forces in Humberside, South and West Yorkshire. They will be providing an overview of their findings in the first edition of the Newsletter in 2018. Brenda Morrison discussed the use of restorative justice in education and Jennifer Llewellyn discussed the remarkable expansion of restorative justice practice globally, particularly in relation to the development of 'restorative cities'.

The second day focused on the use of restorative practices in inter-group and international conflicts and settings. Presenters included Professor Ivo Aertsen (KU Leuven); Tim Chapman (University of Ulster); Professor Kieran McEvoy (Queens Belfast University) and Shadd Maruna (University of Manchester); Dr Estelle Zinsstag (University of Leuven); Professor →

Jonathan Doak (Nottingham Trent University) and David O'Mahony (University of Essex); and Dr Stephan Parmentier (KU Leuven).

Ivo Aertsen discussed how restorative justice practice and theory needed to be expanded in cases of historical abuse. He demonstrated this based on practice in Belgium, an Onati workshop he attended on the topic and findings from the 2012-2014: Daphne project 'Developing integrated responses to sexual violence'. Tim Chapman then spoke about restorative justice theory development in relation to the ALTERNATIVE project, one that we have reported on before in some detail.

Jonathan Doak and David O'Mahony presented on their new book 'Reimagining Restorative Justice: Agency and Accountability in the Criminal Process'. They argued that RJ theory 'as broadened but not deepened'. Their book attempts to rectify this by using Empowerment Theory from Social Psychology. Stephan Parmentier delivered the final presentation of the conference. His key point was that restorative justice is precarious in transitional settings primarily because the dominant paradigm is retributive. Distinguishing between concepts used that imply a particular frame (i.e. gross human rights violations or international crimes). He concluded by arguing for a shift to dealing with political crimes in both transitional and democratic settings (e.g. police corruption, political violence and killings, terrorism and institutionalised sexual abuse).

Professor Crawford closed the conference by saying innovative ideas and practice had emerged and that it was clear that restorative justice was in rude good health. He identified three areas for moving forward:

1. Institutionalisation – what should this look like, who should implement it and how should it be done?
2. Domains – domestic violence, transitional justice, institutional violence: are these all acceptable for restorative justice?
3. Posing new questions, some old but in new light:
 - A. Is the definition of restorative justice broader or narrower?
 - B. Is it a bridge (i.e. to connect) or a scaffold (i.e. to support)?
 - C. Is it an innovation for change?

There were calls for more ethnography and micro-studies around rituals. For more connections between restorative justice in the past, present and future and evidence of a move from personal to interpersonal conflicts during the conference. When making interpersonal and communal apologies context and scale does matter. So is restorative justice and theory in search of practice, or a practice in search of a theory? Perhaps we need to decentre. Should restorative justice theory move to the margins? Perhaps we gather more information about individual and professional perspectives.

Most presentations and all information about the speakers can be found at: <https://n8prp.org.uk/event/rjleeds17/>

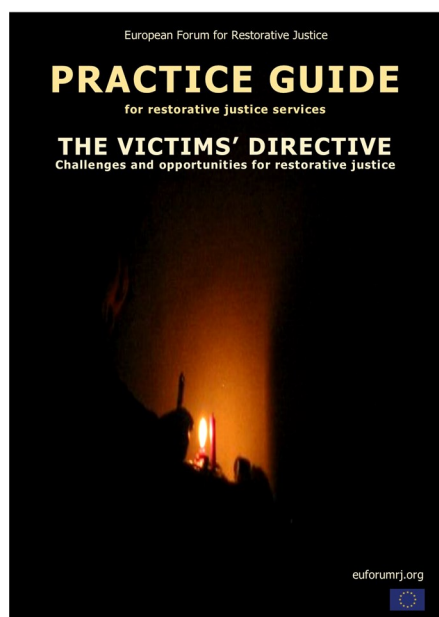
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Poster of the EFRJ Conference Tirana 2018

New resources EFRJ 2017: contact us to know more!



SEE YOU IN 2018!

- **12-13 JUNE** Tirana | EFRJ Course *RJ in Serious Crime* & Annual General Meeting
- **14-16 JUNE** Tirana | EFRJ Conference *Expanding the restorative imagination*
- **3-6 JULY** Barcelona | CJPE Criminal Justice Summer Course *Radicalisation*
- **18-25 NOVEMBER** | International RJ WEEK 2018

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Submission

The European Forum for Restorative Justice welcomes the submission of articles and information for publication. Please contact the Editor.

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