



RE-JUSTICE

Judicial Training in
Restorative Justice

Annex 10

Handout 10: Supra-national and european levels of international legal and policy framework on restorative justice

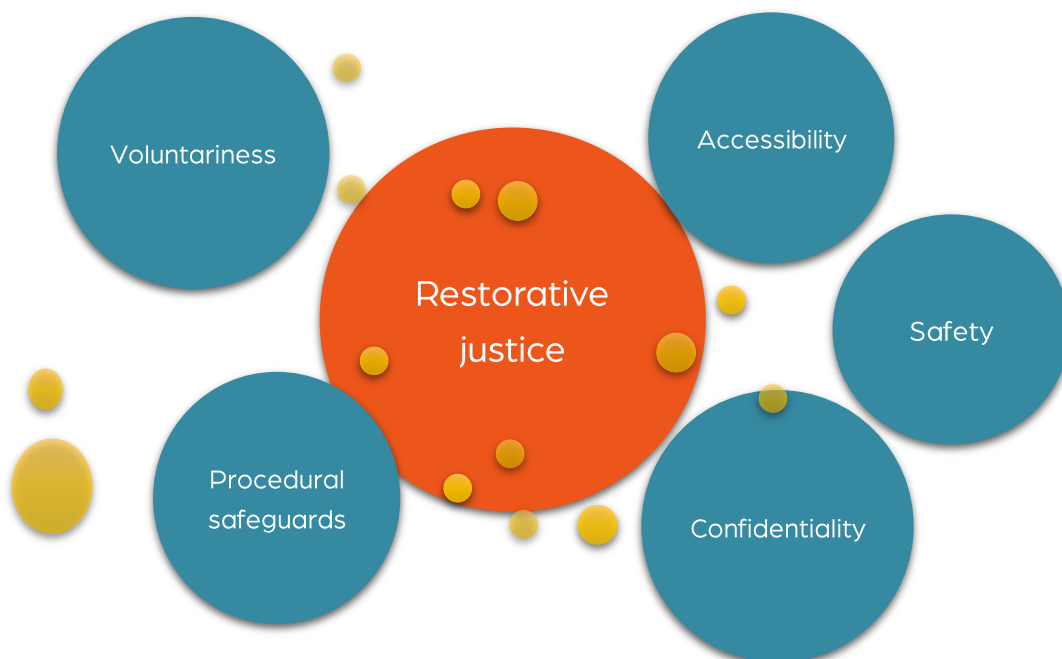


Main supra-national and European sources

1. UN – ECOSOC Resolution 2002/12 – Basic principles on the use of restorative justice programmes in criminal matters
2. 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
3. Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters (Adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies)

Some relevant common elements

Supra-national and European documents set several and consistent recommendations and rules. They cover many different aspects, such as the basic principles of restorative justice, type and peculiarities of restorative justice programs, safeguards for a safe participation of the parties, rules for the relationship with judicial proceedings, inspiration for the developing of restorative justice in the future. Therefore, some core elements are particularly and specifically relevant for judicial authorities in dealing with restorative justice referrals. The most important of them are described in the boxes below through the direct quotations of the international sources.





2.1. DEFINITIONS OF RESTORATIVE JUSTICE

«Restorative process” means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles» (UN Res. 2002/12, § 2).

«'Restorative justice' means 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 criminal offence through the help of an impartial third party» (Dir. 2012/29/EU, art. 2, § 1, lett. d).

«"Restorative justice" refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the "facilitator") (CM/Rec(2018)8, § 3).

Those – very similar – definitions point the core elements of a restorative justice program: the encounter and facilitated dialogue between those who – directly or indirectly, such as community members – are involved and touched by a crime, in order to actively address the subsequent consequences and to find possible solutions for the matters arising from the crime. See also CM/Rec(2018)8, §§ 13, 14.

2.2. VOLUNTARINESS

«Restorative processes should be used only [...] with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily [...], (UN Res. 2002/12, § 7). «Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes», (UN Res. 2002/12, § 13 lett. c).

«The restorative justice services [...] are based on the victim's free and informed consent, which may be withdrawn at any time»; «any agreement is arrived at voluntarily», (Dir. 2012/29/EU, art. 12, § 1, lett. a-d).

«Restorative justice is voluntary and shall only take place if the parties freely consent, having been fully informed in advance about the nature of the process and its possible outcomes and implications, [...]. The parties shall be able to withdraw their consent at any time during the

process», (CM/Rec(2018)8, § 16); «Restorative justice shall only take place with the free and informed consent of all parties. No person should be induced by unfair means to participate in restorative justice. Restorative justice shall not proceed with those who are not capable, for any reason, of understanding the meaning of the process», (CM/Rec(2018)8, § 26).

Voluntariness also means:

- ▶ Right to be fully informed (see UN Res. 2002/12, § 13 lett. b; Dir. 2012/29/EU, art. 12, § 1, lett. b; CM/Rec(2018)8, § 25)
- ▶ Absence of negative consequences on the criminal proceeding in case of refusal or interruption of the restorative justice program (see UN Res. 2002/12, §§ 16, 17; CM/Rec(2018)8, § 35).

2.3. CONFIDENTIALITY

«Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law», (UN Res. 2002/12, § 14).

«Discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest», (Dir. 2012/29/EU, art. 12, § 1, lett. e).

«Restorative justice should be performed in a confidential manner. The discussions in restorative justice should remain confidential and may not be used subsequently, except with the agreement of the parties concerned», CM/Rec(2018)8, § 17; «Notwithstanding the principle of confidentiality, the facilitator should convey information about imminent or serious crimes which may come to light in the course of restorative justice to the competent authorities», CM/Rec(2018)8, § 49.

Confidentiality also means:

- ▶ Reports by facilitators to judicial authorities do not include the contents of discussion between the parties (see CM/Rec(2018)8, § 53)
- ▶ Facilitators cannot convey information also on the behavior of the parties during restorative justice (see CM/Rec(2018)8, § 53)

2.4 ACCESSIBILITY AND AVAILABILITY

«Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law», (UN Res. 2002/12, § 6).

«Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive: [...] j) the available restorative justice services», (Dir. 2012/29/EU, art. 4, § 1).

«Restorative justice should be a generally available service. The type, seriousness or geographical location of the offence should not, in themselves, and in the absence of other considerations, preclude restorative justice from being offered to victims and offenders» (CM/Rec(2018)8, § 18); «Restorative justice services should be available at all stages of the criminal justice process. [...]», (CM/Rec(2018)8, § 19)

Accessibility also means:

- ▶ Adequate human and financial resources (see CM/Rec(2018)8, § 54)
- ▶ Engagement and coordination between restorative justice agencies, judicial authorities, criminal justice agencies and other relevant public services at the local level (see CM/Rec(2018)8, § 62)

2.5 PROCEDURAL SAFEGUARDS

Due to the – necessary – victim oriented view of the EU Directive 2012/29, procedural safeguards regarding the criminal proceeding are not taken into account in the Directive itself. The box below quotes therefore only the Un Resolution 2002/12 and the CM/Rec(2018)8.

«[...] Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings», (UN Res. 2002/12, § 8); «Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings», (UN Res. 2002/12, § 16). «[...] Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings», (UN Res. 2002/12, § 17).



«[...] Participation in restorative justice should not be used as evidence of admission of guilt in subsequent legal proceedings», (CM/Rec(2018)8, § 30); «When a case is referred back to the judicial authorities without an agreement between the parties or after failure to implement such an agreement, the decision as to how to proceed should be taken without delay and in accordance with legal and procedural safeguards existing in national law», (CM/Rec(2018)8, § 35).

Procedural safeguards also means:

- ▶ Legal basis and policies for restorative justice within the criminal proceeding (see CM/Rec(2018)8, §§ 21, 22)
- ▶ Right to legal assistance, grievance procedures, translation services (see see CM/Rec(2018)8, § 23)
- ▶ *Ne bis in idem* principle (see CM/Rec(2018)8, § 34)

2.6. SAFETY

«Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process» (UN Res. 2002/12, § 9). «The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process» (UN Res. 2002/12, § 10).

«Restorative justice services [...] can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. [...] Factors such as 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 [...] should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process», (Dir. 2012/29/EU, Cons. 46); «Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services [...]», (Dir. 2012/29/EU, art. 12)

«Restorative justice should not be designed or delivered to promote the interests of either the victim or offender ahead of the other. Rather, it provides a neutral space where all parties are encouraged and supported to express their needs and to have these satisfied as far as possible», (CM/Rec(2018)8, § 15); «Judicial authorities and criminal justice agencies [...] with responsibility for making these referrals should contact restorative justice services prior to making a referral if they are unsure whether disparities with respect to the parties' age, maturity, intellectual capacity or other factors may preclude the use of restorative justice. [...]», (CM/Rec(2018)8, § 28).

Safety also means:

- ▶ Specific safeguards for children involved in restorative justice, as the right of their parents or legal guardians to attend (see CM/Rec(2018)8, § 24)
- ▶ 'All-partiality' and respect for the dignity of the parties (see CM/Rec(2018)8, § 46)
- ▶ Sufficient time for preparation, sensitiveness to the parties' vulnerabilities, readiness to discontinue restorative justice if necessary (see CM/Rec(2018)8, § 47)