

## Council of Europe Draft Recommendation concerning restorative justice and penal mediation

### Some comments and suggestions on behalf of the European Forum for Restorative Justice (EFRJ)

The EFRJ appreciates the intention to further strengthen restorative justice in Council of Europe member states and expanding the scope of CoE recommendations on the potential of restorative justice in probation and prison settings. We believe that restorative principles in these domains contribute to the efforts of making probation and prison more efficient, open and closer to society. Before giving some comments on certain clauses of the draft, we raise some more crucial and overarching questions on restorative justice as presented in the draft, with the aim of bringing these again back to the discussion. We hope that the points presented below will contribute to your work.

#### 1. On the terminology of 'restorative justice' and 'penal mediation'

It is good to broaden the terminology of 'mediation in penal matters' that was used in Recommendation No. R(99)19 to 'restorative justice'. In the Explanatory Memorandum with Recommendation No. R(99)19 it was already mentioned that 'mediation in penal matters' had to be understood in this larger framework of restorative justice. The Committee of Experts preparing Recommendation No. R(99)19 during the years 1997-1999 after ample discussion decided not to use the term 'penal mediation' but to name it 'mediation in penal matters'. Indeed, 'penal mediation' was considered to contain a 'contradictio in terminis': mediation in the spirit of restorative justice cannot be punitive on its own. On the basis of this argument, Recommendation No. R(99)19 was influential to the drafting process of the 2002 UN ECOSOC Resolution on Restorative Justice in criminal matters. The makers of the 2002 UN Resolution deliberately changed 'penal matters' into 'criminal matters', in order to avoid any confusion between 'restorative justice' and 'punitivity'. Against this background and against the background of later European and international developments both in research and practice, it is strange to find here again a preference for the terminology 'penal mediation'. There are only a few European countries where 'penal mediation' is used in law and practice, and most often the terminology refers to a type of mediation that is part of criminal justice procedures at the prosecutorial level, hence representing much more a diversionary offender oriented measure than a true restorative justice approach. Moreover in this regard, a comparison could be made between France and Belgium: whereas in the early 1990s the term and practice of 'médiation pénale' was transferred from France to Belgium, 20 years later the Belgian term (and legal framework) of 'restorative mediation' inspired the new legal provision and legal

terminology (2015) in France, much closer to the idea of 'restorative justice'. This example demonstrates that the terminology of 'penal mediation' should not be over-estimated with respect to its general character and transferability. Also on the basis of its inherent ambiguity, the term should be avoided, and a more neutral terminology should be adopted, such as 'victim-offender mediation' or 'mediation in criminal matters'.

There is an international consensus both in research and practice that 'restorative justice' - even when it can be defined in slightly different ways - stands for a general set of principles and values, that can find an operationalisation in practice models such as victim-offender mediation, conferencing and peacemaking circles. That is also explicitly recognised by the UN Resolution 2002 and by European Directive 2012/29/EU. Why then confusing the public and professional actors in Europe by making an inconsistent distinction between 'restorative justice' and 'penal mediation'? The new Recommendation should be on 'restorative justice', and should explain once again in its preamble that restorative justice contains various practices including victim-offender mediation and conferencing. How to explain the general approach of 'restorative justice' can be found for example in the UN Handbook on restorative justice programmes in criminal matters, but also in many other practice and policy oriented publications from various countries.

## 2. On the autonomous character of restorative justice

In Recommendation No. R(99)19 the autonomous character of mediation vis-à-vis the criminal justice process was stressed. At the same time, there should be a fruitful collaboration and mutual fertilisation. Mediation, conceived as part of restorative justice, should not only keep its own character and its own potential to challenge existing penal practices and to contribute to the development of a more participatory, democratically based, effective and sustainable system of justice in our European societies, but it should also keep a balance between the interests of all involved. Restorative justice should not be perceived by the public, or by the end-users, of being more on the side of the offenders or the victims. It should offer a neutral space and a forum where both victims and offenders, but also their communities, are encouraged and supported to express their needs and expectations. This is exactly the strength of restorative justice in practice: to facilitate justice processes in this way. When it comes to the policy level, this neutrality should also be respected, and therefore any impression that restorative justice is predominantly linked to the interest of the victims or the offenders should be avoided. It is of utmost importance - and a high need - that probation and prison services support restorative justice, but victims and victims' organisations should not be given the feeling that it is mainly 'for the benefits' of the offender. Therefore, linking restorative justice to the field of probation and prisons without fully including the victims' interests, is not a good cause strategically and politically. It will put restorative justice in one corner, making it suspicious, and therefore weakening and threatening its potential fundamentally.

In short, the Council of Europe should further develop its Recommendation in such a way that restorative justice is perceived as being unbiased. It should be a common endeavour of all involved

actors in Europe, including the victims' movement. The elaboration of such a neutral, strong and encompassing instrument should not prevent various policy domains also at the level of the Council of Europe to include restorative justice in its regulations (as is already done in an excellent way in many Council of Europe instruments). In fact, one could opt for one of two ways: (1) as Council of Europe we draft a new guiding instrument (Recommendation) supporting restorative justice principles and practices as they can be developed within our societies (of which our criminal justice systems are part), or (2) we adopt a new Recommendation on 'how to implement restorative justice practices in the criminal justice system and offender related work'. The first option might need a more extensive discussion and involvement of the victims' movement and other potential stakeholders. If we go for the latter, it should not create the ambition and confusion that we encompass 'restorative justice' completely and therefore also the title should be fundamentally adapted. However, the Council of Europe - much more than the EU - has the expertise and the (political) potential to opt for a restorative justice approach and policy instrument that is closer to the democratic and participatory principles of restorative justice in general.

### 3. On the meaning of the previous Recommendation

Recommendation No. R(99)19 was certainly not influential enough, as CEPEJ rightly observed in 2007, but its evaluation also showed that it exercised a clear effect in various countries. Moreover, it highly influenced the final wording of the 2002 UN Resolution, and even the definition of restorative justice in the 2012 EU Directive. In fact, the contents of Recommendation No. R(99)19 as formulated in its clauses, are still valid to a very high degree: this is a common experience when evaluating practices and policies and providing training in member states of the Council of Europe. The Council of Europe PC-CP Working Group decided to revise the 1999 Recommendation with four key aims. These are all valid, taking into account what was said above: that restorative justice should not be presented as something only for the criminal justice system (it is, first, a societal approach to which the criminal justice system should contribute), nor predominantly linked to prison and probation services. Once again, to avoid all misunderstandings: prison and probation services are very much needed to support and help developing restorative justice programmes, but they should not claim these programmes as only 'their practices'.

In many European countries, restorative justice is 'in the lift' indeed, but very often it mainly offers lip service to political interests and discourses. Many practices and programmes are recorded as restorative justice, without involving a dialogue between all those involved, or without involving local communities in a true representative way. There is a strong tendency to call all new, rehabilitation and treatment oriented programmes as 'restorative'. In that case, the real innovative potential of restorative justice is highly endangered. Restorative justice should not be 'integrated into criminal justice', but it should help the criminal justice system to be integrated into society.

Probably the most important limitation of Recommendation No. R(99)19 relates to the monopoly position of criminal justice authorities to decide to refer a case to mediation (old clause 9). Taking into account the persistent offender oriented focus of the criminal justice process and the obstacles

experienced by most countries to involve victims properly, one cannot expect that the police, public prosecutors, judges, prisons and probation services will inform and motivate all offenders and all victims of this offer. Research in 36 European countries (Dünkel et al., 2015) has revealed that the selection criteria to refer cases to restorative justice programmes highly depend on offender related characteristics (age of offender, type and seriousness of offence, offending history, stage in the criminal justice process, etc.), and therefore exclude many victims of this possibility.

#### 4. On the proposed clauses

##### Clause 3

Definition: restorative justice is presented as a method to be used by criminal justice actors, and to help the stakeholders ('to satisfy their needs'). Instead, restorative justice should be presented as a process for people to participate in ...

##### Clause 5

... refers to any process 'provided for by law': the reference to the legality principle has offered an excuse for various (Southern European) countries not to start (pilot) projects on mediation. These countries should be encouraged to start working in mediation 'as long as it is not against the law'.

##### Clause 7

Penal mediation may bear the name of ... restorative conferencing, ... sentencing circles: this is highly confusing and against all restorative justice typologies internationally.

##### Clause 13

(Commentary) Determining who should be given the possibility to participate in mediation should not be the prerogative of professionals. This would present mediation again as something to be allowed as a favour, not as a right. We know in the meantime that this is one of the most important reasons of the under-use of mediation in criminal matters, namely that it is made dependent on the initiative, assessment or judgement of criminal justice professionals who are often not really familiar with this type of balanced victim-offender-community oriented approach. The principle should be that everyone is given the opportunity to participate in mediation (given the fact that there is an identifiable victim and offender), unless the well trained and skilled mediator finds a situation too risky in terms of power imbalance or otherwise. Therefore it should not be: 'mediation if', but rather 'mediation unless' (this makes a huge difference in practice).

##### Clause 14

First of all, victims and offenders should be encouraged themselves (through adequate information) to address restorative justice services. Criminal justice actors have an important task to inform their clients in an appropriate and motivational way. So, the order of the initiators of restorative justice processes

should be inverted in this article. Parties should not be 'enabled to request' restorative justice, but should be given a right of access to restorative justice services.

#### Clause 15

The gate keeping function of criminal justice authorities should be abolished, as argued above. Instead, strategies should be developed and adopted in member states on how probation and other criminal justice authorities can inform and help the public and other agencies to make use of mediation. Moreover, in the proposed formulation of clause 15, it is not clear what 'and justice is done' means.

#### Clause 27 and following

Not sure whether 'criminal justice authorities' can be simply replaced by 'judiciary'. The latter may refer to the judges in some countries, excluding public prosecutors and other actors.

#### Clause 29

OK for the principle 'non bis in idem', but that does not necessarily imply that all successful cases (e.g. after an agreement between victim and offender, or what other criteria for success might apply) have to result in a termination of the criminal justice proceedings. What in case of very serious crimes where mediation is offered in parallel with the criminal justice investigation and where it is clear from the very beginning that a sentence by the judge will follow? The same for mediation in the phase of the administration of the (prison) sentence.

#### Clause 48 (and following)

There should be more focus on how to develop cooperation with 'the community'. Achieving societal support for restorative justice is crucial, for diverse reasons. Member states should be encouraged and supported to develop tools and strategies to inform society and to build relationships with the community with respect to restorative justice.

#### Clause 51

This is an interesting innovation and an added value.

#### Clause 54

The appointment of restorative justice champions might not be sufficient. There is ample experience in various countries that a special staff function is required within the system (the prison system, the public prosecutor's office, the probation office) in order to sensitise, inform, educate, train and support colleagues in restorative justice work on a continuous basis.

#### Clause 57

The necessity of cooperation between member states should be stressed more explicitly. Both member states and Council of Europe should offer support in this regard. Exchange programmes, common

training and research can be mentioned. But also the need of a support structure in Europe to make this happen: member states should support such a structure.

Clause 59

A separate clause should be added here, not on evaluation research of mediation practices (which is important as well), but on regular monitoring of mediation practices by service providers themselves. Mediation services, and certainly when they are part of probation, should develop appropriate data recording systems that allow for collecting information on their mediation work specifically (so that the characteristics of mediation cases will be depicted without being absorbed by general figures).

Clause XX

What is missing in section VII: the responsibility of member states to support restorative justice services and their ongoing development also in terms of providing sufficient resources (human, material, financial). Moreover, national 'responsibility centres' or structures should be established, in order to support and coordinate policies and developments in the field of restorative justice in a coherent and sustainable way.

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