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Recommendations

CM/Rec(2018)8

3 October 2018

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)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Noting the growing interest in restorative justice in its member States;

Recognising the potential benefits of using restorative justice with respect to criminal justice systems;

Noting the developments in member States in the use of restorative justice as a flexible, responsive, participatory and problem-solving process;

Recognising that restorative justice can complement traditional criminal proceedings, or be used as an alternative to them;

Considering the need to enhance the participation of stakeholders, including the victim and the offender, other affected parties and the wider community, in addressing and repairing the harm caused by crime;

Recognising restorative justice as a method through which these parties' needs and interests can be identified and satisfied in a balanced, just and collaborative manner;

Recognising the legitimate interest of victims to have a stronger voice regarding the response to their victimisation, to communicate with the offender and to obtain reparation and satisfaction within the justice process;

Considering the importance of encouraging the offenders' sense of responsibility and offering them opportunities to make amends, which may further their reintegration, enable redress and mutual understanding, and encourage desistance from crime;

Recognising that restorative justice may increase awareness of the important role of individuals and communities in preventing and responding to crime and its associated conflicts, thus encouraging more constructive criminal justice responses;

Recognising that delivering restorative justice requires specific skills and calls for codes of practice and accredited training;

Recognising the growing body of research evidence which indicates the effectiveness of restorative justice on a variety of metrics, including victim recovery, offender desistance and participant satisfaction;

Recognising the possible harm which may be caused to individuals and societies by over-criminalisation and the overuse of punitive criminal sanctions, particularly for vulnerable or socially excluded groups, and that restorative justice can be used to respond to crime, where appropriate;

Recognising that crime involves a violation of individuals' rights and relationships, the repairing of which may require a response which extends beyond penal sanctions;

Considering the substantial contribution which can be made by non-governmental organisations and local communities to restoring peace and achieving social harmony and justice, and the need to co-ordinate the efforts of public and private initiatives;

Having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No.5);

Bearing in mind the European Convention on the Exercise of Children's Rights (ETS No.160) and Recommendations of the Committee of Ministers to member States No. R(85)11 on the position of the victim in the framework of criminal law and procedure, No. R(87)18 concerning the simplification of criminal justice, No. R(87)20 on social reactions to juvenile delinquency, No. R(88)6 on social reactions to juvenile delinquency among young people coming from migrant families, No. R(95)12 on the management of criminal justice, No. R(98)1 on family mediation, No. R(99)19 concerning mediation in penal matters, Rec(2006)2 on the European Prison Rules, Rec(2006)8 on assistance to crime victims, CM/Rec(2010)1 on the Council of Europe Probation Rules and CM/Rec(2017)3 on the European Rules on community sanctions and measures;

Bearing in mind document CEPEJ(2007)13 by the European Commission for the Efficiency of Justice which establishes Guidelines for a better implementation of Recommendation No. R(99)19 concerning mediation in penal matters;

Bearing in mind 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;

Bearing in mind the Vienna Declaration on Crime and Justice: Meeting the Challenges of the XXIst Century (10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/CONF. 187/4/Rev. 3), the ECOSOC Resolution 2002/12 on the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, the Handbook on Restorative Justice Programmes published by the United Nations Office on Drugs and Crime in 2006, and Rebuilding Community Connections - Mediation and Restorative Justice in Europe, published by the Council of Europe in 2004;

Recommends that the governments of member States take into account the principles set out in the Appendix to this Recommendation, which builds on Recommendation No. R(99)19 concerning mediation in penal matters, when developing restorative justice, and

make this text available to the relevant national authorities and agencies and, in the first place, judges, prosecutors, police, prison services, probation services, youth justice services, victim support services and restorative justice agencies.

Appendix to Recommendation CM/Rec(2018)8

I. Scope of the Recommendation

1. This Recommendation aims to encourage member States to develop and use restorative justice with respect to their criminal justice systems. It promotes standards for the use of restorative justice in the context of the criminal procedure, and seeks to safeguard participants' rights and maximise the effectiveness of the process in meeting participants' needs. It also aims to encourage the development of innovative restorative approaches - which may fall outside of the criminal procedure - by judicial authorities, and by criminal justice and restorative justice agencies.
2. This Recommendation is addressed to all public and private agencies which operate in the domain of criminal justice, and which deliver or refer cases for restorative justice, or which may otherwise be able to utilise restorative justice or to apply its principles to their work.

II. Definitions and general operating principles

3. "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").
4. Restorative justice often takes the form of a dialogue (whether direct or indirect) between the victim and the offender, and can also involve, where appropriate, other persons directly or indirectly affected by a crime. This may include supporters of victims and offenders, relevant professionals and members or representatives of affected communities. Hereinafter, the participants in restorative justice are referred to, for the purpose of this Recommendation, as "the parties".
5. Depending on the country in which it is being used and the manner in which it is administered, restorative justice may be referred to as victim-offender mediation, penal mediation, restorative conferencing, family group conferencing, sentencing circles or peacemaking circles, *inter alia*.
6. Restorative justice may be used at any stage of the criminal justice process. For example, it may be associated with diversion from arrest, charge or prosecution, used in conjunction with a police or judicial disposal, occur before or parallel to prosecution, take place in between conviction and sentencing, constitute part of a sentence, or happen after a sentence has been passed or completed. Referrals to restorative justice may be made by criminal justice agencies and judicial authorities, or may be requested by the parties themselves.
7. The need for judicial supervision is greater if restorative justice will have an impact on judicial decisions, as when the discontinuation of prosecution depends on an acceptable settlement, or when the agreement is put to court as a recommended order or sentence.

8. Practices which do not involve a dialogue between victims and offenders may still be designed and delivered in a manner which adheres closely to the basic principles of restorative justice (see Sections III and VII). Restorative principles and approaches may also be applied within the criminal justice system, outside of the criminal procedure (see Section VII).
9. "Restorative justice services" refers to anybody which delivers restorative justice. These can be specialised restorative justice agencies, as well as judicial authorities, criminal justice agencies and other competent authorities.
10. "Judicial authorities" refers to judges, courts and public prosecutors.
11. "Criminal justice agencies" refers to the police and to prison, probation, youth justice and victim support services.
12. "Restorative justice agencies" refers to any specialist agency (whether private or public) which delivers restorative justice services in criminal matters.

III. Basic principles of restorative justice

13. The core principles of restorative justice are that the parties should be enabled to participate actively in the resolution of crime (the principle of stakeholder participation), and that these responses should be primarily oriented towards addressing and repairing the harm which crime causes to individuals, relationships and wider society (the principle of repairing harm).
14. Other key restorative justice principles include: voluntariness; deliberative, respectful dialogue; equal concern for the needs and interests of those involved; procedural fairness; collective, consensus-based agreement; a focus on reparation, reintegration and achieving mutual understanding; and avoiding domination. These principles may be used as a framework with which to underpin broader reforms to criminal justice.
15. 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.
16. 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, including what impact, if any, the restorative justice process will have on future criminal proceedings. The parties shall be able to withdraw their consent at any time during the process.
17. 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 (see Rule 53).
18. 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.

19. Restorative justice services should be available at all stages of the criminal justice process. Victims and offenders should be provided, by the relevant authorities and legal professionals, with sufficient information to determine whether or not they wish to participate. Referrals could be made by judicial authorities or criminal justice agencies at any point in the criminal justice process; this does not preclude possible provision for self-referral to a restorative justice service.

20. Restorative justice agencies should be given sufficient autonomy in relation to the criminal justice system. Balance should be preserved between the need for these agencies to have autonomy and the need to ensure that standards for practice are adhered to.

IV. Legal basis for restorative justice within the criminal procedure

21. Member States may wish to establish a clear legal basis where restorative justice is referred to by the judicial authorities, or where it is otherwise used in a way which impacts, or which may impact, upon prosecution or court proceedings.

22. Where restorative justice is provided within the criminal procedure, policies should be developed. These should, in particular, address the procedures providing for the referral of cases for restorative justice and the handling of cases following restorative justice.

23. Procedural safeguards must be applied to restorative justice. In particular, the parties should be informed about and have access to, clear and effective grievance procedures. Where appropriate, the parties must also be given access to translation services or to legal assistance.

24. Where restorative justice involves children (whether as victims or as offenders), their parents, legal guardians or another appropriate adult, have the right to attend any proceedings in order to ensure that their rights are upheld. Any special regulations and legal safeguards governing their participation in legal proceedings should also be applied to their participation in restorative justice.

V. The operation of criminal justice in relation to restorative justice

25. Before agreeing to restorative justice, the facilitator must fully inform the parties of their rights, the nature of the restorative justice process, the possible consequences of their decision to participate, and the details of any grievance procedures.

26. 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.

27. Restorative justice services should be as inclusive as possible; a degree of flexibility should be used in order to enable as many people as possible to participate.

28. Judicial authorities and criminal justice agencies should create the conditions, procedures and infrastructure necessary to refer cases to restorative justice services whenever possible. Persons 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. Where a presumption in favour of referral exists, this would enable trained facilitators, in collaboration with the parties, to determine whether cases are suitable for restorative justice.

29. Facilitators must be afforded sufficient time and resources to undertake adequate levels of preparation, risk assessment and follow-up work with the parties. Where facilitators are drawn from judicial authorities and criminal justice agencies, they should operate in accordance with restorative justice principles.

30. The basic facts of a case should normally be acknowledged by the parties as a basis for starting restorative justice. Participation in restorative justice should not be used as evidence of admission of guilt in subsequent legal proceedings.

31. A decision to refer a criminal case to restorative justice, where this is taken with a view to discontinuing legal proceedings in the event that an agreement is reached, should be accompanied by a reasonable time frame within which the judicial authorities should be informed of the state of the restorative justice process.

32. Where a case is referred to restorative justice by the judiciary before conviction or sentencing, the decision on how to proceed after the outcome agreement between the parties is reached, should be reserved to the judicial authorities.

33. Before restorative justice starts, the facilitator should be informed of all relevant facts of the case, and provided with the necessary information by the competent judicial authorities or criminal justice agencies.

34. Decisions by judicial authorities to discontinue criminal proceedings on the grounds that a restorative justice agreement has been reached and successfully completed, should have the same status as decisions on other grounds, which, according to the national law, have the effect of discontinuing criminal proceedings against the same persons, in respect of the same facts and in the same State.

35. 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.

VI. The operation of restorative justice services

36. Restorative justice services should be governed by standards which are acknowledged by the competent authorities. Standards of competence and ethical rules, and procedures for the selection, training, support and assessment of facilitators, should be developed.

37. Restorative justice services and restorative justice training providers should be overseen by a competent authority.

38. Restorative justice services should regularly monitor the work of their facilitators to ensure that standards are being adhered to and that practices are being delivered safely and effectively.

39. Restorative justice services should develop appropriate data recording systems which enable them to collect information on the cases they deliver. At a minimum, the type of restorative justice which took place or the reasons for cases not progressing should be recorded. Anonymised data should be collated nationally by a competent authority and made available for the purpose of research and evaluation.

40. Facilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. They should possess the sensitivities and capacities which enable them to utilise restorative justice in intercultural settings.
41. Facilitators should be able to demonstrate sound judgement and possess the interpersonal skills necessary to deliver restorative justice effectively.
42. Facilitators should receive initial training before delivering restorative justice, as well as ongoing, in-service training. Their training should provide them with a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims, offenders and vulnerable persons, and basic knowledge of the criminal justice system. Criminal justice professionals who refer cases for restorative justice should also be trained accordingly.
43. Facilitators should be experienced and receive advanced training before delivering restorative justice in sensitive, complex or serious cases.
44. Facilitators' managers should receive case supervision and service management training which is specific to restorative justice.
45. Training providers should ensure that their materials and training approaches correspond with up-to-date evidence on effective training and facilitation practices.
46. Restorative justice should be performed in an impartial manner, based on the facts of the case and on the needs and interests of the parties. The facilitator should always respect the dignity of the parties and ensure that they act with respect towards each other. Domination of the process by one party or by the facilitator should be avoided; the process should be delivered with equal concern for all parties.
47. Restorative justice services are responsible for providing a safe and comfortable environment for the restorative justice process. The facilitator should take sufficient time to prepare the parties for their participation, be sensitive to any of the parties' vulnerabilities and, if necessary to ensure the safety of one or more parties, discontinue restorative justice.
48. Restorative justice should be carried out efficiently, but at a pace that is manageable for the parties. Sensitive, complex and serious cases in particular may require lengthy preparation and follow-up, and the parties may also need to be referred to other services, such as treatment for trauma or addiction.
49. 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.
50. Agreements should only contain fair, achievable and proportionate actions to which all parties provide free and informed consent.
51. Agreements do not have to include tangible outcomes. The parties are free to agree that the dialogue sufficiently satisfied their needs and interests.

52. As far as possible, agreements should be based on the parties' own ideas. Facilitators should only intervene in the parties' agreements where they are asked by the parties to do so, or where aspects of their agreements would be clearly disproportionate, unrealistic or unfair, in which case facilitators should explain and record their reasons for intervening.

53. If restorative justice will have an impact on judicial decisions, the facilitator should report to the relevant judicial authorities or criminal justice agencies on the steps taken and on the outcome(s) of restorative justice. Notwithstanding facilitators' obligations under Rule 49, their reports should not reveal the contents of discussions between the parties, nor express any judgment on the parties' behaviour during restorative justice.

VII. Continuing development of restorative justice

54. Restorative justice requires adequate human and financial resources to be effectively provided. Where it is used, national structures should support and coordinate policies and developments in the field of restorative justice in a coherent and sustainable way.

55. There should be regular consultation between judicial authorities, criminal justice and restorative justice agencies, legal professionals, offenders and groups acting on behalf of victims and communities, in order to enable the development of a common understanding of the meaning and purpose of restorative justice.

56. Judicial authorities, and criminal justice and restorative justice agencies, should be encouraged and supported to engage with their local communities, in order to inform them about the use of restorative justice and to include them in the process where possible.

57. Restorative justice should only be delivered by those who are sufficiently trained in facilitation. However, it is advisable to raise the awareness of all staff and managers from judicial authorities and criminal justice agencies, as well as criminal justice professionals, in relation to the principles of conflict resolution and restorative justice, so that they understand these principles and are able to apply them in the course of their day-to-day work.

58. Where offenders are sentenced to supervision and assistance by probation services, restorative justice may take place prior or concurrent to supervision and assistance, including during sentence planning work. Using restorative justice alongside sentence planning would allow restorative justice agreements to be considered when determining supervision and assistance plans.

59. While restorative justice is typically characterised by a dialogue between the parties, many interventions which do not involve dialogue between the victim and offender may be designed and delivered in a manner which adheres closely to restorative justice principles. This includes innovative approaches to reparation, victim recovery and offender reintegration. For example, community reparation schemes, reparation boards, direct victim restitution, victim and witness support schemes, victim support circles, therapeutic communities, victim awareness courses, prisoner or offender education, problem-solving courts, Circles of Support and Accountability, offender reintegration ceremonies, and

projects involving offenders and their families or other victims of crime, *inter alia*, can all be delivered restoratively, if undertaken in accordance with basic restorative justice principles (see Section III).

60. Restorative principles and approaches may be also used within the criminal justice system, but outside of the criminal procedure. For example, they may be applied where there is a conflict between citizens and police officers, between prisoners and prison officers, between prisoners, or between probation workers and the offenders they supervise. They may also be applied where there is a conflict between staff within judicial authorities or criminal justice agencies.

61. Restorative principles and approaches may be used proactively by judicial authorities and criminal justice agencies. For example, they could be utilised to build and maintain relationships: among staff within the criminal justice system; between police officers and members of the community; among prisoners; between prisoners and their families; or between prisoners and prison officers. This can help to build trust, respect and social capital between or within these groups. Restorative principles and approaches may also be applied proactively by judicial authorities and criminal justice agencies when making managerial decisions and consulting staff, and in other areas of staff management and organisational decision-making. This can help to build a restorative culture within these organisations.

62. Notwithstanding the need for restorative justice to be delivered autonomously in relation to the criminal justice process, restorative justice agencies, judicial authorities, criminal justice agencies and other relevant public services, should engage with each other at the local level in order to promote and coordinate the use and development of restorative justice in their area.

63. Judicial authorities and criminal justice agencies should consider appointing a member of staff with formal responsibilities for promoting and coordinating the use of restorative justice by and within that organisation. This person could also be responsible for liaising with other local organisations and communities in relation to the development and use of restorative justice.

64. Member States should co-operate and assist each other in their development of restorative justice. This should involve sharing information on the use, development and impact of restorative justice, and the co-production of policies, research, training and innovative approaches. Member States (and/or local authorities and relevant organisations within member States) with well-developed restorative justice policies and practices, should share information, materials and expertise with other member States, or with local authorities and relevant organisations therein.

65. National and local governments, judicial authorities, and criminal justice and restorative justice agencies, should undertake promotional activities in order to increase awareness of restorative justice among the general public.

66. Member States should promote, assist and enable research on restorative justice, and facilitate the evaluation of any schemes or projects which they implement or fund. Restorative justice services of all kinds should allow and assist in the independent evaluation of their service.

67. This Recommendation, the principles annexed to it and their implementation should be assessed regularly in the light of any significant developments in the use of restorative justice in member States and, if necessary, should be revised accordingly.

Related documents

1326th meeting of the Ministers' Deputies (3 October 2018)

www.coe.int/.../1326th-meeting-of-the-ministers-deputies-3-october-...

CM(2018)115-add2

European Committee on Crime Problems (CDPC) - b. Commentary to Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters [1326 meeting]

 DOCX  20/08/2018  English  CM-Public

CM/Del/Dec(2018)1326/10.2

European Committee on Crime Problems (CDPC) - a. Abridged report of the 74th plenary session (Strasbourg, 5-7 June 2018) - b. Draft Recommendation CM/Rec(2018)... of the Committee of Ministers to member States concerning restorative justice in criminal matters and its Commentary

 DOCX  03/10/2018  English  CM-Public

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