



MJU-26(2005) 1

26th CONFERENCE OF EUROPEAN MINISTERS OF JUSTICE

Helsinki (7-8 April 2005)

SOCIAL ASPECTS OF JUSTICE

- **SEEKING LEGAL SOLUTIONS TO DEBT PROBLEMS IN A CREDIT SOCIETY**
- **THE SOCIAL MISSION OF THE CRIMINAL JUSTICE SYSTEM**

Report presented by the Minister of Justice of

FINLAND

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SEEKING LEGAL SOLUTIONS TO DEBT PROBLEMS **IN A CREDIT SOCIETY**

Executive summary

In many European countries, the significance of credit has increased over the past decades. Lending drives economic growth and benefits individuals. As a matter of fact, the availability of sufficient credit is a central element of a functioning market economy. Nevertheless, the growth in lending is not without its problems. In some cases, excessive borrowing may result in serious financial difficulties for individuals. The indebtedness of young persons, especially, is a very serious problem. The alienation of debtors is detrimental to the society as a whole.

Enforcement is the traditional method of compulsory debt collection. However, in a credit society it is important that we prevent problems arising from indebtedness, and that we come up with a proper system for the management of existing debt problems, so as to avoid the alienation of debtors.

To prepare for this conference, we sent a questionnaire on the various methods of debt management to the Member States. We appreciate very much all the responses, which will serve as a valuable basis for discussion. The responses show that there is great variety among the European countries when it comes to the solutions of debt problems. Some countries have introduced many different measures, while others have been content with fewer measures. In some countries, preventive methods have been used, together with the rehabilitation of debtors who have lost control of their financial situation. It is true, of course, that many politically and societally sensitive issues arise from the prevention and amelioration of debt problems.

In order to further the objective of this conference, I propose that we discuss, here under the auspices of the Council of Europe, the following questions:

1. Is over-indebtedness and the management of the concomitant problems in the Member States of the Council of Europe an issue that merits our common attention?
2. To what extent is it a task for the public authorities to prevent and ameliorate debt problems in the first place?
3. What kind of measures are needed for the prevention of debt problems, e.g.:
 - a) General education and targeted education (especially to young persons),
 - b) Arrangement of financial advice and debt advice, as well as co-operation among the various actors,
 - c) Ensuring proper and responsible conduct by both parties in a credit relationship, and
 - d) The use of credit data in lending?
4. Should we enact or develop further legislation on the adjustment of the debts of private individuals, with a view to the simplest possible procedure that guarantees

legal security? Which of the tasks relating to such matters should be tasks for the courts?

5. Can we consider other measures for the management of debt problems, e.g.:
 - a) The development of the minimum financial protection of the debtor in enforcement, or
 - b) The temporal restriction of liability for debts, e.g. the final extinction of debt liability for lapse of time?
6. Do the Member States of the Council of Europe consider that there is a need for the development of legal and other solutions for the prevention and amelioration of the problems arising from over-indebtedness? What kind of joint action under the auspices of the Council of Europe would be feasible?

1. Credit Society

In European market economies, the significance of credit has increased over the past decades. More and more citizens tap the growing credit market e.g. for financing house purchases, consumption, business or studies. Lending both drives economic growth and benefits individuals in need of funds. In fact, the availability of sufficient credit is a central element of a functioning market economy. To achieve such availability, it is necessary to have a system of banks and credit institutions in place, to establish the ground rules for lending and to organise the management of the problems arising from lending.

The growth in lending is not without its problems. When credit is freely available on the market, it will be increasingly used for purposes of financing consumption. The marketing of consumer credit may take quite intensive forms and the terms of the credit agreements may be opaque. Individuals in the direst economic straits will have to resort to consumer credit, with high interest rates or otherwise disadvantageous terms.

The household indebtedness ratio – the proportion of debt to the annual available income – varies between the European countries. In Finland, the 2002–2003 indebtedness ratio was just over 70 per cent.

In most cases, the use of credit as a financing method is fully without problems. Nevertheless, general economic conditions, such as a downturn, high interest rates or the diminution of the value of collateral, as well as individual circumstances, such as unemployment, illness or divorce, may result in serious financial difficulties for persons in debt, as well as in the loss of control over one's life. Possibly, it is then not only the repayment of debt, but also the payment of taxes and public charges that may fall in default. The consequences of extensive over-indebtedness seriously affect the society as a whole, e.g. through the passivisation and alienation and indeed the increased health problems of debtors.

In Finland, the debt problems of individuals and businesses increased rapidly during the recession of the early 1990s, but they have been on the decrease ever since. Nevertheless, e.g. in 2002 six per cent of the households, that is, some 150,000 households, had experienced at least occasional debt problems. Over 50,000 household displayed signs of recurring debt problems.

In Finland, debt problems concern proportionally the most those persons who also otherwise are in the most difficult financial situations, such as the jobless, single parents, low-income households and persons with little education or training. However, most of the borrowing is done by the middle class and the well-off. Also these groups have seen an increase in their debt problems.

In most cases, individuals can get by their debt problems by decreasing their consumption and by entering into voluntary repayment arrangements with their creditors. However, there are times when this cannot be done, resulting in a need to employ the legal and practical safeguard systems available in the society concerned.

In general, only a small proportion of debt problems results in insolvency. For instance, in Finland the credit losses arising from household loans have amounted to no more than one per mill (1/1,000) of the total outstanding credit.

2. Management of Debt Problems

2.1. From Enforcement to Rehabilitation

Enforcement is the traditional method of collecting on debts. A heavily over-indebted citizen will be subject to enforcement measures for the rest of his or her life. This situation is in itself unreasonable, and very likely to result in the alienation of the debtor and in other personally and societally adverse consequences. For this reason, many countries have developed possibilities for a comprehensive adjustment of a person's debts as an alternative to traditional forcible enforcement. An adjustment will enable the debtor to regain control over his or her financial situation and thus try to make a fresh start in life.

The modern law of insolvency tends away from forcible enforcement and towards the rehabilitation of the debtor. The rehabilitation of an over-indebted debtor is evidence of the desirability of social justice in a credit society.

Nowadays the rehabilitation of the debtor may be more and more common also in enforcement proceedings. Various measures are taken to protect the debtor so that he or she both retains a certain minimum standard of livelihood and that he or she may recover and become a productive member of the society.

2.2. Preventive and Restorative Measures

Debt problems are a persistent phenomenon in a market economy with a free credit market. The European countries have come up with a variety of measures to manage these problems.

Many countries have implemented legislation for the adjustment of the debts of private individuals and some countries are in the process of drafting such legislation.

Besides debt adjustment legislation, there are also many other types of measure undertaken in various countries so as to level the risks inherent in lending. There has been work towards the development of financial advice and debt advice, as well as several reforms towards the improvement of the situation of debtors in enforcement proceedings. Some of the most important reforms in practice have been the expansion of the debtor's right of separation of assets and the granting of repayment holiday months in the garnishment of wages, salaries, pensions and other recurring income.

A very important reform in Finland in terms of principle is the implementation of rules on the time limit of enforcement, which entered into force with partially retroactive effect in the spring of 2004. The maximum effective period of enforcement in credit relationships is normally 15 years from the issue of the final judgment confirming the repayment liability.

Both in Finland and in many other European countries, the focus has so far been on the amelioration of problems caused by over-indebtedness. In the future, however, the focus should shift towards the prevention of debt problems. Some key issues in this respect will be general education, as well as education specifically geared for special target groups, such as young persons. The promotion of financial literacy both at home and in schools is very important. Also the co-operation of various public authorities and NGOs for the support of individuals with debt problems is a significant

element. There is a variety of social credit and security facilities provided by different foundations in Finland for the purpose of refinancing problem loans.

Over the past few years, increased attention has been paid to the notion that both the lender and the borrower should act responsibly in a credit relationship. Responsibility for a smooth credit relationship rests with both parties. The allocation of adverse consequences justly and predictably between the parties so that no moral hazards are created and lending is not unduly hampered requires careful political, societal and legal consideration.

2.3. Situation in the Member States

With a view to the Conference of Ministers of Justice in Helsinki, A questionnaire on the various methods of debt management was circulated among the Member States of the Council of Europe in the summer and autumn of 2004. In all, 25 responses were received. The responses have served as a valuable basis for the drafting of this report and for further discussion of the issue.

The responses show that there is great variety among the European countries when it comes to the solutions of the debt problems. Some countries have introduced numerous measures, while others have been content with fewer. There seems to be some correspondence in the selection of available measures and the degree of development of the credit society and a free credit market in the country in question. For instance, those countries which are still in the process of transformation into a credit society do not have debt adjustment legislation in place. Of course, not all of the traditional market economies have specific legislation on debt adjustment, either.

For instance, during the 1980s and 1990s the Nordic countries have implemented legislation for the adjustment of the debts of private individuals. Also many of the Western European countries have such legislation in place. Estonia and Portugal have introduced debt adjustment legislation quite recently, in 2004. In addition, e.g. Slovenia and the Czech Republic are in the process of drafting such legislation.

In the countries with debt adjustment legislation, a debtor may gain release from liability by making repayments in accordance with a confirmed payment schedule. The duration of the schedule varies somewhat (being normally between three and seven years). Usually, compliance with the payment schedule confers a release of the remainder of the debt burden. If the debtor is totally insolvent, it is possible in certain countries to gain release even without the confirmation of a payment schedule. It is generally the task for a court of law to confirm a schedule. In many judicial systems, debt adjustment cases now feature as a completely new type of court case.

In most European countries, it is legal to garnish wages, salaries and pensions. In some countries, there is a specific list of debts which can be enforced by way of garnishment of wages, salaries or pensions. Every country has relatively detailed provisions on the minimum amounts to be left to the debtor when recurring income is being garnished. In addition, it is typical for European legal systems to have very detailed provisions on the items and assets that the debtor and the family of the debtor may separate from any enforcement proceedings. On many occasions, this is achieved by way of itemised lists in the law.

The organisation of the enforcement service varies considerably between one country and the other. It is relatively common that the courts see to enforcement tasks as well. In some countries, e.g.

Estonia, Lithuania and Romania, enforcement is a service offered on a private, professional basis. Moreover, in some other countries enforcement is a task for state administrative authorities.

Financial advice and debt advice are offered in a number of countries, but normally not on any statutory basis. Often this service is provided by NGOs.

There is much variance in the organisation of credit data activity. There are countries which do not have any private or public register of defaults or credits at all. In many countries, only defaults are registered. The registration may proceed as a private or a public service. In contrast, it is not very usual that also the loans taken by the individuals, or their “positive credit data”, would be registered. In those countries where positive credit data are registered, the extent of the registration varies considerably.

3. International Approach

3.1. The European Convention on Human Rights and the Recommendations of the Council of Europe

The established view of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) is that it requires a sufficiently efficient system for the enforcement of judgments. The concept of a fair trial is considered to include also the requirement that the judgment will be carried out within a reasonable time.

The fair trial standards in Article 6 ECHR may also otherwise be held up as a benchmark for purposes of enforcement. This is evident also in Resolution No. 3 on the enforcement of judicial decisions, which was adopted in the Conference of Ministers of Justice in Moscow in 2001.

Based on the Resolution, a Recommendation (Rec (2003)17) on enforcement was prepared. The instrument emphasises that the beneficiary of a legally binding court judgment is also entitled to require the enforcement of the same. A judgment that cannot be enforced remains illusory. It is noted in the Recommendation that enforcement must be as efficient as possible. The Recommendation is a broad and well-argued statement for the European countries on the requirements that a properly functioning enforcement service should meet.

According to the Recommendation, enforcement must be supported by sufficiently detailed legislation, which guarantees legal certainty and procedural transparency. Any postponement of enforcement must be based on legislation. A balance between the interests of the debtor and those of the creditor must be struck in enforcement. Given essential assets and income must remain the property of the debtor. The search for the assets of the debtor should be effective, while human rights and data protection must be respected. Any distrained assets must be liquidated as promptly as possible, for the going price and avoiding any unnecessary depreciation. An enforcement agent should act with professionalism and without bias. The competence of enforcement agents must be clearly defined by law and differentiated from the competence of judges.

3.2. Measures in the European Union

The problems inherent in a credit society have been addressed also in the European Union (EU). The Directive on Consumer Credit (87/102/EEC) was adopted as early as in the 1980s. It establishes

the general community legal framework for consumer credit activity. The Directive was amended in 1990 and 1998. More recently, however, it has been found to be obsolete. In September 2002, the Commission issued its proposal for a new Consumer Credit Directive (COM (2002) 443 final). After revision by the European Parliament, the Commission issued its amended proposal (COM (2004) 747 final). This is a proposal for maximum harmonisation.

The objective of the proposed Directive is to make possible the creation of more efficient and transparent credit markets, while guaranteeing a sufficient level of consumer protection at the same time. One of the most significant changes would be to expand the scope of application of the provisions to more and more credits extended by businesses to consumers. Another innovation would be to include in the Directive detailed provisions on the information to be supplied to the consumer before a credit agreement is concluded, as well as a provision on the principle of responsible lending. In the Council's working group, most of the Member States have supported the inclusion of the principle in the Directive. Also the European Parliament has considered it necessary. The principle of responsible lending includes e.g. the duty of the lender to supply information and the duty to assess the creditworthiness of the consumer before any agreement is concluded.

4. Possible future co-operation in the Council of Europe

The prevention of debt problems makes sense, because it ameliorates human suffering and decreases social costs by averting alienation. In a credit society, it is impossible to prevent all debt problems at all times, but there are various measures for holding their level as low as possible. For instance, financial education can be given both at home and in school. Individual financial advice and debt advice is often an effective check against an emerging debt problem.

There is a preventive element also in the allocation, in the legislation, of adverse consequences between the creditor and the debtor. If some of these adverse consequences fall on the creditor, there is an incentive to consider the possibility of default already at the stage where a loan is being considered. However, excessive safeguards may push interest rates up or cause other uncalled-for credit market phenomena.

Especially the indebtedness of young persons is a serious problem, which may cause considerable and long-term financial difficulties to individuals at the very beginning of their productive years. The alienation of young persons in debt is detrimental to the society as a whole.

In Finland during the 1990s, there was debate, at times intense, especially as a result of the enactment of the debt adjustment legislation. One of the doubts expressed was that the Act would constitute a moral hazard to the prompt repayment of debts. At present, there have been some 70,000 payment schedules confirmed for private individuals in Finland. Most of these have already run their course, and the debtors have come to grips with their financial situation. The debt adjustment legislation is nowadays largely accepted also by the creditors, having become an unquestioned element of our legal system. Owing to experiences, there have been several amendments to the debt adjustment legislation, e.g. so as to decrease the workload of the courts and to reassess the prerequisites for debt adjustment.

There was similar, occasionally heated, debate in Finland in the early years of the 21st Century relating to the issue of whether a time limit of enforcement should be enacted. The legislation where

this reform was introduced entered into force in the spring of 2004. The Act has a partially retroactive effect, so that the persons indebted during the recession of the early 1990s will be released from enforcement in the spring of 2008. However, the time limit of enforcement does not mean that the debt itself would be materially extinguished at the same time. As a matter of fact, the present debate in Finland concerns the possibility of legislation for the final extinction of debts, which would allow the total release of the debtor from an overwhelming debt burden. The time limit of enforcement was enacted as a secondary measure for those cases where the primary measures, such as a voluntary accord or statutory debt adjustment, have for some reason not solved the debt problem. The temporal restriction of the debtor's liability is one measure by which the adverse consequences of over-indebtedness can be justly allocated in a credit society.

Hence, many politically and societally sensitive issues arise in the prevention and amelioration of debt problems. We can, perhaps, agree that the lending system must nonetheless function properly in all market economies. Such proper functioning includes also the management of the problems arising from lending in a manner that strikes a balance between the interests of the debtors, the creditors and the society.

THE SOCIAL MISSION OF THE CRIMINAL JUSTICE SYSTEM

Executive Summary

The "social mission" of the criminal justice system may be understood in a variety of ways, including general prevention and deterrence, and the protection of society from crime-related evil and harm. In the present context, the issue was rather interpreted with reference to such modern developments in crime control and crime prevention that are paying special attention to concerns that are beyond the traditional focus. Here, the interest is directed towards neglected issues such as crime prevention, the role of the victim, the importance of undoing the harm done by crime and crime control, and improving the balance between the involved parties in the criminal process. Crime prevention is being extensively covered elsewhere and is on its way to become established as part of a standard approach to criminal policy issues. Therefore, the present analysis concentrates on aspects of what is presently comprised in the concept of restorative justice.

Restorative justice being a rather broad and programmatic concept, the relevant concerns are represented in this report by just a few central items: victim-offender mediation, crime victim support, the prevention of re-offending and the re-integration of offenders, special restorative measures regarding offender groups with particular problems. Furthermore, the restorative role of judges and prosecutors is dealt with briefly.

The questionnaire on these issues was distributed to all Ministers of Justice of the 46 Council of Europe member States, and the 40 received replies are analysed in this report. It is rather safe to presume that practically all aspects of the situation are reflected in these replies, even though the situation in some countries has not been dealt with. In some member States, principles of restorative justice have not been implemented at all, while in some other countries, the approach seems to have been adopted in a dynamic and constructive fashion, admitting however to the fact that a lot of progress still remains to be achieved even in the most advanced countries, due to the relatively brief history of international trends and recommendations regarding restorative justice. Furthermore, as has rightly been pointed out by some Ministers, solid evidence as to the benefits of restorative justice innovations of criminal justice systems remains, as yet, inconclusive. However, the overwhelming response to the restorative justice approach may be judged to have been strongly positive.

Such observations would lead to three types of conclusions. First, the Council of Europe may definitely play an active and important role in promoting the restorative justice approach in its member countries both at the level of further recommendations, and collecting and disseminating experiences of good or promising practices, and also by providing technical support, expertise and advice for individual member States requiring such support, as well as promoting bilateral and regional co-operation between member States in these issues, its role then perhaps also being one of a clearing-house. Second, member States could be recommended to become more involved in learning from each other in regards of these reforms. It is often the practical experience that overrides any general principles and recommendations when trying to learn how to improve one's criminal justice system. Third, member States may take a more active role in promoting restorative justice principles in their respective jurisdictions since much remains to be done even in the most advanced countries.

Consequently, the following topics are dealt with in detail:

1. Victim-offender mediation. The benefits of victim-offender mediation are broadly accepted, bearing in mind however that this approach may not be applicable in all cases and obviously is not a mechanism that replaces the traditional measures of the criminal justice system but rather functions as a complementary element that is often able to bring positive aspects to crime control.

Discussion question: What should be done to improve the adoption of victim-offender mediation as a formal part of the criminal justice systems?

2. Victim support schemes. Similarly, victim support schemes have been or are presently being introduced in most member States, representing a major improvement in the situation as compared with what was being done only a decade ago. Also in this issue, further improvements remain to be designed and carried out, some member States being more advanced in this respect than others.

Discussion question: What should be done to improve victim support mechanisms?

3. Preventing re-offending and promoting the re-integration of offenders. The prevention of re-offending and the re-integration of offenders has, compared with the previous issues, in a way been dealt with much longer in most member States, if for instance the progressive corrections ideology is understood as part of the restorative approach. However, long-term as well as rather recent findings would strongly question this interpretation, making reference to the often very high re-offending rates as well as the well-documented hardships experienced by offenders attempting to return to normal society. Consequently, new programmes and new approaches with explicit restorative objectives have been designed and are in the process of being developed. Such innovations, again, have been more systematically adopted in some member States than in others, to the extent that not all member States seem to be at all aware of such advances in the corrections and extra-institutional community measures of which good experience is currently accumulating.

Discussion question: What should be done to adopt mechanisms to prevent re-offending and for the re-integration of offenders?

4. Specifically vulnerable offender categories. As far as specifically vulnerable offender categories are concerned, progress in most member States is still less obvious. Mostly, such groups are, according to the replies to the questionnaire, not provided with measures, programmes or approaches particularly designed to address their vulnerabilities. However, obviously also here, positive developments may be observed. Of particular interest are the developments in some countries that are in the process of an overall reform of their criminal justice system after the radical political changes of the 1990s.

Discussion question: What should be done to improve and develop mechanisms that provide support for specifically vulnerable offenders groups?

5. Training of prosecutors and judges. The training of law enforcement and criminal justice personnel for promoting the restorative justice approach is typically an issue that is being taken care of only after relevant legislative reforms have been carried out, and may be understood as belonging rather to the implementation phase. However, as many innovations to criminal justice systems in the spirit of restorative justice do not require extensive legal reforms, some countries are already reporting some progress also in this respect.

Discussion question: What should be done to promote the training of law enforcement personnel, prosecutors and judges in restorative justice issues?

Introduction

The social role of the criminal justice system

The criminal justice system has, by its very nature, a fundamental social role to play in a democratic society governed by the rule of law. Its primary role is indeed to protect individuals and the society as a whole against those forms of harmful behaviour which the legislator has decided to prohibit.

In the work of the European Committee on Crime Problems, social expectations of the criminal justice system relate to:

- the prevention of crime,
- ways of dealing with offenders, including treatment of prisoners and reintegration of offenders,
- ways of dealing with victims,
- ways of dealing with juveniles and other vulnerable categories of offenders or victims,
- ways to improve the functioning of the criminal justice systems.

The scope of criminal policy

Criminal policy is the entity of societal decision-making that relates to crime and crime control. Traditionally, the criminal justice system in most countries can be seen to concentrate about the offender, the issues of guilt and punishment. Crime prevention and social issues such as attending to the victim's needs, or aspects of offender reintegration have often not received much systematic attention in this context.

The development of systematic crime prevention is one response to this bias. It may be viewed as an extension of the traditional preventive efforts and functions of law enforcement and criminal justice, prevention being one of the core responsibilities of the criminal justice system.

Prevention of crime

Crime prevention is an essential part of an effective overall crime control strategy. In order to be effective, crime prevention measures often need to exceed the remits of the criminal justice system and require the integration of appropriate policies in social, economic, education, health, information and other sectors.

Crime prevention, in its widest sense, has been a long-standing issue on the agenda of the European Committee on Crime Problems as well as of the Conference of European Ministers of Justice. They have emphasised. i.a.:

- the link between economic crisis and crime (1982),
- the need to devote a particular effort to crime-prevention strategies aimed at reducing victimisation and lightening the burden of the criminal justice system (1984),
- the importance of the organisation of crime prevention - the need to address both the social factors associated with criminal behaviour (social prevention) as well as measures to reduce opportunities for the commission of offences and to increase the risk of being detected (situational prevention). This is also recognised to require the creation by member States of

- crime-prevention agencies, involving police and other public or private agencies, at national, regional and local level (1987),
- the role of early psychosocial intervention in the prevention of criminality (as a particular measure of social prevention) (2000),
- partnership in crime prevention, which reiterates the importance of crime prevention strategies involving the community and local authorities, emphasising that these should establish partnerships among the relevant key actors at all levels (2003),
- the need to pursue the "partnership" and "multi-agency" approach, requiring the participation of the community at large, recognising that the criminal justice system alone is not in a position to deal effectively with crime prevention (2004),
- the increasing role of private security services. Their contribution to crime prevention is presently being considered an interesting object of further study, as well as to the possible need for adopting common principles to guide member States in the development of national regulations on their functioning.

Restorative justice

As another recent response to the perceived lack of balance in the operations of the criminal justice system, the issue of restorative justice has been introduced and promoted widely, also at international level (see e.g. the Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC resolution 2002/12). Also the Council of Europe has created a number of instruments related to various aspects of the restorative justice approach:

- Concerning the issue of dealing with offenders, these include at least twenty conventions, resolutions and recommendations from 1962 onward and until 2003. Furthermore, the European Prison Rules are presently in the process of updating.
- Concerning the issue of dealing with victims, at least nine instruments have been introduced from 1983 and until 2003.
- Concerning victim-offender mediation, two instruments dealing specifically with this issue have been developed, in 1985 and 1999.
- Concerning the issue of dealing with juveniles and other vulnerable categories of offenders or victims, at least nine relevant instruments have been introduced from 1978 and until 2003. The Council of Europe is also launching a new multidisciplinary project devoted to "children and violence".
- Concerning ways to improve the functioning of the criminal justice system, at least five relevant instruments may be identified, including the 1980 Report on decriminalisation and the 1996 recommendation Rec. R(96) 8 concerning crime policy in Europe.

Over the past decades, there has been, world-wide, a significant growth of restorative justice initiatives. Restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities. Restorative justice processes often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people. This approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs. This approach provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime.

Consequently, in contrast to the traditional objectives of the criminal justice system, one central objective of restorative justice is to meet **the needs of the crime victim** better than before. In part, such needs are material and may be satisfied by restitution. The needs of the victim also comprise emotional needs such as restoring dignity, and social needs such as restoring or improving the feeling of security. In the restorative justice approach, also **the needs of the offender** are considered: he or she is given the opportunity to take genuine responsibility for his or her acts and their consequences and to improve his or her behaviour. Restorative justice makes sense also in the fiscal realm: since court proceedings are expensive and slow both for the parties concerned and for the state, restorative justice can lead to an equitable result at less cost.

Examples and considerations regarding restorative justice

A typical example of victim-offender restorative justice is victim-offender mediation. There are many varieties of this approach, where the parties concerned meet with an outside mediator in order to discuss the conflict and agree on what should be done because of the crime. The parties have an active role in the process, whereas the task of the police, prosecutor and social authorities is to facilitate their coming together.

There is some, not very strong, evidence that restorative justice is successful in reducing re-offending. However, the reduction of recidivism is not the central objective of the restorative justice approach. Victims often feel that it is most important to receive information and to be able to influence the offender's behaviour. The typical outcome of mediation in practice is an agreement that is also usually implemented successfully. In most cases, the parties involved, and victims in particular, have also been satisfied with the outcome.

One of the central insights of restorative justice is that the process itself may be more important than its direct outcome. It is important for the parties involved that they have been treated in a fair manner, with attention paid to their particular needs. If the process is experienced as being fair and just, it is also easier to commit oneself to the outcome. Commitment and learning may also be facilitated by the feature that all those involved are able to participate in the decision-making and to share in the responsibility for the success of the endeavour.

One of the obstacles preventing more widespread implementation of the principles of restorative justice is the belief that the offender is let off too easily. Restorative justice may thus also be confused with restitutive justice where the offender "gets off" by paying compensation. In reality, successful mediation places higher demands on the offender than is the case in traditional court proceedings where professionals deal with the matter as his or her representatives. In practice, offenders often feel it is hard to face the victim in the mediation process. Facing the victim makes it more difficult to excuse his or her conduct and evade his or her responsibility, and discussing the consequences of the offence forces the offender to face the seriousness of the offence to a greater degree than what he or she would learn in the traditional criminal procedure. Even damages ordered by the court may become irrelevant if the offender already has a burden of unpaid debts that are subject to distraint.

A second misunderstanding related to restorative justice is that nothing is being done about crime. As a matter of fact, restorative practices are taking crime particularly seriously, much attention is being paid to crime prevention, and genuine efforts are being taken to solve crimes that have already occurred.

An analysis of the country replies to the questionnaire

Considering that crime prevention is being dealt with extensively in other structures, and considering that a questionnaire addressing the social mission of the criminal justice system should, in order to be kept reasonably short, the Ministers of Justice of the Council of Europe Member States were sent a questionnaire **focused on restorative justice issues** during Summer and Fall of 2004. Replies from a total of [40] countries were received in time to be analysed for this report.

This analysis follows the structure of the questionnaire. The largest bulk of response material was provided on the topics of mediation and victim assistance, moderate returns were received for the items of preventing re-offending and promoting re-integration of offenders, and very little was provided on the issue of training judges and prosecutors in restorative justice matters. Accordingly, the following concentrates on mediation and victim support, and relates only briefly on the two latter issues.

A. Mediation in Penal Matters

There is a common misunderstanding that mediation or other variants thereof, and the entire approach entitled restorative justice is promoted as an alternative to the criminal justice system, so as to influence conflict resolution in a way in which the criminal justice system is avoided and cases are systematically deflected, re-routed, or diverted from it. In the restorative justice paradigm, this is not at all the case, albeit that in some countries, and in some debates, mediation has indeed been propagated with this end in mind. Rather than this, the restorative justice framework is offering a new perspective to how and to what end society should deal with criminal justice matters besides working on the issue of punishment. Victims in particular have been generally satisfied with such amendments and parallel developments to the traditional procedure where they often have a rather marginal role.

The benefits of victim-offender mediation are broadly accepted, bearing in mind however that this approach may not be applicable in all cases and obviously it is not a mechanism that replaces the traditional measures of the criminal justice system but rather functions as a complementary element that is often able to bring positive aspects to crime control.

There are various roles that mediation is given: it may be an alternative sanction as is the case in a few countries, or it may be a prerequisite to dropping a case, or part of a diversion programme; it may also be voluntary or obligatory. This broad range of alternatives would probably deserve closer analysis, and comparative work with the objective of sharing experiences about the different variants. The European Forum for Victim-Offender Mediation could provide a common platform for this work.

Often, mediation in penal matters is being practised parallel to the legal system, not as an alternative but a supplement to the ordinary criminal proceedings, and it may have an impact on in police, prosecutor, and court decision-making. This is the case in several countries. Of these, at least Finland is, however, about to give mediation in penal matters explicit formal recognition.

Mediation in penal matters is recognised in the legal system in a number of member States.

Mediation is about to be formally introduced in one form or another, with local experiments already existing, and draft legislation being prepared in several other member States.

Financing mediation in penal matters is solved in a variety of ways. In some countries, public financing is the solution, but more often the system is based on mixed financing where public and private (NGO) financing go together. Even exclusively NGO-based financing is found.

Some obstacles to progress were identified:

In many replies, the self-evident obstacle to progress in this issue was often said to be of a legislative nature: the lack of relevant legislation or the lack of detailed regulation, the absence of legal traditions, the Roman tradition of law requiring the involvement of the State in criminal matters. Even though such obstacles are of a technical kind, they obviously do have relevance in the sense that the legal prerequisites do need to be considered in the first place if mediation is to be effectively promoted. In this category of obstacles, also the problem of unfinished penal and justice system reforms may be mentioned. One very technical but relevant problem was noted in one reply: the problem of insurance of the offender when he is performing generally useful work, and determining the organisations where such work can be performed.

A further common obstacle referred to in several replies is a simple material one: the lack of adequate numbers of trained mediators, limited local experience and expertise, lack of specialists with practical skills, practical implementation problems. Related to material obstacles are the problem of "other urgent priorities", and the explanation that "other initiatives have been given higher priority".

Obstacles of an ideological kind are referred to in some replies. Thus, it is noted in different replies that

- the public needs to be informed about the procedure and its advantages,
- the social acceptance of mediation may take a long time,
- a common view among police and prosecutors that mediation should not replace regular prosecution and punishment in cases of serious crimes,
- it has been found very difficult to promote mediation as an alternative to the criminal justice system. Also, victims very often are unwilling to participate,
- the lack of confidence in restorative justice as an effective approach to crime, confidence being created through raising awareness and understanding about restorative justice and its benefits.

Some other types of obstacles were also identified. Thus, one reply reminds that there is the problem of inconclusive evidence about the effects of restorative justice on re-offending rates and specifically the impact on offence types. In one case, a system-

specific obstacle was mentioned: the reconciliation institution has been applied increasingly widely in the country, reducing the number of potential mediation cases.

B. Crime Victim Support

From the perspective of the victim, restorative justice is represented by the support he or she receives from experts and/ or laymen. Victim hotlines provide overall support to victims. The same objective is served by crisis centres, support groups, shelters for victims etc. Support means practical aid, advice, and the comforting of victims and their intimates.

Victim support schemes have been or are presently being introduced in most member State jurisdictions, representing a major improvement in the situation as compared with what was being done some decades ago. Also in this issue, further improvements remain to be designed and carried out, some member States being more advanced in this respect than others.

Alternative solutions in this issue are that there are no particular public victim support mechanisms, or that there is some legislation as to provide compensation for criminal damages caused by violent crimes - or more broadly by also other types of crimes, or there is only NGO-based victim support, shelters, etc., that may or may not receive public financial support. Some countries are not reporting general victim programmes but only victim programmes restricted to narrowly defined specific victim categories. These are typically relating to trafficking in human beings and /or terrorist acts and organised crime, and are found in countries particularly affected by these problems. Rather than victims, these initiatives refer to witnesses and victims. Often such special support programmes have been created upon international initiatives. Some countries have adopted special programmes addressing violence in the family and victims of such violence.

A general state-financed support system for victims exists in less than one half of the member States, and is being developed in a few others. These systems may be restricted to violence victims only, or they may also comprise property crime victims. Some systems are even compensating for immaterial damages (for example Finland as of 2006). Compensation systems are often of a secondary character, and mostly do not provide support or compensation to corporate victims.

Only special schemes or NGO action to protect victims of trafficking in human beings were reported in several member States. However, in some of these, also a general victim protection and damage compensation plan was in preparation, or, for example, also support through telephone help lines was provided.

Only provisions to protect witnesses and victims related to organised crime, terrorism and smuggling (or some of these) are reported by a few countries, with reference to very limited resources available for such services of a more general nature.

Public financial support is often provided, and sometimes the entire system is state-financed, typically also with NGOs active in the field. In some countries, however, victim support is mainly or even exclusively provided by NGOs.

C. The Prevention of Re-Offending and the Reintegration of Offenders

In a broader sense, restorative justice also encompasses support to offenders, the aim of which is to improve his or her situation and to prevent the crimes from recurring. Such support measures comprise for instance anti-addiction programmes, professional training that facilitates employment, rehabilitation, or halfway housing offered to offenders released from prison. Support may also be provided to the offender's family.

One of the postulates of restorative justice is that it is important to re-institute self-respect and a sense of responsibility on the part of the offender. He or she is not seen only as an offender but also his or her "better half" is appealed to. In this way, the stigmatisation and defiance created in him or her by traditional crime control measures may be avoided.

The prevention of re-offending and the re-integration of offenders, compared with the previous issues, in a way been dealt with much longer in most member States, if for instance the progressive corrections ideology is understood as part of the restorative approach. However, long-term as well as rather recent findings would strongly question this interpretation, making reference to the often very high re-offending rates as well as the well-documented hardships experienced by offenders attempting to return to normal society. Therefore, new programmes and new approaches with explicit restorative objectives have been designed and are in the process of being developed. Such programmes and approaches, again,, have been more systematically adopted in some member States than in others, to the extent that not all member States seem to be at all aware of such advances in the corrections and extra-institutional community measures of which good experience is currently accumulating.

Criminal justice systems are often traditionally explained to be responsible for the prevention of re-offending and for the re-integration of offenders into society. Variants of the so-called progressive system are abundant. In some cases, this includes also a personal individual programme of treatment. Many countries explained in detail the said traditional system. It is also often the case that the general social welfare system is said to be responsible for this matter as well. For the purposes of this report, such responses were not counted as reporting specific programmes.

A number of countries have introduced or are in the process of introducing new comprehensive programmes for the re-integration of offenders. One country, for example, is developing a National Action Plan which includes the evaluation of the existing institutions, the introduction of new ones, and on the implementation of therapeutic programs for detainees. Similarly, a new punishment named probation has recently been introduced by another member State, where this punishment includes many supporting measures. This country also reports many penitentiary programmes for detainees. Also another country reports a similar innovation, the probation service supporting offenders in many ways.

One member State has introduced a law on reintegration of released prisoners, with measures supporting social adaptation; another member State, with the help of the EC has established a social service to this end, furthermore NGOs are active in this field.

A third member State similarly has a law to this end. Another member State has established a new probation and mediation service, proposed as a good example also for other countries as it has under one roof all measures preventing re-offending. Also others report having innovative new solutions that are improving.

Some countries present experience which is promising or advanced. One country is about to invest more in a new Transition Facility and in re-offending programmes. One country has a large number of reintegration programmes run by the probation service. Another country has adopted a new Plan to this end. One member State has introduced a new comprehensive Plan including a study assessing the effectiveness of rehabilitation activities.

Two member States report special reintegration programmes, where in particular they have noted the **indebtedness problem** as a reintegration issue. In one country., there is a very detailed Action Plan, perhaps the most systematic one of those we have found. Finland is applying therapeutic programmes for violent and sex offenders, and is about to introduce a new comprehensive approach to the treatment of prisoners, based on the idea of an individualised re-integration plan to be designed for each prisoner.

The main obstacles hampering progress in this respect were, according to the questionnaire replies:

- financial shortcomings, insufficiency of human resources and lack of training,
- financial obstacles are also partly related to prison overcrowding, long queues to prisons, and overloading of the Probation and Mediation Service,
- unfinished penal and justice system reforms,
- limited practical experience with the new system,
- the lack of a system of specialised institutions,
- prioritising; old legislation, to be reformed; short sentences, many foreign prisoners.

Also other obstacles were recognised. For instance, the resistance to change expressed by local communities, mass media and even professionals present a serious problem according to one country. Public demands for more security are seen as a problem, too. A further problem was seen in the lack of public awareness of the reintegration process and of restorative justice, the lack of support from society and limited understanding of the importance of reintegration. In one reply, this problem receives still another kind of formulation "progress waits for the new sanctions to be monitored and evaluated".

D. Restorative Justice and Offender Groups with Particular Problems, Including Juveniles, Ethnically Specific Groups, Substance Abusers and Immigrants

Models of restorative justice have most successfully been applied in the control of juvenile delinquency. The punishments directed at young people often attempt to improve their future adaptation in society. However, treatment and punishment do not always pay sufficient attention to the plight of the victim and do not always succeed even in making the young person understand that he or she has done wrong. The basic problem of young offenders often lies in their family background, their exclusion from school and employment, and their abuse of alcohol and other substances.

Other offender groups with particular problems would obviously require programmes and approaches that pay special attention to their particular re-integration problems, such as substance abuse, or ethnic minority characteristics including discrimination.

As far as specifically vulnerable offender categories are concerned, progress in most member States is still less obvious. Mostly, such groups are, according to the replies to the questionnaire, not provided with measures, programmes or approaches particularly designed to address their vulnerabilities. However, obviously also here, positive developments may be observed. Of particular interest are the developments in some countries that are in the process of an overall reform of their criminal justice systems after the radical political changes of the 1990s.

Examples of such activities given in the country replies mostly refer to juveniles and substance abusers. However, not all countries have such special programmes. A few countries refer also to other groups such as the elderly, refugees, victims of trafficking, the Roma minority and other special ethnic groups. Regarding such programmes, the overall impression is that the most common and the most advanced ones have to do with substance abuse. Also programmes related to trafficking in human beings have a notable role in some countries much affected by this particular problem (as source or transit countries of trafficking in human beings), and these programmes are often developed in co-operation with international organisations active in the area; destination countries typically do not make reference to such programmes.

E. The Restorative Role of Judges and Prosecutors

Also courts have a role in restorative justice. From the restorative justice perspective, the courts have the role of a last resort. This last resort can be used if the parties do not want to participate in mediation, if the offender denies his or her guilt or fails to keep the agreement, the offence is very serious, or the parties involved come to the conclusion that the offender should be punished. Even in such cases, however, the courts could pay more attention to repairing the problem caused by the offence, and to encourage the parties to engage in a more comprehensive discussion.

Overall, the training of law enforcement and criminal justice personnel for promoting the restorative justice approach is typically an issue that is being taken care of only after relevant legislative reforms have been carried out, and may be understood as belonging rather to the implementation phase. However, as many innovations to criminal justice systems in the spirit of restorative justice do not require extensive legal reforms, some countries are already reporting some progress also in this respect. The questionnaire only made reference to court staff - prosecutors and judges - albeit that law enforcement obviously also plays an important role.

It may be of interest to note that replies on this issue were very different, some taking it "for granted" that judges and prosecutors should be trained on this issue, while others were not at all doing this. Overall, the questionnaire did not provide much positive response on this issue. Most countries reported that they have some systematic judge and prosecutor training, but restorative justice is mostly not an (important) issue. It is separately mentioned only in a few replies, from countries that have recently introduced or are about to introduce restorative justice elements in their criminal justice system:

- in one country, a restorative justice experiment was set up in 2002, in partnership with an NGO and with technical assistance from the Government of another member State. The personnel were trained by experts, one of the activities of the project being to inform judges about restorative justice principles and methods.
- another country reports that after the introduction of criminal law mediation there have been and will again be seminars and projects to ensure the awareness of the duty to order and use these measures given, whenever possible.
- one reply states that private sector organisations offer seminars and conferences for the purpose of improving such awareness.
- a further country notes that the restorative justice pilots funded by government agencies to test the effectiveness of restorative justice in the criminal justice system have been raising awareness and understanding about restorative justice amongst sentencers.
- one reply states that prosecutors and judges are trained in and also aware of their important role, in and out of court, in restorative justice.

Conclusions

Such observations would lead to three types of conclusions. First, the Council of Europe may definitely play an active and important role in promoting the restorative justice approach in its member countries both at the level of further recommendations, and collecting and disseminating experiences of good and promising practices, and also by providing technical support, expertise and advice for individual member States requiring such support, as well as promoting bilateral and regional co-operation between member States in these issues, its role then also being one of a clearing-house. Second, member States could be recommended to become more involved in learning from each other in these reforms. It is often the practical experience that overrides any general principles and recommendations when trying to learn how to improve one's criminal justice system. Third, member States may take a more active role in promoting restorative justice principles in their respective jurisdictions since much remains to be done even in the most advanced countries.

Concerning joint international efforts on the social mission of the criminal justice system, a number of issues could thus be discussed in the Council of Europe framework.

1. Is the situation regarding the progress being made in different realms of restorative justice satisfactory, indicating that joint international efforts are not required for the time being?
2. Should Member States define it as their obligation to promote the application of principles of restorative justice?
 - a) regarding victim-offender mediation?
 - b) regarding crime victim support?
 - c) regarding the prevention of re-offending and promoting the re-integration of offenders?
 - d) regarding the training of judges and prosecutors?

Victim-offender mediation

3. Regarding victim-offender mediation, what kind of measures could be recommended:
 - a) to improve the adoption of victim-offender mediation as a formal part of the criminal justice systems?
 - b) to provide victim-offender mediation financing from public funds?
 - c) to raise awareness and understanding about the benefits of victim-offender mediation?
 - d) to develop joint general standards of victim-offender mediation?
 - e) to provide support to member States in need of technical assistance in the adoption of victim-offender mediation?

Crime victim support

4. Regarding crime victim support, what kind of measures could be recommended:
 - a) to establish compensation systems to ensure that victims are adequately compensated for damages caused to them by crimes?
 - b) to establish or support the creation of other victim services?
 - c) to raise awareness about victim support services?

- d) to develop joint overall standards for crime victim compensation systems and the creation of other crime victim services?
- e) to provide support to member States in need of technical assistance in improving their crime victim compensation systems and other crime victim services?

The prevention of re-offending and promoting the re-integration of offenders

5. Regarding the prevention of re-offending and promoting the re-integration of offenders, what kind of measures could be recommended:

- a) when developing and promoting the use of general in-prison programmes to this end?
- b) when developing and promoting the use of in-prison programmes designed for specific offender categories?
- c) when developing and promoting the use of joint prison-and-community programmes designed for the re-integration of offenders and for special groups of offenders?
- d) when developing and promoting the use of community programmes designed for the re-integration of offenders and for special groups of offenders?
- e) to raise awareness about the benefits and importance of the prevention of re-offending and of promoting the re-integration of offenders?
- f) to develop joint overall standards for restorative programmes for the prevention of re-offending and for promoting the re-integration of offenders?
- g) to provide support to member States in need of technical assistance in developing restorative programmes for the prevention of re-offending and for promoting the re-integration of offenders?

The training of judges and prosecutors

6. Regarding the training of judges and prosecutors in their role in promoting restorative justice, what kind of measures that Member States could adopt could be recommended to this end:

- a) to raise awareness amongst judges and prosecutors?
- b) to further involve judges and prosecutors in the restorative process?
- c) to develop joint recommendations regarding the training of judges and prosecutors concerning their role in promoting restorative justice?
- d) to provide support to Member States in need of technical assistance regarding the training of judges and prosecutors concerning their role in promoting restorative justice?

