UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

GIUSTIZIA RIPARATIVA

RESPONSABILITÀ, PARTECIPAZIONE, RIPARAZIONE

a cura di

Gabriele Fornasari
Elena Mattevi

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1. Introduction

There appears to be an emerging consensus in Europe that Restorative Justice (RJ) can be a desirable alternative or addition to ordinary criminal justice approaches to resolving conflicts. RJ attributes greater consideration to the needs of victims and the community, and research has repeatedly highlighted its reintegrative potential for both victims and offenders, and the promising preventive effects such interventions can have on recidivism (see *Section 7* below). Accordingly, throughout

[1] The present paper is an actualized version of DÜNKEL 2017, summarizing the main results of DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015 and DÜNKEL/HORSFIELD/PĂROȘANU 2015.

Europe, the number of countries that have introduced RJ into the criminal justice context over the past few decades is perceived to have been increasing continuously. Research into the field has increased almost exponentially, and international standards and instruments from the European Union, the Council of Europe and the United Nations have increasingly been devoted to RJ over the last 15 years.

The consensus reaches its limits, however, when one regards the ways in which RJ has been implemented in legislation and "on the ground", why it has been introduced, and the role that RJ plays in practice in the context of the criminal justice system (see *Section 2* below). Previous studies have indeed painted a very heterogeneous picture of the European RJ landscape[2], characterized by in some cases strongly divergent approaches to achieving similar outcomes. While some countries have succeeded in situating RJ in a more prominent position in the criminal procedure and in criminal justice practice, other jurisdictions have struggled (or not even sought) to move RJ beyond the margins of the criminal justice system, reflected for instance in strict eligibility criteria for offenders or in the geographically localized availability of providers of RJ services.

The aims of the two research projects presented here were to draw a comprehensive picture of RJ and mediation in the context of responding to criminal offending in Europe. The purpose of the first comparative overview was to summarize information on key issues from the pool of data collected on 36 European countries in an EU-funded project, covering most EU-Member states, but as well other European jurisdictions of Council of Europe member states[3]. The second compara-

[2] So stated by MIERS/AERTSEN 2012a, 514. See for instance AERTSEN ET AL. 2004; MIERS 2001; MIERS/WILLEMSENS 2004; MESTITZ/GHETTI 2005; JOHNSTONE/VAN NESS 2007; EUROPEAN FORUM FOR RESTORATIVE JUSTICE 2008; PELIKAN/TRENCZEK 2008; MASTROPASQUA ET AL. 2010; VANFRAECHEN/AERTSEN 2010; VANFRAECHEM/AERTSEN/WILLEMSENS 2010; MIERS/AERTSEN 2012; 2012a; ZINSSTAG/VANFRAECHEM 2012.

[3] See DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015; participating countries/jurisdictions were: Austria, Belgium, Bosnia-Hercegovina, Bulgaria, Croatia, Czech Republic, Denmark, England/Wales, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Macedonia, Montenegro, The Netherlands, Northern Ireland, Norway, Poland, Portugal, Romania, Russia, Scotland, Serbia, Slovakia, Slovenia,

tive overview was restricted to the 28 EU-member states (i.e. 30 jurisdictions). It specially emphases juvenile justice systems with the same aim to create a comprehensive overview of the current RJ landscape[4], while at the same time seeking to identify key obstacles and problems that hinder RJ in playing a less peripheral and more central role in the context of the criminal procedure, and to examine promising, experience-based solutions to these problems.

Before presenting the findings of these projects, however, it appears advisable to set the objectives of the study against their *contextual and conceptual backdrop*, and to review the literature on *what Restorative Justice means* by *different definitions* (see *Section 2* below).

2. Contextual and conceptual background of the European comparison – What does Restorative Justice mean?

The two projects and their objectives summarised in the present paper need to be set against the backdrop of an *unprecedented growth in the availability and application of processes and practices in Europe* (and indeed the rest of the world) over the last few decades that seek to employ an alternative approach to resolving conflicts, that has come to be termed "Restorative Justice" (RJ). The values reflected in restorative thinking are indeed not entirely new[5]. In fact, they can be traced back to indigenous cultures and traditions all over the world[6]. The modern "rejuvenation" of RJ has in fact taken much of its impetus from indigenous traditions for resolving conflicts in many countries, like the develop-

Spain, Sweden, Switzerland, Turkey, Ukraine; the project was funded by the EU Criminal Justice Programme (JUST/2010/JPEN/AG/1525) and the University of Greifswald.

[4] See DÜNKEL/HORSFIELD/PĂROȘANU 2015; participating countries were all EU-member states respectively 30 jurisdictions (the UK representing 3 jurisdictions, England/Wales, Northern Ireland and Scotland), i.e. in addition to the ones covered in the first study (see Fn. 2) Cyprus, Luxembourg, and Malta.

[5] STRICKLAND 2004, 2.

[6] HARTMANN 1995; LIEBMANN 2008, 302; VAN NESS/STRONG 1997; BRAITHWAITE 2002; BOYES-WATSON 2019.

ments in *New Zealand*, *Australia*, *Canada* and the *USA*[7]. The gradual spreading of RJ in the context of responding to criminal offences has been part of a general «rediscovery of traditional dispute resolution approaches», with restorative processes and practices becoming more and more used in community, neighbourhood, school, business and civil disputes[8].

When confronted with the question as to *what RJ actually is*, a frequent response tends to be that it «means different things to different people»[9], or «all things to all people»[10]. *Van Ness/Strong* state that «it can seem that there are as many answers as people asked»[11]. There is no clear-cut definition of what RJ is, not least because «it is a complex idea, the meaning of which continues to evolve with new discoveries»[12]. *Van Ness/Strong* go on to state that «it is like the words 'democracy' and 'justice'; people generally understand what they mean, but they may not be able to agree on a precise definition»[13].

The modern concept of RJ was originally formulated in a theory by *Christie* ("conflicts as property")[14], and builds on the view that the traditional criminal justice process is an inadequate forum for resolving conflicts between victims and offenders and for meeting both their needs and those of the wider community in which their conflict is set[15].

> Policymakers have become more concerned about the capacity of traditional criminal systems to deliver participatory processes and fair out-

[7] See for instance MAXWELL/LIU 2007; ROCHE 2006; ZEHR 1990; VAN NESS/ MORRIS/MAXWELL 2001; MAXWELL/MORRIS 1993; MOORE/O'CONNELL 1993; DALY/HAYES 2001.

[8] For a look at the "dimensions of restorative justice" in this regard, see for instance ROCHE 2006; see also DALY/HAYES 2001, 2; WILLEMSENS 2008, 9.

[9] FATAH 1998, 393.

[10] See for instance O'MAHONY/DOAK 2009, 167.

[11] VAN NESS/STRONG 2010, 41.

[12] VAN NESS/STRONG 2010, 41.

[13] VAN NESS/STRONG 2010, 41.

[14] CHRISTIE 1977.

[15] O'MAHONY/DOAK 2009, 165 f.; DOAK/O'MAHONY 2011, 1, 717; STRICKLAND 2004, 3.

comes that are capable of benefiting victims, offenders and society at large[16].

The same applies to traditional state responses to offending, which tend to focus chiefly on punishment, deterrence and retribution as responses to breaches of the criminal law. *Walgrave* speaks of the «state monopoly over the reaction to crime»[17].

«Many expectations have been placed upon the criminal justice system and in recent years a new one has been added: it should focus more on victims»[18]. Victims can often feel abandoned by the system by not being involved in the resolution of the conflict to which they are a key party. «While the defendant has a lawyer, the victim does not; instead, the victim's interests are considered to be identical with society's, which the prosecutor represents»[19]. More often than not, victims have a desire to question the offender, to receive an apology and ideally receive some other form of reparation, desires that can only seldom be met by the criminal justice system in most countries of Europe today. Steps have been taken in the past to improve the standing of the victim in criminal proceedings in some countries, often as a result from growing victims' movements and research in the field of victimology, for example the possibility in *Germany* of attaching a civil suit to the criminal case in order to receive compensation (the so-called *Adhäsionsverfahren*), the "Compensation Order" in *England and Wales* or the *partie civile* in *France* and *Belgium*[20]. Such or similar compensation schemes can indeed be found in large parts of Europe today. While these approaches have improved victims' prospects of being compensated, they do very little to change the position of the victim in the resolution of the conflict. The conflict continues to be defined as a dispute between the offender and the State whose laws the offender has breached. Furthermore, by being subjected to the formal criminal process, the victim runs

[16] DOAK/O'MAHONY 2011, 1, 717.

[17] CHRISTIE 1977, 1; WALGRAVE 2008, 5.

[18] See AERTSEN ET AL. 2004.

[19] VAN NESS/STRONG 2010, 42.

[20] See the reports by DÜNKEL/PĂROȘANU, DOAK, CARIO and AERTSEN in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015.

the risk of secondary victimization, for example by being accused of lying or being attributed a degree of blame in the offence, however without being in a position to defend himself, personally or through legal representation.

Likewise, the adequacy of traditional criminal justice processes and interventions for offenders is also disputable if a resolution of the conflict arising from the offence is the desired outcome. Beyond the general notion that criminal justice responses to crime should be designed in a fashion that seeks to promote the reintegration of offenders into the community rather than merely punishing them (for instance through imprisonment). The criminal justice *process* in many countries does very little to promote the notion of an offender's responsibility for his/her behaviour and its consequences for victims and the community. Often their defence lawyers speak for them, thus reducing the degree to which offenders are actively involved in the process and thus to which they (can) truly face up to their actions.

RJ on the other hand aims to give the conflict back to those persons most affected by offending, by actively involving them in the procedures that respond to offending behaviour, rather than placing them on the side-lines in an almost entirely passive role[21]. According to *Christie's* theory of the re-appropriation of conflicts, RJ aims to restrict the role of the State to the provision of a less formal forum in which parties to an offence can deliberate on and actively resolve the crime and its aftermath[22]. The aim is to reintegrate offenders by confronting them with the negative consequences of their behaviour, and in doing so to bring the offender to assume responsibility for his actions and to deliver some form of redress to the victim or the community. In this conceptual approach, participation and involvement are key: victims are given a chance to state how they have been affected and what they expect from the offender, while the offender can explain himself and feel to have been able to express his position, which is likely to improve satisfaction among all stakeholders[23]. Restorative procedures are usually highly informal, and are geared to avoiding negative stigmatizing or labelling

[21] WILLEMSENS 2008, 8.

[22] O'MAHONY/DOAK 2009, 166.

[23] See for instance LIEBMANN 2007.

effects. Rather, RJ aims to separating the offender from his bad behaviour, and to help all parties to the offence leave the offence behind and to thus be "restored". Therefore, restoration refers not only to the damage that has been caused, but also to the status of the stakeholders in the offence.

This overall conceptualization places the process involved at the centre of importance[24]. Accordingly, *Marshall* defines it as «a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future»[25].

Braithwaite's theory of "reintegrative shaming", that regards processes of involvement, personal confrontation, voluntary active participation, family and community involvement and a focus on the harm that the offence has caused to the victim and the community, as promising strategies for fostering a sense of personal responsibility, maturation and reintegration[26]. Accordingly, in such a "narrow" definition of RJ, the primary strategies involve forms of mediation, conferencing and circles that have a focus on participation, impartially facilitated exchange, active involvement and voluntariness. *Braithwaite's* theoretical approach of reintegrative shaming implies that the key factor is the process of reaching a mutual agreement, rather than the agreement and its fulfilment themselves.

However, not all in the field adopt an "encounter" or "process"-based definition (also termed the *minimalist* or *purist approach*). Rather, others see the primary aim of restorative practices in facilitating the delivery of reparation, the making of amends for the *harm* caused ("outcome" or "reparation" oriented definitions, *maximalist approach*). *Liebmann* for instance defines RJ as

> [aiming] to resolve conflict and to repair harm. It encourages those who have caused harm to acknowledge the impact of what they have done and gives them an opportunity to make reparation. It offers those who

[24] ZEHR 1990.

[25] MARSHALL 1999, 5.

[26] BRAITHWAITE 1989.

> have suffered harm the opportunity to have their harm or loss acknowledged and amends made[27].

Some argue for including any action that «repairs the harm caused by crime»[28]. Therefore, schemes that provide for the making of reparation to the victim or even the community at large (like reparation orders, community service or diversion schemes) can be regarded as restorative. However, this will depend on how these practices are organized and implemented.

> As an alternative to associating the concept with a specific archetypal process, the term [RJ] should be instead thought of as encapsulating a body of core practices which aim to maximize the role of those most affected by crime: the victim, the offender and potentially the wider community[29].

Therefore, for instance community service should only be regarded as restorative practice if it fulfils key restorative justice values like voluntary active participation, the aim of reintegration, fostering offender responsibility and the making of amends (in this case to the community through *meaningful* work).

Van Ness/Strong seek to unite the encounter and the outcome orientations in a hybrid definition, describing RJ as «a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders»[30]. Therefore, they feel that the best outcomes can be achieved where the delivery of reparation is facilitated through encounter. However, an encounter is not absolutely necessary.

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[27] LIEBMANN 2008, 301.

[28] DALY/HAYES 2001, 2; see also WILLEMSENS 2008, 9.

[29] O'MAHONY/DOAK 2009, 166; see also UNITED NATIONS OFFICE ON DRUGS AND CRIME 2006.

[30] VAN NESS/STRONG 2010, 43.

This flexibility (or room for personal preference) in defining the concept

> has led to a raft of divergent practices and a lack of consensus on how they should be implemented. As a result mediation and restorative justice programmes worldwide vary considerably in terms of what they do and how they seek to achieve their outcomes[31].

The UN Office of Drugs and Crime refers to RJ as «an evolving concept that has given rise to different interpretations in different countries, one around which there is not always a perfect consensus»[32]. The driving forces for their introduction vary from country to country – were they introduced primarily with the aim of improving the standing of victims by providing opportunities to receive reparation or emotional healing through involvement in the process of resolving the case? Or have the developments been more focused on providing alternative processes and outcomes for (young) offenders in the context of expanding systems of diversion and a shift in the focus of criminal justice intervention from retributive to rehabilitative, reintegrative strategies, with victimological considerations being an "added bonus"? Or both? Such considerations as well as the social, penal, political, cultural and economic climate/context will have had an effect on how RJ has been implemented, how it is linked to the criminal justice system (if at all) and the role it plays in the practices of criminal justice decision-makers.

What has become clear, however, is that the outcomes achieved through restorative practices have indeed been very promising ones. Numerous research studies all over Europe have measured significantly elevated satisfaction rates among victims and offenders who have participated in restorative justice measures compared to control groups[33]. While such levels of satisfaction are no doubt greatly dependent on the way the specific programme in question has been implemented, they nonetheless indicate that it is indeed possible to better meet the needs of victims through RJ. At the same time, RJ has repeatedly and continu-

[31] DOAK/O'MAHONY 2011, 1, 718.

[32] UNITED NATIONS OFFICE ON DRUGS AND CRIME 2006, 6.

[33] See for instance CAMPBELL ET AL. 2006 on experiences in *Northern Ireland*.

ously been associated with promising recidivism rates[34], making them viable alternatives to traditional criminal justice interventions (see in detail *Section 7* below).

The clearest point of European consensus lies in the fact that the perceived expansion in the provision of RJ has been a real one, and that more and more people are coming to regard it as an attractive alternative or addition to the criminal justice system, regardless of the role it plays or the outcomes aimed for. This consensus is reflected in the continued growth in the degree to which RJ is the subject of international conferences as well as of international instruments from the Council of Europe, the European Union and the United Nations, for instance:

- Committee of Ministers Recommendation Rec (99) 19 concerning mediation in penal matters[35];
- Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings[36];
- Resolution 2002/12 of the Economic and Social Council of the United Nations on basic principles on the use of restorative justice programmes in criminal matters[37];
- 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;
- Council of Europe Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice[38];
- Council of Europe Recommendation No. R. (2008) 11 on European Rules for Juvenile Offenders Subject to Sanctions or Measures[39];
- Council of Europe Recommendation No. R. (2006) 2 concerning the European Prison Rules[40].

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[34] See for instance LATIMER/DOWDEN/MUISE 2005; BERGSETH/BOUFFARD 2007; SHERMAN/STRANG 2007; SHAPLAND ET AL. 2008; SHAPLAND/ROBINSON/SORSBY 2012.

[35] COUNCIL OF EUROPE 1999.

[36] COUNCIL OF EUROPE 2001.

[37] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL 2002.

[38] COUNCIL OF EUROPE 2003.

[39] COUNCIL OF EUROPE 2008.

[40] COUNCIL OF EUROPE 2006.

Growth in the number of research projects and publications relating to the issue has been on the verge of exponential. As *Daly* states, «no other justice practice has commanded so much scholarly attention in such a short period of time»[41]. Therefore, there is also agreement that such research is desirable, which is not least reflected in the fact that the European Commission specifically sought to fund research into the matter, as was the case with the study on which the publication at hand is based.

In light of the diversity and flexibility in defining the concept of RJ, it was necessary to draw a *conceptual outline*. As our starting point, we drew on the definitions of "restorative processes" and "restorative outcomes" as provided in Articles 2 and 3 to ECOSOC Resolution 2002/12[42]. Article 2 defines a restorative process as:

> Any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

Further, Article 3 states that:

> Restorative outcomes are agreements reached as a result of a restorative process. [They] include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

So, first of all we were interested in restorative processes, such as mediation and conferencing, in terms of why they were introduced, how they are linked to the criminal procedure, how they have been implemented in legislation and "on the ground", the quantitative role they play in criminal justice practice and positive and negative experiences that have been made with them (or rather: problems that have been faced and solutions to those problems).

[41] DALY 2004, 500.

[42] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL 2002.

However, using such a definition excludes many initiatives that imply the delivery or making of reparation or restitution without a preceding restorative process having taken place – practices that are in fact widespread in Europe today in the form, for instance, of reparation orders, community service orders, or legal provisions allowing prosecutorial or court diversion on the grounds that amends have been made. The research team, therefore, decided to widen the scope of what should be covered in the project so as to include pathways through which making reparation is facilitated in, and has an effect on, the criminal justice process, and to in turn ascertain to what degree they are in fact implemented in a fashion in practice that can be regarded as restorative.

3. Key driving factors for the introduction of restorative justice in European criminal justice systems[43]

As already stated earlier in this article, the idea of resolving conflicts through encounters and mutual decision-making and focusing on the harm caused by the offence and the resulting imbalance of rights and needs is not entirely new and can be traced back to indigenous cultures and traditions all over the world. The *modern* roots of RJ in penal matters are said to be found in abolitionist thinking[44]. Europe's earliest bottom-up VOM initiatives in *Austria*, *Norway* and *Finland*[45] in the early 1980s had their roots in this notion of the "re-appropriation of conflicts" which, as described above, regards the formal criminal justice system as an inadequate forum for resolving conflict, and which instead endorses "giving the conflict back" to those persons who have inflicted

[43] *Subsection 3* is based on information drawn from the 36 national reports from the Greifswald project, as the snap shots did not focus on this matter due to spatial constraints. Likewise, the presentation also includes non-EU states, as reform developments outside the EU, in *Norway* in particular, in the early years of RJ were very influential for the rest of Europe.

[44] For instance CHRISTIE 1977; see for a comprehensive historical review of the roots of the RJ-movement BOYES-WATSON 2019.

[45] See GOMBOTS/PELIKAN, LUNDGAARD and LAPPI-SEPPÄLÄ in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015.

or suffered harm so as to better meet their needs and restore their rights[46]. The reports of the EU-funded project from the *Netherlands*, *Spain*, *Belgium* and *Croatia* stated that developments in their countries were also driven by the notion that traditional criminal justice processes are in fact inadequate for truly resolving conflicts[47].

In reality, abolitionist thinking will have played a significant role in all countries that provide for restorative processes like VOM or conferencing, albeit not expressly, as the concept of providing an informal forum for stakeholders in an offence to resolve their conflicts themselves is intrinsic to restorative processes. Essentially, choosing to implement restorative processes can be seen as an implicit confirmation that abolitionism is the ideal to be applied in order to achieve whatever goals have been set in the countries' given social, cultural, political, legal, historical, penal and economic decision-making contexts.

Boyes-Watson summarizes the historical roots of RJ by emphasizing on the four "arenas" of 1) *reforming the justice system* (finding new and more constructive reactions to the offence and avoiding incarceration, including improving the position of the victim in criminal procedures), 2) management of youth and families (focusing "on youth with the goal of developing more effective strategies of disciplining, morally educating and rehabilitating delinquent youth"; the birth of the New Zealand family group conferencing after Maori understandings of conflict resolution), 3) peacebuilding (in the realm of transitional justice after massive violent conflicts such as genocides, war conflicts etc.) and 4) indigenous rights and regeneration (the movement for fighting against "oppression, marginalization and discrimination" of indigenous people, "institutionalized in the current social structure", e.g. in North-America, Australia, New Zealand)[48].

[46] WILLEMSENS 2008, 11.

[47] See GOMBOTS/PELIKAN, VAN DRIE/SANNEKE/WEIJERS, AERTSEN and BOJANIĆ in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015.

[48] See BOYES-WATSON 2019, 8 ff., 10, 13.

3.1. Changing paradigms of criminal justice and juvenile justice

The early developments in *Finland* also served the purpose of providing an alternative to the use of imprisonment with juvenile offenders. The reports from *Estonia*, *Hungary*, *Ireland*, *Northern Ireland*, *Poland*, *Romania*, *Scotland*, *Slovakia* and *Slovenia*[49], all echoed that the introduction of RJ into their systems was driven at least in part by the aim of decarceration. The aim of reducing the use of imprisonment was tied to developments in many countries in Europe that sought to effect an overall shift in criminal justice thinking, away from a purely retributive strategy of inflicting punishment for breaches of the law, towards a rehabilitative, reintegrative approach (*Austria*, *Belgium*, *Croatia*, *France*, *Germany*, *Hungary*, *Ireland*, *Italy*, the *Netherlands*, *Northern Ireland*, *Portugal*, *Romania*, *Scotland*, *Slovenia*, *Spain*)[50]. Such general criminal justice reforms, which were observable in juvenile justice as well, were characterized overall by an increased focus on expanding discretionary decision-making among key "gatekeepers" to the criminal justice system and introducing alternative responses to crime that seek to rehabilitate and reintegrate offenders. The "principle of opportunity" at the level of the police or prosecution services and the powers of courts to drop cases in certain circumstances have been widely expanded over the past few decades, thus providing "access points" to the system for the implementation of diversionary measures and practices, including such that reflect restorative values (see *Section 4* below). Widespread legislative provision has been made for "reconciliation" between victim and offender and/or the making of amends ("effective repentance") to be regarded as grounds for dropping the case or for mitigating sentences (see *Section 4.1* below), which in turn opens the door for the use of restorative processes and/or for victim and offender to achieve restorative outcomes, or for made reparation to be taken into consideration.

[49] The same was true for the Non-EU-member states of *Norway*, *Russia*, *Turkey* and the *Ukraine*.

[50] See for instance CAVADINO/DIGNAN 2006; 2007. This aspect was also mentioned in the national reports of the Non-EU-members *Bosnia* and *Herzegovina*, *Russia*, *Serbia*, *Switzerland* and the *Ukraine*.

In many countries in Europe, these developments towards diversion and decarceration were particularly reflected in juvenile justice, or rather, within the context of reforming the ways in which offending by young people is responded to. The reports from EU-states such as *Austria*, *Belgium*, *England and Wales*, *Estonia*, *Germany*, *Ireland*, *Italy*, *Northern Ireland*, *Portugal*, *Romania*, *Spain* and the *Non-EU-members of Bosnia and Herzegovina*, *Norway*, *Russia*, and *Switzerland* indicated that such reform movements were key contextual factors for the introduction of RJ. Systems for responding to juvenile delinquency have increasingly sought to employ a more educational approach with a focus on providing alternative processes (to avoid stigmatization) and alternative measures (to seek to positively influence the offender with the aim of reintegration)[51]. In the context of juvenile justice reform, the reintegrative, educational prospects of restorative outcomes and the alternative processes they can entail came to be regarded as promising means for achieving this. More and more also in the general criminal law special prevention and victim oriented sentencing options play an important role and therefore RJ-elements such as mediation and reparation have been introduced in the last decades.

3.2. Developments in the field of victimology and victims' rights

Another key driving factor for the development and expansion of RJ initiatives in Europe in the last few decades has lain in developments in the field of victimology and victims' rights[52]. The reports from *Croatia*, *Denmark*, *England and Wales*, *France*, *Germany*, *Greece*, the *Netherlands*, *Poland*, *Romania*, *Scotland*, *Slovakia*, *Spain* and *Sweden*[53] indi-

[51] See for instance DÜNKEL/VAN KALMTHOUT/SCHÜLER-SPRINGORUM 1997; ALBRECHT/KILCHLING 2002; DOOB/TONRY 2004; CAVADINO/DIGNAN 2006; JUNGER-TAS/DECKER 2006; MUNCIE/GOLDSON 2006; HAZEL 2008; JUNGER-TAS/DÜNKEL 2009; DÜNKEL ET AL. 2011; DÜNKEL 2013; 2015; 2015a; 2016; ZIMRING/LANGER/TANENHAUS 2015.

[52] See for instance DIGNAN 2005; MIERS/AERTSEN 2012a, 530; WILLEMSENS 2008, 11.

[53] From Non-EU-member states: Montenegro, Norway, Russia, Serbia and Switzerland.

cated that the introduction of restorative thinking into their systems was also driven by parallel attempts to strengthen the role of victims in the criminal procedure – so the deficiencies of traditional criminal justice in meeting the needs of victims[54] was one of the primary driving factors. «Whilst initially victims' rights movements were focused on promoting victims' interests to the detriment of offenders' interests»[55], today «most victims' advocates are oriented towards a broader scope of social, personal, and juridical needs of those victimized by crime»[56]. Accordingly, legislative provisions have been increasingly introduced that seek to involve victims through restorative processes, or that seek to facilitate the making of reparation and the alleviation of caused harm, to which the restorative ideal, regardless of whether an encounter or outcome-oriented definition is applied, can cater very well[57].

3.3. The influence of international standards and European harmonization

A more recent driving force that is closely connected to the aforementioned factors has been the influence of international standards and recommendations from the Council of Europe, the European Union and the United Nations, that have recently come to focus increasingly on mediation, RJ and the role and rights of victims in responding to crimes (see already *Section 2* above)[58].

International instruments governing responses to juvenile offending have also made increased reference to mediation and RJ as being desirable practices, for instance in § 8 of Council of Europe Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice[59], and Basic Principle 12 of the "European Rules for Juvenile Offenders Subject to Sanctions or

[54] See AERTSEN ET AL. 2004; VAN NESS/STRONG 2010, 42.

[55] WILLEMSENS 2008, 8.

[56] WALGRAVE 2008a, 618.

[57] See for an overview HARTMANN 2019, 127 ff.

[58] See in particular WILLEMSENS 2008 for an investigation into the role of such standards in Europe. See also MIERS/AERTSEN 2012a, 538 ff.

[59] COUNCIL OF EUROPE 2003.

Measures" (Council of Europe Recommendation No. R. (2008) 11)[60]. Rule 56.2 of the European Prison Rules states that «whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners»[61].

Within our research projects, the reports from *Bulgaria*, *Croatia*, the *Czech Republic*, *Estonia*, *Hungary*, the *Netherlands*, *Poland*, *Portugal*, *Romania*, and *Slovenia*[62], all stated that the developments in the field of RJ in their countries needed to be understood in the context of international standards. On the one hand, the standards have provided guidance on the ways in which restorative strategies have been implemented in law and practice, as they are regarded as depicting "best practices" in the field. But more importantly, these instruments have also been central driving forces for introducing RJ and the "access points" through which it can enter the (juvenile) justice system *per se*.

This latter issue needs to be understood within the context of European harmonization and EU accession[63]. Particularly Eastern European countries (for instance *Bosnia and Herzegovina*, *Bulgaria*, *Croatia*, the *Czech Republic*, *Estonia*, *Romania*, *Slovenia* and *Ukraine*) stated that their motivation or impetus for introducing RJ schemes had come from the desire to harmonize their legislation and practices to western states. Other countries point to the obligations arising from certain international instruments as being pivotal in the passing of legislation so as to provide a statutory framework for victim-offender mediation or other restorative processes and practices that had in fact already been provided "on the ground" for quite some time. The role of Art. 10 of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings that obliged Member States to make legislative provision for mediation by 22 March 2006, is of particular relevance in this

[60] COUNCIL OF EUROPE 2008 with an explanatory commentary in COUNCIL OF EUROPE 2009, 33 ff.

[61] COUNCIL OF EUROPE 2006.

[62] From Non-EU-member states: *Bosnia and Herzegovina*, *Macedonia*, *Montenegro*, *Serbia*, *Turkey* and *Ukraine*, which underlines the importance of human rights instruments in the process of adjusting to a European Union philosophy of a state governed by the rule of law (Rechtsstaat).

[63] LIEBMANN 2007, 49.

regard. Legislative reforms in *Hungary* and *Finland* in 2006, and in the *Netherlands*, *Estonia* and *Portugal* one year later, were said to have been motivated by this Framework Decision. In *Finland*, doing so had a positive effect on the use of RJ in practice, as it provided clearer guidance for a tested nationwide system of non-statutory mediation that had existed for quite some time. However, in *Hungary*, pressure to implement the requirement from the Framework Decision in fact resulted in a hurried, untested and thus greatly flawed top-down reform[64].

3.4. Summary

As has been illustrated above and summarized in *Table 1* below, the driving forces behind the introduction of RJ and mediation into the context of responding to criminal offences are rather diverse. Naturally, it was seldom the case that developments in a country were driven only by one of these different factors. On the contrary, there has indeed been a certain degree of overlap, as the different issues are also interrelated to a certain degree.

Table 1: Factors influencing the introduction and implementation of Restorative Justice in penal matters in Member States of the EU

Abolitionist thinking; traditional criminal justice system deemed inappropriate forum for resolving conflicts	*Austria; Belgium; Croatia; Finland; Latvia; the Netherlands; Spain*
Strengthening victims' rights; victim's movements	*Croatia; Denmark; England and Wales; France; Germany; Greece; the Netherlands; Poland; Scotland; Slovakia; Spain; Sweden*
Inefficient/overburdened criminal justice system	*Bulgaria; Croatia; Greece; Hungary; Ireland; Latvia; Portugal; Romania; Slovakia; Slovenia*
Rehabilitation and reintegration over retribution and punishment; diversion	*Austria; Belgium; Croatia; France; Germany; Hungary; Ireland; Italy; the Netherlands; Northern Ireland; Portugal; Romania; Scotland; Slovenia; Spain*

[64] See LAPPI-SEPPÄLÄ and CSÚRI in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 247, 370 f.

Reforms in particular in the field of Juvenile Justice or Youth Assistance and Welfare	*Austria; Belgium; England and Wales; Estonia; Germany; Ireland; Italy; Northern Ireland; Portugal; Romania; Spain*
Curbing custody rates	*Estonia; Hungary; Ireland; Northern Ireland; Poland; Romania; Scotland; Slovakia; Slovenia*
Compliance with international standards, EU harmonization	*Bulgaria; Croatia; Czech Republic; Estonia; Hungary;* the *Netherlands; Poland; Portugal; Romania; Slovenia*
Lack of trust in the judiciary following period of transition	*Bulgaria; Czech Republic; Northern Ireland*

In addition, these factors are not exhaustive, as the local political, economic, social, historical, cultural backgrounds and contexts are vital as well. For instance *Bulgaria*, *Croatia*, *Hungary*, *Ireland*, *Portugal*, *Romania* and *Slovenia* stated that a primary concern had been a reduction of the caseloads of overburdened court systems, while *Bulgaria*, the *Czech Republic*, *Macedonia* and *Northern Ireland* stated that the introduction and implementation of RJ in their countries had been facilitated by and needed to be placed before the contextual background of a perceived lack of trust in the justice system due to a phase of societal transition and conflict[65].

These motors or aims combined with each other as well as with the overall penal, social and economic climate and the criminal justice system of a given country will have had effects on the ways in which restorative processes and practices have been legislated for (if at all) and implemented in practice, how they are tied into the criminal procedure, and on the quantitative role that they play in a country's criminal justice practice. Accordingly, there is a great degree of variation in Europe in these regards, to which we now turn our attention.

[65] For an elaborate look at the role and potentials of transitional contexts, see CLAMP 2014. See also O'MAHONY/DOAK/CLAMP 2012.

4. Forms of restorative justice in European criminal justice and their legislative basis

Summarizing somewhat, the most widespread manifestation of RJ in Europe is victim-offender mediation (VOM). By contrast, programmes that seek to employ conferencing schemes or sentencing circles that involve a wider circle of participants are by far less widespread (see *Sections 4.1* and *4.2* below). This is not entirely surprising, as European international standards predominantly focus on mediation[66]. In fact, the definition of RJ provided in Directive 2012/29/EU of the European Parliament and of the Council on 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, is the same as the definition of mediation applied in Council of Europe Recommendation No. R. (99) 19 concerning mediation in penal matters. To a certain degree this exemplifies that, in seeking to establish processes that reflect restorative values, the focus in Europe has been on mediation. All 36 reports in the research of *Dünkel*, *Grzywa-Holten* and *Horsfield* (2015) and almost all 30 jurisdictions covered in the survey of EU-member states (see *Dünkel/Horsfield/Păroşanu* 2015) refer to the existence of such services and programmes that seek to provide offenders and victims with an opportunity to take part in mediation, albeit with stark differences in the degree of national coverage and how they have been implemented (see also *Section 4.2* below). In *Cyprus*, mediation is yet not available, and in *Bulgaria*, it is available only for adult offenders.

Summarising the availability of Sanctions or measures that are (at least theoretically) oriented to restorative justice processes on the one hand and on restorative justice oriented sanctions without such processes we get a European landscape as shown in *Table 2* below.

[66] ZINSSTAG/TEUNKENS/PALI 2011, 19.

Table 2: Restorative Justice elements focused either on restorative processes or on reparation/community service in Europe

Restorative processes seeking to achieve restorative outcomes	
Victim-Offender Mediation/Reconciliation (37 out of 39 jurisdictions)	*Austria; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Czech Republic; Denmark; England and Wales; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Macedonia; Malta; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Scotland; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Turkey; Ukraine*
Conferencing (13 out of 39 jurisdictions)	*Austria; Belgium; England and Wales; Germany; Hungary; Ireland; Latvia; Northern Ireland; the Netherlands; Norway; Poland; Scotland; Ukraine*
Making reparation to victim/community without need for preceding restorative process	
Reparation/Reconciliation (32 out of 39 jurisdictions)	*Austria; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; England and Wales; Estonia; France; Germany; Greece; Hungary; Ireland; Italy; Lithuania; Macedonia; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Serbia; Slovakia; Slovenia; Spain; Switzerland; Turkey; Ukraine*
Community Service (34 out of 39 jurisdictions)	*Austria; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; England and Wales; Estonia; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Macedonia; Malta; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Serbia; Slovakia; Slovenia; Spain; Switzerland; Turkey; Ukraine*

If we widen the conceptual framework and include practices that reflect the making of reparation to victims and communities without a preceding restorative process, it becomes apparent that *Community Service* is very widespread in Europe, receiving mention in 32 of 36 national reports in the study of *Dünkel/Grzywa-Holten/Horsfield* (2015) and 25 out of 30 jurisdictions of the EU-member states study (*Dünkel/*

Horsfield/Păroşanu 2015; albeit with certain reservations in most cases with regard to its restorative nature, see *Section 4.5* below). Likewise, 31 of 36 authors in the first study reported that criminal justice decision-makers (police, prosecutors, courts) in their countries have discretionary powers to take the making of reparation (or attempts to do so) and "reconciling" with the victim into consideration when making charging, prosecution or sentencing decisions, or to refer offenders to make reparation prior to making such decisions (either as routes of diversion or as grounds for sentence mitigation). In fact, it is precisely these points of decision-making that we shall be focussing on first in this Section, as they constitute the "access points" through which restorative processes, like VOM and conferencing, can gain entry to the criminal justice system in most of Europe, as shall become clearer as this *Section* progresses.

Therefore, *Section 4.1* is devoted to a look at the different gateways to the criminal justice system in Europe today. Subsequently, VOM and conferencing, as restorative practices involving restorative processes, are each investigated in individual subsections (*Sections 4.2* and *4.3* respectively), followed by a brief look at "peace-making circles" that have begun to emerge in some countries (*Section 4.4*). In presenting these practices, they are placed into the context of the "access-points" described in *Section 4.1*, to which we shall shortly be turning our attention. Finally, *Section 4.5* is dedicated to "Community Service". As has already been stated earlier, and as shall become even more apparent further below, Community Service in Europe today should not really be enumerated together with practices like VOM and conferencing, as it only falls under RJ when a particularly wide definition based on the alleviation of harm and making reparation is applied (i.e. working for the harmed community). However, community service *could* bear great restorative potential if implemented in a fashion that brings it closely in line with the central foundations and notions of RJ, which is why a separate Section has been devoted to the matter.

Relatively new is the implementation of RJ-elements into the execution of prison sentences. Some of the initiatives and legal concepts are described under *Section 4.6*.

4.1. Gateways to the formal justice system

As already highlighted in *Chapter 2* above, the emergence of restorative processes and practices all across Europe has to be viewed against a complex contextual backdrop. Through juvenile and general criminal justice reforms, linked with a stronger focus on the interests and rights of victims, decision-makers throughout the criminal justice system have been increasingly equipped with powers (via amendments to Criminal Codes and/or Criminal Procedure Codes) to divert cases from prosecution, conviction and/or sentencing into alternative procedures and measures that bear superior reintegrative and rehabilitative potential than purely retributive intervention, while at the same time alleviating court caseloads.

Prosecutors (and police forces in some countries, for instance *England and Wales*, *Northern Ireland*, *Ireland* and the *Netherlands*) have seen expansions in their *statutory discretion to divert criminal cases* by dropping charges subject to certain conditions. In 34 of the 36 countries covered by *Dünkel/Grzywa-Holten/Horsfield* (2015), among such conditions we find the condition of having "made reparation" to or having "reconciled" with the victim. Thus, where an offender has alleviated (or in some cases sought to alleviate) the harm caused by the offence, either by his own initiative or upon the making of such a requirement by the prosecuting agencies, he can be *released from criminal liability*. Many Eastern European countries (for instance in *Croatia*, *Estonia*, *Latvia*, *Lithuania*, *Poland*, *Slovakia* and *Slovenia*) in particular make legal provision for cases to be dropped where victim and offender achieve "reconciliation", or where there has been "effective repentance" (like *Poland*, *Portugal*, *Spain* for example). Such diversion is usually limited to offences that carry a certain penalty, usually offences that can attract a prison sentence of three to five years, but often also to so-called "complainant's crimes" (crimes in which charges/criminal complaints have to be brought by the victim, for instance in *Bulgaria*, *Finland*, *Portugal*, *Spain*).

Likewise, while not as widespread as prosecutorial diversion, in 26 of the countries covered in the study of *Dünkel/Grzywa-Holten/Horsfield* (2015), the *courts have powers to refrain from convicting or sen-*

tencing a young offender on similar grounds. Courts can either postpone the procedure so as to enable reparation to be made, mediation to be conducted or reconciliation to be achieved, or can close the case due to the fact that, in the run-up to the trial, the offender has made reparation and/or reconciled with the victim, or has at least undertaken efforts to do so (as is the case in *Germany* for example). Also, 18 of the 30 jurisdictions of the present study reported that courts can regard made reparation, achieved reconciliation or "effective repentance" as a *mitigating factor in sentencing* (*Belgium*, *Croatia*, *Cyprus*, *Denmark*, *Estonia*, *Finland*, *Germany*, *Greece*, *Ireland*, *Latvia*, *Lithuania*, *Malta*, the *Netherlands*, *Poland*, *Portugal*, *Romania*, *Spain*, and *Sweden*).

What is important to understand at this point is that, while there is wide consensus in the laws that achieving reconciliation or making reparation can be taken into consideration in the criminal procedure, it is mostly not clearly defined *how* such reconciliation is to be achieved, *how* reparation should be determined and/or *how* it should be delivered. Rather, the legal regulations governing prosecutorial and court diversion as well as sentence mitigation serve as the most central "access points" through which restorative processes like VOM and conferencing can enter into the criminal procedure as "tools" for achieving reparation or reconciliation. However, in the legal sense, reparation and reconciliation, as outcomes, can also be achieved without there necessarily having been a restorative process (like VOM or conferencing) involved, as the law makes no such requirements in the majority of cases. Thus, while reparation/reconciliation as grounds for diversion or mitigation of sentence are legally prescribed and thus valid nationwide, VOM and conferencing as means of achieving them not always are. Mention of "reconciliation" in the legislation should be taken as implying a measurable legal fact or outcome rather than a particular process. Therefore, just because the term "reconciliation between victim and offender" is used, it does not mean that an impartially facilitated encounter between the two actually took place.

It needs to be noted, though, that in many countries, for example in *Greece*, *Lithuania*, *Slovakia* and numerous other Eastern European countries, the laws foresee "reconciliation processes" or "reconciliation procedures", in which victim and offender are summoned before a

prosecutor or judge who in turn seeks to help the parties reach an informal solution to the offence. Such practices should not, however, be confused with actual VOM, as they lack an important hallmark of VOM – the impartiality of the facilitator.

31 of 36 reports of the Greifswald study and additionally all three EU-member states not covered by it indicated that their national courts are equipped with *special sentencing options* (special sanctions or measures) that reflect restorative justice thinking, most prominently community service (34 of 39 countries covered in both studies, often practised as a condition of probation, e.g. in *Cyprus* or *Malta*) or other forms of court-ordered reparation like "reparation orders" (in *England* and *Wales*, *France*, *Germany*, *Northern Ireland* and *Scotland*), but also court-ordered restorative processes like youth conferences in *Northern Ireland* and *Ireland*, so-called "Referral Orders" in *England and Wales* and VOM in *Germany*.

Another route through which RJ can come to be applied in the criminal justice process is during the serving of a sentence to imprisonment or detention. Restorative practices like conferencing or VOM can serve as promising elements of release preparation and/or even as a ground justifying early release, but likewise can also serve as alternative, more inclusive means for resolving conflict within prisons and detention centres. Prisons bear great potential for restorative practices, as they are in fact places characterized or even defined by conflict. However, only 18 out of 39 reports (concerning both studies together) stated that restorative justice approaches were being used in this context on an experimental level (see more in detail under *Section 4.6*). *Table 3* summarises the availability of RJ-elements in the 39 countries/jurisdictions according to the different levels of criminal prosecution, sentencing or execution of sentences.

Table 3: Stages of the criminal procedure at which restorative practices and outcomes can play a role in Europe

Delivery of reparation or successful restorative process as grounds for/condition of *pre-court* diversion	*Austria; Bosnia and Herzegovina; Belgium; Bulgaria; Croatia; Cyprus, Czech Republic; England and Wales; Estonia; Finland; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Macedonia; Malta; Montenegro; Netherlands; Northern Ireland; Norway; Poland; Portugal; Romania; Russia; Scotland; Serbia; Slovenia; Slovakia; Spain; Sweden; Switzerland; Turkey; Ukraine*
Delivery of reparation or successful restorative process as ground for/condition of *court* diversion	*Austria; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Estonia; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Luxembourg; Macedonia; Malta; (the Netherlands); Montenegro; Poland; Scotland; Switzerland; Romania; Russia; Serbia; Slovenia; Spain; Switzerland; Turkey; Ukraine*
Restorative justice as a ground for sentence mitigation	*Belgium; Croatia; Cyprus; Denmark; Estonia; Finland; Germany; Greece; Ireland; Latvia; Lithuania; Luxembourg; Malta; the Netherlands; Poland; Portugal; Romania; Russia; Spain; Sweden; Switzerland; Turkey; Ukraine*
Court Sanctions with restorative character (including Community Service)	*Austria; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; England and Wales; Estonia; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Macedonia; Montenegro; the Netherlands; Norway; Poland; Portugal; Romania; Russia; Serbia; Slovakia; Slovenia; Spain; Switzerland; Turkey; Ukraine*
Use of restorative justice practices in prison settings	*Belgium; Bulgaria; Denmark; England and Wales; Finland; Germany; Hungary; Italy; Latvia; the Netherlands; Norway; Poland; Portugal; Scotland; Switzerland; Russia; Spain; Ukraine*
Restorative justice is available to all victims and offenders at all stages of the procedure	*Belgium; Denmark; Finland; Germany; Malta; the Netherlands; Sweden; Romania*

Finally, it needs to be addressed that the availability of RJ (or rather, access to RJ) is not always restricted by certain legal preconditions or to certain stages of the criminal procedure. Rather, some countries provide restorative justice programmes as a general service that is (and in some countries *has to be*) offered to all victims and offenders, regardless of the offence and regardless of the course of the procedure (for instance *Belgium*, *Denmark*, *Finland*, the *Netherlands* and *Sweden*). These countries apply a more "victim"-oriented approach, in which the focus is on resolving the conflict between victim and offender in all cases in which the parties wish for such conflict resolution, rather than conditioning access to RJ on offender and offence characteristics and focusing on the consequences of making reparation (potentially following restorative processes) for the offender ("offender"-oriented approach).

4.2. Victim-offender mediation

The most widespread encounter-based restorative practice in Europe is Victim-Offender Mediation (VOM). According to Council of Europe Recommendation No. R. (1999) 19, VOM implies «a process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)»[67].

Liebmann defines it as «a process in which an impartial third party helps two (or more) disputing parties to reach an agreement»[68]. VOM essentially provides victim and offender with a safe, structured setting in which they can engage in a mediated discussion of the offence, and come to a mutual agreement on how the aftermath of the offence should be resolved. Taken together, the key variables that define a process as VOM are that offenders and victims participate voluntarily, are in agreement on the facts of the case and thus the distribution of roles in the process, and are provided a "safe environment" in which their encounter is impartially mediated by a third party[69].

[67] See COUNCIL OF EUROPE 1999.

[68] LIEBMANN 2007, 27.

[69] See for instance BAZEMORE/UMBREIT 2001.

As already indicated in *Section 2* above, there is a need for caution when dealing with the terms "reconciliation" and "victim-offender mediation". Several countries in Europe make legislative provision for "reconciliation processes" or "reconciliation procedures". This is the case for instance in *Greece*, *Lithuania* and *Slovakia* and as Non-EU-member states in *Montenegro*, *Serbia* and *Turkey*, where the person responsible for conducting the process of reconciliation is a prosecutor or a judge, which virtually negates any likelihood of *impartiality* on behalf of the "facilitator" of the process, particularly from the offender's perspective. Similar concerns can be voiced regarding the use of (albeit specially trained) police officers in the context of restorative police cautioning in *Ireland*, *Northern Ireland* and *England and Wales*. Furthermore, from a legal perspective, in lots of Europe the term "reconciliation" is to be understood as an outcome – as in: the fact that victim and offender "have reconciled" – rather than the actual process through which that outcome was achieved. Accordingly, in many countries VOM is used as one of many possible means for achieving reconciliation.

In this section, we have sought to compile a general overview of how widespread VOM *services* are in Europe (not to be mistaken with there being nationwide *legislation* in theory). According to the national reports and the snap shots, services that offer VOM can be found in all countries covered in both studies with the exception of *Cyprus*, however with strongly varying degrees of national coverage. In fact, the number of countries in which all regions can provide VOM-services is in fact small (*Austria*, *Belgium*, the *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Hungary*, *Latvia*, *Malta*, the *Netherlands*, *Norway* and *Poland*). The remaining countries, by contrast, have local or regional initiatives run by research teams, NGOs or state agencies in certain regions of the country, that vary significantly in their geographic scope.

VOM is linked to the criminal justice system in a number of ways throughout Europe. In most of Europe, access to VOM is determined through the discretionary decision-making of prosecutors, courts or other criminal justice agencies who refer "suitable" or "appropriate cases" in the context of their diversionary and sentencing powers, or who take previous VOM into consideration in the context of those powers.

Thus, in the interest of proportionality, in these countries there are usually statutory limits on the kinds of offences that can be referred to VOM, usually limited to offences that can attract a custodial sentence of up to three or five years, that are often applicable not only to VOM but to diversion in general.

In some countries, the law makes explicit mention of VOM as a means for diversion or as a court measure. In *Austria*, for example, VOM is one of several options within a pre-court and court diversion scheme for offenders of all ages (the other options being Community Service and probation). There, VOM can be applied in cases of offences for which the maximum penalty does not exceed five years, the offender has assumed responsibility for the offence and both parties voluntarily consent to the mediation process. Successful participation in VOM results in the case being closed. In others, VOM can enter into the criminal justice system as a means of achieving "settlement", "agreement" or "reconciliation" in the context of legislative provisions governing diversion. For instance, in *Finland*, achieving reconciliation through mediation can be grounds for non-prosecution, court diversion or a mitigation of sentence. In *Romania*, VOM is applicable nationwide (for juveniles and adults) in cases of "complainant's crimes" (so too in *Finland*), as well as certain minor crimes specified in the Mediation Act to which the provisions governing non-prosecution due to "reconciliation" apply. Furthermore, the prosecutor can waive prosecution in cases where a fine or imprisonment for up to seven years is provided and the offender has made efforts to remove or diminish the consequences of the offence.

However, not all countries in Europe condition access to VOM on the fulfilment of certain legal requirements/conditions (offence types, offence severity, offending history etc.) at certain stages of the process. Instead, a small handful of countries (*Belgium*, *Denmark*, *Finland*, the *Netherlands*, *Sweden* and *Romania* to a certain degree) follow a more victim-oriented approach to VOM. What stands out in these countries is that the use of VOM is not necessarily linked to the criminal procedure – instead, decision-makers (police, prosecutors and courts/judges) offer to victim and offender to refer them to mediation as a general service. The offender is usually not *guaranteed* the benefits of diversion or mit-

igation when VOM has been "successful". In the majority of cases, criminal proceedings and sanctioning shall ensue for the offender, regardless of whether or not VOM ends in an agreement or whether that agreement is fulfilled.

In the *Netherlands*, for instance, VOM is provided nationwide as a service to all victims and offenders of all ages, regardless of offence severity. In *Denmark*, too, § 4 of the Code on VOM explicitly states that «VOM does not replace punishment or any other court decision as a consequence of a crime», but *can* be taken into consideration as a mitigating factor in sentencing. As in the *Netherlands*, the availability of VOM in *Denmark* is not dependent on the course of the criminal procedure. VOM can be applied before or after sentencing (or at any later date if the parties so desire) and is not subject to limitations in terms of eligible offences.

Overall, it can safely be stated that VOM is widespread in Europe when it comes the number of countries that actually provide for it. However, the spread of availability of actual VOM services in those countries varies tremendously, and is in fact geographically constrained in all but 14 out of 39 jurisdictions that provide them on a nationwide scale[70] (see *Table 4* below). In practice, VOM comes to be used in the context of resolving minor forms of criminality through diversion – only rarely are no legal limitations on eligible offences or offenders in place, and is predominantly used more in cases of young offenders, though provision for adults appears to be on the increase.

Table 4: Availability of providers of Victim Offender Mediation Services according to degree of geographic coverage

Country	Nationwide availability of VOM services	Regional availability of VOM services
Austria	X	
Belgium	X	
Bosnia and Herzegovina		X
Bulgaria		X
Croatia		X

[70] As it is demanded by Art. 3 of the Rec. (99) 19 on Mediation in Penal Matters: «Mediation in penal matters should be a generally available service».

Country	Nationwide availability of VOM services	Regional availability of VOM services
Cyprus		X
Czech Republic	X	
Denmark	X	
England and Wales		X
Estonia		X
Finland	X	
France		X
Germany	X	
Greece		X
Hungary	X	
Ireland		X
Italy		X
Latvia	X	
Lithuania		X
Luxembourg	X	
Macedonia	X	
Malta		X
Montenegro		X
The Netherlands	X	
Northern Ireland		X
Norway	X	
Poland	X	
Portugal		X
Romania		X
Russia		X
Scotland		X
Serbia		X
Slovakia		X
Slovenia		X
Spain		X
Sweden	X	
Switzerland		X
Turkey		X
Ukraine		X

4.3. Restorative conferencing

The model sought to develop a more culturally sensitive approach to offending, through placing particular emphasis upon the desirability of

> including victims, offenders and communities in rectifying harm caused by criminal behaviour[71].

In the following decades, this model served as a template for conferencing initiatives in Australia, the USA and Canada. As we shall see, so far it has gained entry to European criminal justice contexts to a lesser extent.

Just as is the case with the overall concept of RJ, finding a definition of conferencing that everyone agrees on is a difficult task. «[It is] indeed a very malleable mechanism and there are […] as many types of conferencing as there are crimes or cultures»[72]. Rather, it is to be regarded as a process for resolving (criminal) conflicts that reflects certain values and ideals that recur in the vast majority of definitions and schemes in Europe and indeed all over the world. *Zinsstag/Teunkens/Pali* provide the following description of conferencing:

> Painting with a broad brush, conferencing consists of a meeting, taking place after a referral due to an (criminal) offence. The condition […] for it to happen is that the offender admits (or does not deny) guilt and takes responsibility for the crime. The meeting will be primarily between the offender, the victim (but it should never be an obligation for him/her), their supporters and a facilitator. Subsequently a number of other individuals may also take part, depending on the scheme or crime, such as a representative of the police, a social worker, a community worker, a lawyer etc. After a period of preparation, the assembly will sit together and discuss the crime and its consequences. They will try to find a just and acceptable outcome for all, with an agreement including a number of tasks to achieve for the offender in order to repair the harm committed to the victim, the community and society in general[73].

Maxwell/Morris/Hayes[74] state that conferencing

> emphasizes addressing the offending and its consequences in meaningful ways, reconciling victims, offenders, and their communities through reaching agreements about how best to deal with the offending, and try-

[71] DOAK/O'MAHONY 2011, 1,736.

[72] ZINSSTAG/TEUNKENS/PALI 2011, 18; see also ZINSSTAG/VANFRAECHEM 2012.

[73] ZINSSTAG/TEUNKENS/PALI 2011, 18.

[74] MAXWELL/MORRIS/HAYES 2008, 92.

> ing to reintegrate or reconnect both victims and offenders at the local community level through healing the harm and hurt caused by the offending and through taking steps to prevent its recurrence.

Thus, while mirroring key values of VOM, conferencing differs from VOM insofar as there is a much stronger focus on the community element of the conflict involved[75], not least represented by the great number of participants involved in the process[76].

In *Ireland*, conferencing is available in the juvenile justice systems at two stages. Firstly, since 2001, in the context of an elaborate police diversion scheme, young offenders aged under 18 can be referred to a restorative conference in the context of a "formal warning". It should be noted that there are no formal legal restrictions to the types of offences that are eligible for such diversionary restorative conferences. They have in fact in the past been conducted for cases of robbery, sexual assault, arson and serious assaults. Instead, it is for the police to decide which cases are appropriate for diversion *per se*, and in turn which diversionary route they should take. Such decisions shall naturally take the public interest in prosecution into consideration. Where the offender assumes responsibility for the offence and voluntarily consents to participate in a conference, said conference is convened at the local police station, facilitated by a specially trained police officer. Parents, guardians, friends, supporters, social workers and representatives from local authority agencies (education, health for instance) are eligible conference participants, as are the victim and his/her family and supporters where the victim consents. Following exchange and discussion, the aim is for all participants to actively participate in the drafting of a conference plan. Where such a plan is agreed, the police drop the charge. Conference plans cannot be enforced. At the court-level, since the Children Act 2001, where a juvenile has not been diverted from prosecution, but a court considers that a conference may be appropriate, the Children Court may direct the Probation and Welfare Service to convene a family conference. As is the case with conferences at the police level, there are no restrictions on offences that are eligible for confer-

[75] O'MAHONY 2008.

[76] VAN NESS/STRONG 2010, 29; see also ZINSSTAG/VANFRAECHEM 2012.

encing, and the key requirement is that the offender accepts responsibility for the offence, i.e. there is agreement on the facts of the case. The circle of participants is the same as in the case of conferences at the police level, as is the outcome to which the process aspires (a conference plan). Court-ordered conferences differ from diversionary conferences though in that they are facilitated by specially trained probation workers rather than police officers. Furthermore, conference plans are subject to approval by the court, and non-compliance results in the re-initiation of court proceedings. Compliance with the plan results in dismissing the charge.

In *Northern Ireland*, a model of statutory youth conferences was introduced in 2002 following major criminal justice reform in the wake of the Good Friday Agreement of 1998 that sought to raise confidence and trust in the justice system following decades of sectarian and political violence[77]. There, prosecutors can refer cases to the Youth Conference Service for a "diversionary youth conference" if the young person admits guilt and thus assumes responsibility for the offence and voluntarily consents to participate in the conferencing process. As light forms of criminality are targeted by the police diversion system, such diversionary conferences at the level of the prosecutor are intended for offences of a more increased severity and/or for offenders who have previously come into contact with the criminal justice system. At the court level, youth courts are statutorily obliged to refer young offenders who admit guilt and voluntarily consent to participate in the conferencing process to the Youth Conference Service for a so called "court-ordered youth conference." In terms of offence severity, the only restrictions that apply are that offences carrying a mandatory life sentence when committed by adults, "grave crimes" (such that carry a maximum penalty of 14 year's imprisonment or more when committed by an adult) and certain terrorist crimes are not automatically referred to conferencing. Overall, this allows for a rather wide range of offence severity to be referred to conferencing, one that is significantly wider than is provided for by the

[77] For an overview of the developments in the juvenile justice system in *Northern Ireland*, see O'MAHONY 2011; CHAPMAN 2012; 2017, 76 ff.; ZINSSTAG/CHAPMAN 2012; see for the implementing process of RJ also DIGNAN/LOWEY 2000; O'MAHONY/CHAPMAN/DOAK 2002; O'MAHONY/DOAK 2004.

principle of opportunity at the prosecutor's level in most countries that offer VOM.

In *England and Wales*, an approach has been adopted that at first glance appears to closely resembling the court-ordered conferences of *Northern Ireland*. In the context of so-called "Referral Orders" (introduced by the Youth Justice and Criminal Evidence Act 1999) youth courts are obliged to refer all young offenders who are convicted for the first time and who plead guilty to the offence(s) in question to a so called Youth Offender Panel. The panel, consisting of community volunteers, the offender, his/her family members and the victim (where the latter agrees), reflect on the offence and draft a Young Offender Contract in which it is stipulated how the offence should be responded to. Among other elements, these contracts entail the making of reparation to the victim (where the victim consents) or to the community, but also statutory supervision and other obligations and prohibitions. Failing to comply with the referral order is a punishable statutory offence. What makes the Referral Order problematic and thus compromises its truly restorative value is that victim participation appears to be a secondary consideration, with actual victims only attending in 13% of cases, and with reparation being made to the actual victim only in 8% of cases. Rather, *Jonathan Doak* points out in the *English* report that the Referral Order can be regarded as an example for a noticeable trend in parts of Europe, in that the label "Restorative Justice" is applied to measures and processes that in fact can only be marginally regarded as such, because the term sounds progressive and has come to be regarded as a "selling point" for new forms of intervention.

In *Belgium*, conferences can be recommended at the court level, albeit also limited to juveniles. Similar to *Northern Ireland*, in *Belgium* conferencing – besides mediation – is "considered to be the primary response to youth crime"[78]. What stands out in *Belgium* though is that courts are obliged to offer conferences in all cases in which a victim has been identified regardless of offence severity. Likewise, successfully fulfilling any agreements stemming from the conference need not au-

[78] See the report on *Belgium* by AERTSEN in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015.

tomatically result in the case being closed or there being no further form of intervention that seeks to reflect public interest in how crimes are responded to. The focus is thus on providing the parties to the offence an opportunity to determine through voluntary participation and active involvement in the process how they feel their conflict should be resolved. If this outcome suffices to satisfy the public interest in how the offence is responded to, there need not be any further action on behalf of the state.

In the *Netherlands* "Own Strength" conferences are available nationwide, having first been initiated as a pilot project in the mid-90s. They are employed for the purpose of repairing harm, reintegrating offenders and reducing the likelihood of reoffending. There are no fixed limitations in terms of eligibility: in principal, anyone involved in a conflict can sign up for a conference, regardless of offence or age. The only true precondition is that both victim and perpetrator are willing to participate voluntarily. The circle of participants includes representatives of the social contexts of both victim and offender (i.e. friends, family members, teachers, social workers). The aim of the conference is that the participants actively and mutually agree on a conference plan or action plan, the fulfilment of which is monitored by the Own Strength Centre. What stands out about the approach used in the *Netherlands* is that, as is already the case with VOM, Own Strength Conferences, too, exist completely independently of the criminal law – conference outcomes usually have no bearing on the penal process, unless victim and offender mutually agree to forward the outcome of the conference to the judge, who then in turn has to decide on whether or not he/she takes that outcome into consideration at all. No promises about consequences for the penal process are made in order to secure the voluntariness and own initiative of the perpetrator. In this regard, the strategy followed in the *Netherlands* could be regarded as being a victim-oriented.

Moving from nationwide to local coverage, a number of pilot initiatives can be observed. In *Germany*, a pilot study initiated in 2006 in *Elmshorn* sought to provide a restorative practice at the court level that is applicable to more serious forms of offending by juveniles and young

adults, like assault, robbery, blackmail and burglary[79]. The circle of participants is wider than in mediation – beside juvenile and young adult offenders, victims and community members as well as police officers are invited to participate. After charges have been filed, juvenile judges refer cases to conferencing that they consider appropriate, so long as the prosecutor agrees. In the course of the conference, victim and offender seek to find a mutual solution to the offence that is subjected discussion among all participants. If all participants agree, a written conference agreement is formulated and signed by all. This agreement is then forwarded to the judge and the prosecutor. They will be informed about the fulfilment of the agreement by the mediators. Where the agreement is fulfilled, either the case may be dropped or the court can consider it in sentencing as a mitigating circumstance[80]. The conferencing model is based on the *New Zealand* model of Family Group Conferencing and the *Belgian* Conferencing model Hergo (*Herstelgericht Groepsoverleg*). The aim of conferencing in this model is to strengthen community relationships and to contribute to crime prevention.

A number of other pilots and local initiatives are still ongoing, and have in fact only been in place for a short period of time. In *Austria*, for instance, a two-year pilot has been underway since Spring of 2012 that seeks to provide different forms of conferencing for juvenile offenders and their victims: "reparation conferences" involving both victims and offenders; conferences without direct victim involvement but with other family and community representatives that seek to help juveniles in socially problematic situations; and conferences that seek to foster the reintegration of offenders following release from prison. The project is being carried out by the Institute for Criminal Law and Criminology at the University of Vienna and is evidence-based in that it is accompanied by continuous evaluation. In the report on *Poland*, too, mention is made of experimental conferencing schemes having been implemented in Warsaw. Here, too, first outcomes, experiences and evaluations have yet to be published, so it remains to be seen how they function in prac-

[79] See HAGEMANN 2009, 236 ff.

[80] See HAGEMANN 2009, 238 ff.; BLASER ET AL. 2008, 27 ff.

tice, and whether or not they may be expanded to a greater degree of geographical coverage in the (near) future.

The reports from *Hungary* and the *Netherlands* indicated that pilot projects have been introduced that seek to incorporate conferencing into the context of prisons and/or youth detention centres. In the *Netherlands*, conferencing was introduced in a juvenile detention centre for girls aged 12-24 years with severe conduct problems in 2002. In the course of the conferences, victim and offender along with supporters meet in person to have a restorative discourse. The focus is on this process itself, rather than on achieving an action plan or a particular outcome that is to be delivered.

In the *Ukraine* as a Non-EU-Member state, conferences have been introduced on an experimental basis in juvenile correctional facilities in *Lviv*. The main purpose of these circles was to familiarise juveniles with restorative approaches, to foster victim awareness and empathy, and support them in and facilitate their return to their families and communities. Victim participation is not foreseen in this model, but nonetheless the focus of the project and the outcomes it aspires to can be regarded as restorative practices.

In summary, according to the national reports at hand, forms of conferencing are a particularly rare breed in Europe, being stated in only 13 of the 39 national reports submitted in the two studies (see *Table 5*). This can to a certain degree be attributed to the fact that European international standards predominantly focus on mediation. In addition, compared to mediation, conferences are far more complex processes that can last for several sessions, as they (depending on the implementation of the scheme in question) seek to involve a significantly larger number of participants in the process. This makes the development of protocols and the effort involved in preparing conferences by far more time consuming (for all involved), and thus potentially more expensive than mediation. In turn, this may make it difficult to justify applying conferencing in minor cases.

Table 5: Countries providing forms of conferencing according to geographical availability

Country	Nationwide availability	Regional availability
Austria		X
Belgium	X	
England and Wales	(x)	
Germany		x
Hungary		x
Ireland	X	
Latvia		x
The Netherlands	X	
Northern Ireland	X	
Norway		x
Poland		x
Scotland		x
Ukraine		x

In fact, interestingly, the case studies presented above leave the general impression that conferencing is sought to be used in cases of more serious offending, and is thus, when it is provided for, frequently available as an option at the court level. Several countries reported that conferences were held for serious offences like robbery, sexual assault or burglary. Another clear commonality is the fact that, in practice, conferencing is predominantly used in the field of juvenile justice – only the *Netherlands* stated that conferencing was open to all age groups, and the *German* pilot in *Elmshorn* also included young adult offenders aged 18 to under 21[81]. This focus on young offenders is not least due to the perception that young people are more likely to carry a positive reintegrative influence from the process due to their continuing mental and social development, and the number of agents that (can) have a positive influence on them. In closing, research and experiences with conferencing from these countries and also overseas indicate that it is indeed a viable means for resolving criminal cases, as is underlined by

[81] In Germany the scope of juvenile justice in general includes young adults, see DÜNKEL in DÜNKEL/GRZYWA/HORSFIELD/PRUIN 2011, 587 ff.; see for European developments in this regard PRUIN/DÜNKEL 2015; DÜNKEL 2015a.

high rates of participant satisfaction and promising rates of recidivism[82].

4.4. Peace-making circles

One form of restorative practice that is even more seldom in Europe are so-called "peace-making circles"[83]. A peace-making circle is an alternative, inclusive and non-hierarchical approach to conflict resolution that has its origins in ancient tribal conflict resolution rituals[84]. *Canada* can be seen as the birthplace of peace-making circles, where First-Nation groups have used them for a long time as a means of resolving conflicts[85].

Compared to other restorative practices, peace-making circles aim to address even broader levels of harm by involving a larger spectrum of people affected by the crime committed[86].

> The most important difference between the circle, the conferencing and mediation model is that in addition to communities of care, members of the wider community and state officials (police, prosecutors, probation officers etc.) are also present[87].

This serves to delineate circles from victim offender mediation, in which mediated discourse and exchange only occurs between the direct parties to the offence. Furthermore, a major difference between circles and conferencing lies in their differing foci. Conferencing tends to be implemented in a fashion that places particular emphasis on the family context. Peace-making circles by contrast seek to strongly and widely involving the community by actively involving representatives from various facets of social life in the circle meetings.

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[82] See *Section 7* below.

[83] See for instance LILLES 2001; RIEGER 2001; PRANIS/STUART/WEDGE 2003; STUART/PRANIS 2008.

[84] See GAVRIELIDES 2007, 34.

[85] See STUART/PRANIS 2008, 121; DHONDT ET AL. 2013; TÖRZS 2013.

[86] FELLEGI/SZEGŐ 2013, 9.

[87] TÖRZS 2013, 30 f.

"Modern" peace-making circles involve multiple procedural steps or phases, usually divided into "case selection", "healing circles", "sentencing circles" and "follow-up circles"[88]. Usually, case selection occurs through cooperation between local justice agencies and community justice committees or panels. Once a case has been deemed appropriate for a circle, the next stage is the "healing circle", at which the facts of what has happened are discussed, and all participants share their views and feelings.

> If the discussion in the healing circle proves to be constructive, helpful and sincere, then a sentencing circle is formed for the discussion on the elements of a sentencing plan. After all parties have agreed a sentence, follow-up circles, in various intervals, are formed to monitor the progress of the offender[89].

Circles can tie in to the criminal process at virtually any stage, be it the pre-trial level or the court level.

In September 2011, under the leadership of the University of Tübingen, Germany, began an EU-funded action research project titled "How can Peacemaking Circles be implemented in countries governed by the 'principle of legality'"[90]? The two-year project, running from September 2011 to August 2013, sought to introduce local circle pilots in multiple regions in *Germany*, *Belgium*[91] and *Hungary*[92].

> The project aimed at experimenting with [peace-making circles] in these three European countries, which have similar legal roots. Furthermore, the objective was to explore whether this method can be implemented into the European legal systems, and if so, how[93].

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[88] See GAVRIELIDE*s* 2007, 34 f.; see also FELLEGI/SZEGŐ 2013.

[89] GAVRIELIDES 2007, 35.

[90] For information on the project, see DHONDT ET AL. 2013; FELLEGI/SZEGÖ 2013; see also the Foresee website, at http://www.foresee.hu/en/segedoldalak/news/592/bf41d09c06/5/.

[91] The responsible partner institution in *Belgium* is KU Leuven.

[92] The *Hungarian* project partner is Foresee Research Group/National Institute of Criminology.

[93] FELLEGI/SZEGŐ 2013, 10.

In each country, the partner institutions entered into cooperation with local mediation service providers and established local collaborations in order to hold peace-making circles in criminal cases, and to simultaneously and retrospectively investigate whether and how such practices can be implemented in countries that are governed by the principle of legality and the rule of law[94].

Research results have been published[95]. The circles in *Belgium* and *Hungary* addressed both juvenile and adult offenders, while the *German* project involved only juveniles and young adults in the peacemaking circles. This is because in Germany, the local mediation provider was specialized in youth matters. A "Handbook for Facilitating Peacemaking Circles" has already been published based on the findings from the project[96]. Furthermore, a follow-up study was planned, in which the circles shall be evaluated in terms of participant perceptions and attitudes among other issues.

4.5. Community Service

There is widespread provision in the juvenile and criminal justice systems of Europe for forms of community service, which is available everywhere in Europe in some form. In the context of the general criminal justice process, community service is used: 1) as a substitute sanction for adults or juveniles for cases of a specific severity in terms of the term of imprisonment defined by law (*Belgium*, *Bosnia and Herzegovina*, *Croatia*, *Denmark*, *Estonia*, *Finland*, *France*, *Macedonia*, *Norway*, *Portugal*, *Romania*, *Slovakia*, *Slovenia*, *Switzerland*); 2) as an alternative sanction introduced as a stand-alone option with the aim of curbing custody or otherwise providing more "rehabilitative" responses to crime, particularly by young people (*England and Wales*, the *Czech Republic*, *Latvia*, *Lithuania*, *Macedonia*, *Scotland*, *Switzerland*, *North-*

[94] DHONDT ET AL. 2013.

[95] See WEITEKAMP 2015; the final research report is available at http://euforumrj.org/assets/upload/PMC_EU_2_Research_Report_Final_Version_RevVer-HJK.pdf and www.ifk.jura-uni-tuebingen.de.

[96] FELLEGI/SZEGÖ 2013.

ern Ireland)[97]; and/or 3) as an educational/alternative measure in juvenile justice as a condition for diversion from prosecution or court punishment (*Austria*, *Belgium*, *Denmark*, *Finland*, *Germany*, *Latvia*, *Macedonia*, *Montenegro*, the *Netherlands*, *Norway*, *Serbia*, *Slovakia*, *Slovenia*, *Spain*, *Sweden*).

In some countries, it is the primary form of intervention used for responding to the delinquency of juvenile offenders. For instance, in *Germany* in 2012, 40.9% of all court sanctions and measures handed down against 14 to 17-year-old juveniles and 18 to 20-year-old young adults were community service. In *Latvia*, in 2011 29% of all court sanctions were to community service. In *Switzerland*, 46.5% of all juvenile cases dealt with by prosecutors or courts ended in community service being ordered in 2010.

There is debate about whether or not there is a definition of RJ that can accommodate this practice. This debate was reflected in the course of the study, as it became clear that for a significant share of authors, community service did not fall within the definition of what they would term "restorative", and thus did not warrant mention or further elaboration in their report (for instance *Austria*, *Belgium*, *England and Wales*, *Denmark*, *Ireland*, *Northern Ireland*, *Finland* and *Sweden*).

The definition of "restorative outcomes" contained in Article 3 of ECOSOC Resolution 2002/12 on Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, states that community service could be the result of an agreement stemming from a restorative process. In practice, though, there are not many reports in which it was clearly or explicitly stated that community service is envisaged as an element of such agreements (only *Belgium*, *Bosnia and Herzegovina*, *Northern Ireland*, *Slovenia* and *Portugal* explicitly stated this). In *Spain*, *Latvia*, *Poland* and certain Cantons of *Switzerland*, community service can imply that the offender works for or to the benefit of the

[97] In *Cyprus* and *Malta*, it is provided as a condition of a probation order. In *Luxembourg*, under the Youth Protection Act principally only safeguarding, educational and protective measures can be applied to juveniles, and no penalties. The Youth Tribunal can, instead of applying reprimand, supervision or placement, decide that the juvenile remains at home and may impose the condition that the juvenile carries out philanthropic or educational work (Art. 1).

victim, which could fall within an outcome-oriented definition of RJ so long as the offender and victim voluntarily consent to it. In *Germany* and *Belgium*, destitute offenders who perform community service can be "remunerated" for their work via a special fund so that they are able to make financial reparation to their victims. In *Belgium*, the fund is sponsored by private donors on the one hand, and by province governments on the other. This way, the community is involved, not only by making means available to the offenders and the victims and by creating opportunities for voluntary work, but also by the operation of a committee that handles the requests for intervention by the compensation fund.

If we look at the kinds of work being performed in the context of community service, several countries state that it is done to the benefit of welfare or humanitarian institutions, charities or persons in need (for instance in *Belgium*, the *Czech Republic*, *Germany* or *Slovakia*). Such work is by all means meaningful, aims to reintegrate offenders and fosters a sense of responsibility towards the community, and can be regarded as a form of "community involvement" and delivery of reparation to the society at large. In a very widely drawn "outcome" oriented scope, such practices could be regarded as fulfilling restorative elements.

However, since such particular forms of work are not guaranteed in practice, and since it is frequently employed as a "voluntary" alternative to imprisonment or prosecution, the true degree of "voluntariness" – an essential characteristic of restorative thinking – can be questioned, as can its restorative value in general. «Therefore, in the Danish context there are zero grounds for even remotely considering [it] to be restorative in nature»[98]. *András Csúri* (*Hungary*) stated that in practice community service is defined as an involuntary punitive measure. In *Norway*, community service is called "community punishment", similar to the *Community Punishment Order* that had been available in *England and Wales* for juvenile offenders aged 16 or 17 up until its replacement in 2008 by the *Youth Rehabilitation Order*. The *Youth Rehabilitation*

[98] See the Danish report by STORGAARD in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 200.

Order is an example for menu-based sentencing, in which sentencers can select different requirements to be attached to the order. These requirements are distinguished into punitive, reparative, supervision and rehabilitative elements, and community service falls within the first category. The authors of the *Lithuanian* report stated that while community service

> usually entails the cleaning of public green spaces, little is done for the victim and no restorative process is involved. While the work can be regarded as a service to the damaged community, overall community service in Lithuania can only sparingly be regarded as a form of restorative practice[99].

In essence, it needs to be borne in mind that, at least according to some commentators, like *Martin Wright* in 1991,

> the central tenet of CS had originally lain in restorative thinking, with punitive elements of community service orders […] [attending] its imposition […] only as by-products of the offender's commitment of time and effort[100].

The restorative elements of this measure can be seen in the delivery of reparation to the community in which the offence occurred. This is a very abstract approach. If one applies a narrower lens, and conditions the restorative nature of an intervention on active participation and involvement of the direct parties to a criminal offence and the concept of "healing", then the number of countries in which community service can be regarded as restorative sinks to close to zero. The reintegrative effects that working for humanitarian or welfare institutions, people in need or charities can have, especially on young offenders, linked with the fact that the community receives reparation in return, nonetheless allows community service to be classified as a measure with great reparative and restorative potential, so long as it is implemented in the right ways for the right reasons.

[99] See the report on *Lithuania* by BIKELIS/SAKALAUSKAS in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 487.

[100] See WRIGHT 1991, 44.

4.6. Restorative Justice in prisons

Article 4 of *Council of Europe* Recommendation Rec (99) 19 concerning Mediation in Penal Matters states that «mediation in penal matters should be available at all stages of the criminal justice process»[101]. Basic Principle 12 of Council of Europe Recommendation Rec (2008) 11 makes a similar recommendation for juveniles and expands the scope to cover other forms of restorative practice. As serving sentence is by all means to be regarded as a stage of the criminal procedure, there is evidence that these recommendations are not being appropriately met in practice.

As mentioned above (see *Section 4.1*), only in 18 out of the 39 jurisdictions reference is made to RJ in the context of imprisonment (*Belgium*, *Bulgaria*, *Denmark*, *England and Wales*, *Finland*, *Germany*, *Hungary*, *Italy*, *Latvia*, the *Netherlands*, *Norway*, *Poland*, *Portugal*, *Scotland*, *Switzerland*, *Russia*, *Spain*, *Ukraine*). The majority of countries in which RJ finds application in this context provide only localized pilot projects in individual institutions (*England and Wales*, *Germany*, *Bulgaria*, *France*, *Hungary*, *Latvia*, *Italy*, the *Netherlands*, *Norway*, *Poland*, *Scotland*, *Switzerland*, *Ukraine*). In many of these countries, little to no information has yet been published, as many projects are still in their infancy or were not accompanied by continuous evaluation.

This is somewhat disappointing, given that restorative practices can bear great potential for fostering responsibility and offender reintegration, putting victims at ease, and for defusing the otherwise harsh realities of prison life to make it more closely resemble life in freedom. Prisons and youth detention centres bear great potential for restorative practices, as they are in fact places characterized or even defined by conflict.

On the one hand, conflict is the defining characteristic of the prison population, in that all persons residing there have been in conflict with the state and its laws. Likewise, the conflict defines the role distribution between offenders and prison staff. From a practical perspective, since the big picture in Europe is that the use of restorative practices is pre-

[101] COUNCIL OF EUROPE 1999.

dominantly limited to the sphere of diversion from court or punishment in most countries, offenders serving prison sentences and the persons they have harmed are unlikely to have had the opportunity to participate in a restorative process. This suggests that, while the conflict between offenders and the state has been resolved, the conflict between victim and imprisoned offender will frequently not have been.

Restorative practices like conferencing or VOM can serve as promising elements of sentence planning, release preparation and/or even as grounds justifying early release[102]. Victims can receive closure and peace of mind at the offender's upcoming release, and offenders can receive the opportunity to participate in measures that are promising means for their reintegration and future prospects, and for enhancing their accountability. Group conferences held prior to release, that involve family members, the victim, supporters, but also representatives of local authorities and social agencies (employment, education, housing, health) can strengthen the offender's release context and help generate important social ties and roles that promote the likelihood of successful reintegration.

Council of Europe Recommendation Rec. (2008) 11 states in Rule 79 that

> regime activities shall aim at education, personal and social development, vocational training, rehabilitation and preparation for release. These may include: […] programmes of restorative justice and making reparation for the offence.

The overall notion of this rule is essentially the need to incorporate a stronger victim-orientation into correctional settings and sentence planning[103]. However, in practice, approaches to putting these words into action are greatly lacking[104]. In *Poland*, *Portugal* and *Croatia*, legislative provision is indeed made for RJ to gain entry to penal institutions, but the provisions appear to be defunct in practice. In *Switzerland*, repa-

[102] For an insightful overview, see VAN NESS 2007; for a summary on Restorative Justice in prisons see JOHNSTONE 2014; see also BARABÁS/FELLEGI/WINDT 2010.

[103] For some German insights, see for instance RÖSSNER/WULF 1984, p103 ff.; WALTHER 2002; GELBER 2012; GELBER/WALTHER 2013.

[104] HARTMANN ET AL. 2012.

ration is a mandatory element of sentence planning for adult offenders; however, no further provision is made in terms of how this should be achieved.

There are of course also positive examples. In *Portugal*, a legal reform in 2009 enshrined in statute that prisoners can participate, when they freely consent, in restorative justice programmes, in particular via mediation sessions with victims. The law goes on to state that prison administrators are free to enter into cooperation and partnerships with NGOs, universities and research institutes in order to develop programmes that aim to enhance empathy for victims and raise awareness to their needs. However, there is a lack of a commitment to restorative practices in the prison context despite the excellent statutory circumstances. According to the authors of the report on *Portugal*, this appears to be due above all to a lack of initiative on behalf of the prison administrators.

In *Belgium*[105], for example, in 2001 a pilot project for mediation between prisoners and their victims was initiated. It allowed for 'mediation for redress'[106] services to be offered on request of the inmate, the victim or the victim's family. The programme focused on serious crimes, including cases of rape, armed robbery and murder. In 2005, the legislative basis for mediation for redress was reformed, making mediation available in all prisons of the country. Overall, the statutory basis in *Belgium* states clear penological objectives: the underlying idea is that the execution of the prison sentence must support the rehabilitation of the offender but also the restoration towards the victim.

In *Germany*[107], some Penitentiary Codes of the *Länder* (the German federal states) make provision for victim-oriented, reparative and reflective measures to play a more prominent role in individual sentence and regime planning. For instance, § 2 Subpara. 5 in Book 3 of the Code on the Execution of Prison Sentences of the Federal State of Baden-Württemberg states that, in order to rehabilitate and successfully reintegrate the offender, steps shall be taken to foster understanding of

[105] See also AERTSEN 2005; GELBER 2012.

[106] For what "mediation for redress" implies, see the report on *Belgium* by AERTSEN in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 50 ff.

[107] See HAGEMANN 2003.

the harm that the offence has caused to the victim and to provide measures via which reparation can be made or reconciliation can be achieved. The Code on the Execution of Prison Sentences of the Federal State of Brandenburg makes similar provision in its § 3 Subpara. 1. § 8 Subpara. 1 of the Code on the Execution of Prison Sentences of the Federal State of Thuringia, in defining fundamental principles for the execution of adult and juvenile prison sentences, states that the execution of prison sentences shall be designed in a fashion that offenders come to face and actively address their offending behaviour and its harmful consequences. More recently, an EU-funded international research project has been initiated by the "Schleswig-Holstein Association for Social Responsibility in Criminal Justice, Victim and Offender Treatment"[108]. The project is titled "restorative justice at post-sentencing level supporting and protecting victims" and has run from 1 January 2013 to 31 December 2014. The aim of this action research is to find effective, context-specific ways to improve the standing and rights of victims by providing a strong victim orientation to restorative practices in prison. «Action research methodology enables a creative search for the best possible implementation of RJ methods at prison settings for diversity of cases and within different legal and institutional frameworks»[109].

Furthermore,

> action planning will reveal which RJ method is most suitable for the setting of individual institutions and partner countries. These can include pilot projects of victim offender mediation, conferencing, victim empathy training, victim groups, guided visits for victims in prison, victim offender dialog and other methods or a combination of these. These will be qualitative evaluated through observation and guided interviews with victims, aiming at further in-depth knowledge on their needs and expectations.

Results are not yet published.

In the federal state of Baden-Württemberg a pilot project of victim-offender mediation with prisoners in four prisons has started in 2013.

[108] See the project website at: http://www.rjustice.eu/en/about2.html.

[109] See the project website at: http://www.rjustice.eu/en/about2.html.

The evaluation of *Kilchling* (2017) after one revealed that a small group of offenders could be motivated to get into contact with the victim and that the interactions were seen as positive by both sides[110].

Particularly interesting experiences have been reported from *England and Wales*. There, the notion of "restorative prisons" was examined in a project run by *King's College London* from 2000-2004[111]. The focus of this project lay in services that prisoners can provide to the local community of which the prison is a part, for instance in the form of community work/service, in order to give something back to the community, to make reparation, in a positive and constructive manner. The notion of connecting correctional institutions to their local communities has been further developed in parts of the *United States* and to a certain degree in *England and Wales* with the "justice reinvestment model". This approach seeks to enable local communities that bear a certain responsibility for "their" prisons, to autonomously design and provide alternative sentencing programmes in order to save costs on imprisonment[112].

On the other hand, prisons are places with great potential for *internal* conflict, either among inmates or between inmates and prison staff. Restorative justice can serve to provide an alternative route for resolving disciplinary issues and even as a channel for prisoners' involvement and representation in internal decision-making processes on issues that affect the entire prison community, and can foster a prison climate that is based less on behaving correctly out of fear of reprisal and punishment, and more on a mutual understanding of community needs[113]. Developing such an understanding can in turn carry over into life in freedom upon release.

Rule 56.2 of the *European Prison Rules* states that «whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners». Rule Nr. 94.1 of

[110] The main problem was to get into contact with the victims, whose residence was often unknown (40 out of 91 cases). Only 11% of the victims explicitly refused to participate, see KILCHLING 2017, 49.

[111] STERN 2005.

[112] See ALLEN/STERN 2007; BROWN ET *al.* 2016.

[113] See JOHNSTONE 2007; EDGAR/NEWELL 2006.

Council of Europe Recommendation Rec. (2008) 11 goes on to state that

> disciplinary procedures shall be mechanisms of last resort. Restorative conflict resolution and educational interaction with the aim of norm validation shall be given priority over formal disciplinary hearings and punishments.

This approach is reflected in nearly all Codes on the Execution of Juvenile Prison Sentences of the German *Länder*, in that, in resolving disciplinary issues, an educational, restorative procedure is provided that should be prioritized over formal disciplinary measures and processes[114].

Again in *Belgium*, in 1998 the criminological institutes of the universities of Leuven and Liège initiated a pilot project in six prisons in order to develop a restorative justice approach to be applied during the administration of prison sentences[115]. The most important element of the project was the appointment of a full time "restorative justice advisor" in each prison, operating at the level of the prison management, whose task was to support the development of a culture, skills and programmes within the prison system which give room to the victims' needs and restorative solutions. Examples of actions were the training of prison officers and other staff and the development of specific programmes in prison in cooperation with external agencies such as victim support and mediation services. The approach was expanded to all prisons in 2000. However, in 2008 the Ministry of Justice for reasons unknown unexpectedly abolished the function of the restorative justice advisor.

In *Scotland*, restorative approaches have been used to assist in prisoner-to-prisoner problems, arguments and bullying in a prison for women offenders. Their value lies in their appropriateness for resolving inter-prisoner disputes without having to resort to ordinary disciplinary sanctions. Where a conflict of such type occurs, the parties can be referred to a facilitated meeting that seeks to identify the facts of what has

[114] See in detail FABER 2014; see also KÜHL 2012, 252 ff.

[115] ROBERT/PETERS 2003; AERTSEN 2005.

happened, the consequences in terms of harm and how to stop it happening again in the future. This practice aims at outcomes that go beyond mere apologies and thus implies the drafting of an action plan to this effect. Part of the motivation behind this approach also lies in seeking to better meet the needs of women prisoners identified as "aggressors" or "offenders" in such cases, as they themselves are often vulnerable and have a history of victimisation. Thus,

> a bullying strategy based on demeaning the bully, trying to identify them, or taking privileges away seems ineffective and potentially damaging to the self-esteem of women who are already vulnerable. Interventions need to start early in induction and be focused on how bullying makes people feel rather than what will be 'taken off you' if you engage in it[116].

It needs to be borne in mind that the development of restorative practices in prisons will need to take the obstacles into account that are intrinsic to the prison setting, namely a lack of trust and strict hierarchies, and the consequences restorative practices can have on these *vice versa*. Likewise, there is a need for caution in bringing RJ into the context of imprisonment, an institution with a focus on "inflicting pain" on those who experience it[117]. There is the danger that, by providing restorative justice and practices within penal institutions, one legitimizes imprisonment, making imprisonment more attractive for decision-makers. At the same time,

> a purist refusal to pursue restorative justice in prisons will result, it is suggested, in a restriction of restorative justice to less serious crimes where it would operate as an alternative, not to imprisonment, but to some other non-custodial sanction[118].

Restorative approaches are not an end in itself and need to be seen as part of a whole systems approach or support programme for individual prisoners. Nonetheless, serious thought should be put towards re-

[116] BROOKES 2006.

[117] EDGAR/NEWELL 2006, 22 f.

[118] JOHNSTONE 2007, 17.

forming prison legislation in a fashion that requires the serving of sentence to be planned in a fashion that places the interests of victims, making amends and inclusionary conflict resolution practices more in the foreground[119].

4.7. Summary

In summary, when looking at the landscape of RJ and mediation in penal matters today, what becomes clear on first sight is that manifestations of restorative thinking can be found all over Europe. The most common form of restorative practice from an "encounter"-based perspective is VOM. However, it has been implemented in a plethora of different ways to significantly varying degrees of geographical coverage and thus availability[120]. While 38 of 39 countries covered in both studies made reference to the existence of VOM services in their countries at all (*Cyprus* being the exception), only *Austria*, *Belgium*, the *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Hungary*, *Latvia*, *Malta*, the *Netherlands* and *Poland* provide nationwide service coverage, as does *Norway* (non-EU). In other countries, for instance the non-EU countries *Switzerland* and *Bosnia and Herzegovina*, availability and provisions are different in the different entities that constitute the Federal State. In the vast majority of the remaining jurisdictions, VOM services gain access to the criminal procedure via local and regional partnerships between local service providers (be they government agencies, NGOs or research-teams involved in local projects), and local criminal justice authorities that latch onto the procedure at key stages of decision-making, most prominently in the context of diversion. According-

[119] An interesting approach could be the re-entry circles as they have been developed in Hawaii, the so-called Hawai'i Huikahi circles, which enshrine restorative justice values in the re-entry planning and a three years after-care support. The effects are described as positive with a recidivism rate of 43% versus 58% of the control group (offenders who had applied for such circles, but finally could not participate), see WALKER/DAVIDSON 2019, 272 ff.

[120] This is a confirmation of findings from previous research into VOM in Europe, see for instance PELIKAN/TRENCZEK 2008; MIERS/WILLEMSENS 2004; MESTITZ/GHETTI 2005; AERTSEN ET AL. 2004.

ly, VOM is regarded as an appropriate practice in cases of less severe offending in most of Europe.

In some countries, the "void" of RJ beyond the pre-court level is filled with conferencing initiatives that are applicable to offences of a greater (or sometimes undefined) severity. However, in contrast to VOM, forms of conferencing are more seldom. Only the reports from *Austria*, *Belgium*, *England and Wales*, *Germany*, *Hungary*, *Ireland*, *Latvia*, *Northern Ireland*, the *Netherlands*, *Norway*, *Poland*, *Scotland* and *Ukraine* referred to there having been experiences with conferencing at any level. Nationwide statutory programmes, though, are only provided for in *Belgium*, the *Netherlands*, *Ireland*, *Northern Ireland* and *England and Wales*. In the remaining jurisdictions, conferencing – like VOM – latches on to the criminal process at key points of diversionary decision-making.

Virtually all countries covered in the general Greifswald study (*Dünkel/ /Grzywa-Holten/Horsfield* 2015) and in the juvenile justice-oriented study in EU-member states (*Dünkel/Horsfield/Păroșanu* 2015) on which it is based make legislative provision for the making of reparation or putting right the harm caused by the offence to factor into administrative and judicial decision-making. This occurs most notably at the level of prosecutorial/pre-court diversion, but also (albeit less widespread) in the context of court diversion and sentence mitigation. In some jurisdictions, reference is made to "achieving reconciliation"; others refer to "making reparation" or "effective repentance" as grounds for non-prosecution, non-conviction or sentence mitigation. Thus, overall, "access-points" through which made or making reparation (via any means, including restorative practices like VOM and conferencing) can enter into the equation are widespread in Europe, thus providing a great deal of potential for the use of RJ to be expanded in practice as – to date – in most of Europe, provision of VOM and conferencing services is geographically constrained.

Community Service is available in the vast majority of countries in Europe, both within and outside the EU. However, only a select few examples can be regarded as actually having a restorative nature (in that Community Service is performed directly for the victim, a restorative process is involved in determining the kind of work, work is done for

welfare or charitable organisations, participation is truly voluntary, work is performed in a non-stigmatizing fashion etc.). At the same time, it needs to be borne in mind that Community Service was initially conceptualized as a restorative practice, and that making reparation to the community at large can indeed be implemented in a fashion that reflect restorative justice values. We return to the potentials of Community Service as a means for increasing the role of RJ in practice in *Section 8.2* below.

A new upcoming approach is to implement RJ-strategies in prisons either to resolve conflicts emerging inside the institution or to encourage offenders to make reparation or even to enter in mediation processes with their victims. A more therapeutic approach in this context is to increase empathy for victims as a rehabilitative measure in order to prevent further victimisation. This can be supported by meetings of victims (not necessarily the own victims) and offenders[121].

5. Organisational structures

As has become clear from the elaborations in the preceding subchapter, there is indeed a great degree of variation in terms of how restorative measures have been implemented in detail, for instance with regard to the procedures that are in place for referrals between the agencies and services involved, the providers of restorative services, the training and eligibility criteria for mediators/facilitators and the degree of geographical service coverage.

Looking at VOM, there appears to be little uniformity in Europe regarding the agency or body that is responsible for providing the service infrastructure. In *Belgium* this is done by NGOs, while in *Austria* (NEUSTART), the *Czech Republic*, *Latvia* and *Malta* for instance, this is a task of the probation services. Yet other countries have placed the responsibility for providing VOM in the hands of the social services, like in *Finland* and *Estonia*, or of private services like SiB in the *Neth-*

[121] An impressive film project on that issue was the 2015 released movie "Beyond Punishment", produced by *Hubertus Siegel*, see www.beyondpunishment.de.

erlands. Finally, some countries (most prominently *Germany*) apply a mixture thereof. VOM providers, which are specialized in youth matters, are established in a few countries, like in *Germany*, however, in most countries the responsible body or agency offers mediation both for adults and juveniles.

Furthermore, there are differences regarding the status of the mediators – they might be volunteers with training like in *Denmark* or *Finland*, professionals like in *Austria*, *Croatia*, the *Netherlands*, trained probation officers like in *Czech Republic*, *Hungary*, *Latvia* and *Slovakia* or a mix thereof. In *Belgium*, mediators are generally full or part time professionals and to a small extent volunteers who receive coaching by professional mediators.

Regarding the professional background of mediators, in most countries a background in the fields of education, social work, sociology, psychology or law can be found. There are noteworthy differences regarding the regulation of the qualification of mediators. While in some countries, a university degree for mediators is required, for instance in *Czech Republic*, *Romania*, *Slovenia*, *Slovakia*, in other countries there is no restricted access to the profession of the mediator, for instance in *Denmark*, *Finland* or *Germany*. In most countries, mediators receive initial training and further in depth training on mediation in order to perform their work. In *Austria*, in-depth and long-lasting training provides for high quality standards with respect to the mediator profession. Emphasis is put on interchange and learning from experience while being trained as a mediator. The training programme takes four years overall and is divided into basic training and a further training programme for becoming a certified mediator, both parts including theoretical and practical aspects.

In order to promote unitary practices and to ensure quality standards regarding the mediation procedure and the profession of the mediators, some countries like *Latvia* or *Romania* have established Mediation Councils. These associations are in charge with authorizing mediators and maintain a list of certified mediators. In *Poland*, VOM providers, either institutions delivering mediation services (principally NGOs) or individual mediators (so-called “trustworthy persons” with specific

qualifications) need to be listed in the register of the District Court in order to carry out mediation.

Moreover, the spread of availability of actual VOM services in those countries varies tremendously, and is in fact geographically constrained in all but a handful that provide them on a nationwide scale. As described in *Section 4.2* above, the number of countries in which all regions can provide VOM-services is small (*Austria*, *Belgium*, the *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Hungary*, *Latvia*, *Malta*, the *Netherlands*, *Norway* and *Poland*). In the remaining countries, have local or regional initiatives are in place, run by research teams, NGOs or state agencies in certain regions of the country, with significant variation in term of geographic coverage.

In terms of participants of VOM, there are differences with respect to the presence of a third party that may attend the mediation sessions. Regarding the role of parents or other legal representatives, in some countries it is regulated that the parents of the juvenile must participate in VOM like in *Slovenia*, while other stipulate that participation of parents or other legal representatives is optional like in *Finland*, *Germany* and *Poland*.

In contrast to VOM, conferences involve a larger number of participants from the victim's and the offender's side, but also from the community, such as police officers, social workers, teachers, and representatives from the education and health systems. This is an apparent point of consensus in European conferencing implementations, which is no surprise as involving more people is inherent to the conferencing model. The *English* referral order also involves community volunteers in the process. However, due to the reservations as to the "restorativeness" of this measure and in how far it resembles actual conferencing (see *Section 4.3* above), the referral order is not highlighted any further in this Section.

As already stated above in *Section 4.3*, what the conferencing approaches in Europe also all have in common is that they (also) seek to target cases of more serious offending. In *Belgium*, *Ireland* and the *Netherlands*, there no restrictions as to offence severity; in *Northern Ireland* only the most serious cases like murder, manslaughter and terrorist offences are not automatically eligible for a youth conference.

The *German* pilot project in Elmshorn also explicitly targets serious crimes.

Accordingly, conferencing is mostly applied at the court-level (insofar as conferencing is linked directly to and mandatorily has effects on the criminal procedure, see below). In *Ireland*, conferencing is available both in the context of police diversion and at the court-level. At the police level, if the offender assumes responsibility for the offence and voluntarily consents to participate in a conference, said conference is convened at the local police station, facilitated by a specially trained police officer. Following exchange and discussion, the aim is for all participants to actively participating in the drafting of a conference plan. Where such a plan is agreed, the police drop the charge. Court-ordered conferences differ from diversionary conferences though in that specially trained probation workers rather than police officers facilitate them.

The framework is similar in *Northern Ireland*, where there are also both diversionary and court-ordered youth conferences that are directly linked to the criminal process. However, there, conferences are mandatory at the court level except for the most serious offences, while this is not the case in *Ireland*. In *Belgium*, conferences and VOM must be offered in all cases in which a victim has been identified, regardless of the severity or nature of the crime. Unlike the situation in *Ireland* and *Northern Ireland*, where successful fulfilment of conference plans results in closure of the case in some way or another, the *Dutch* own strength conferences can be applied for completely independently from the criminal proceedings, and conference outcomes usually have no bearing on the penal process. The situation is similar in *Belgium*: fulfilling conference agreements does not automatically have effects on the criminal process in terms of diversion or sentence mitigation. If the outcome of conferencing satisfies the public interest in how the offence is responded to, there *need* not be any further action on behalf of the state, i.e. the outcome *can* be considered when making decisions as to the course of proceedings and sentencing.

Conferences may be conducted by specially trained independent coordinators (the *Netherlands*), employees of public services (*Belgium*, *Ireland*) like the probation service (*Ireland*), youth assistance services

or specially founded conferencing services (*Northern Ireland*) or by specially trained police officers (also *Ireland*). In *Northern Ireland*, facilitators who are employees of the special Youth Conferencing Service conduct all conferences (both diversionary and court-ordered). In *Ireland*, specially trained probation workers from the Probation and Welfare Service deliver court-ordered conferences. In the *Netherlands*, the so-called "real justice" or "own strength conferences" are provided by "Own Strength Centres", which are run by Eigen Kracht Centrale, a subsidized private organization. Facilitators are instructed coordinators who follow the "real justice script". In the majority of pilot projects stated in *Section 4.3* above, services are provided at the local level by NGOs (*Poland*, *Ukraine*) and research groups that include trained facilitators (*Germany*, *Hungary*), which is understandable given the fact that they are projects that are seeking to add conferencing to an already existing juvenile justice system that thus naturally provides no dedicated state-run infrastructures.

Overall, it can be said that implementation strategies are rather heterogeneous when one looks at the details. As shall also become clear in the further course of this paper, the same applies to the use of these measures in practice. It is not possible to precisely pinpoint whether it is "better" to use professionals or volunteers as facilitators/mediators, or whether to place responsibility for providing services in the hands of state agencies (like the probation service or child support services), NGOs or private organisations. Good experiences have been made and difficulties have been encountered with all of these approaches throughout Europe. As shall become clear in the later analysis, rather than attempting to superimpose a detailed one-size-fits-all strategy, it is vital that implementations of RJ take into account and are tailored to the context in which they are applied.

6. Restorative Justice in criminal justice practice

As already elaborated in *Section 2* above, in some countries restorative initiatives and/or legislation were introduced primarily as a means of providing alternative procedures and measures in the context of gen-

eral criminal justice and particularly juvenile justice reform. In others, strengthening the role of victims and reinforcing their rights was the primary driving force. Therefore, the theoretical, ideological role that RJ plays is largely defined by the driving factors behind its introduction, which in turn – despite clear signs of overlap throughout Europe – are dependent on the national context. Accordingly, as we have seen in *Section 3*, the forms of RJ that are available, the ways they have been implemented, how they are connected to the criminal procedure (if at all) and their effects on that process (if any) vary significantly throughout Europe. The same degree of variation can also be observed regarding the extent to which restorative justice initiatives or measures play a quantitative role in the context of criminal justice practice.

In the following subchapters, we investigate the available quantitative data and show the role that RJ plays in practice in numerical, quantitative terms (*Sections 6.1* and *6.2*) and how these figures have developed over time (*Section 6.3*). Prior to doing so, however, it is important to consider the problems that exist in measuring the use and role of restorative justice in practice (*Section 6.1*). Data refer not only to juveniles, but also to adults or in general, as specific data on juveniles are not always available and painting a wider, more complete picture of the use of RJ in practice is by all means sensible, since the use of RJ with adults in practice is an important contextual factor, as it is indicative of a general acceptance (or lack thereof) of the notion of RJ and what it can offer. Respective age differentiations are made throughout. We also refer to the nine European Non-EU-member states included in the research by *Dünkel/Grzywa-Holten/Horsfield* 2015, as some of the difficulties of "measuring" can be best exemplified in countries that have just recently begun reforming their (juvenile) justice systems and introducing restorative justice measures.

6.1. Problems with measuring the role of Restorative Justice in criminal justice practice

Measuring the role that restorative processes, practices and outcomes play in the context of criminal justice practice (in terms of case numbers, and the share they make up of all recorded responses to of-

fending) is not a straightforward task[122]. First and foremost, many authors in the study reported that, in their countries, the state of official statistical data sources is fragmented (*Switzerland*, *Germany*, *England and Wales*, *Ireland*, *Spain*) or entirely lacking (for instance *Bosnia and Herzegovina*, *Bulgaria*, *Denmark*, *Greece*, *Italy*, *Macedonia*, *Norway*, *Romania*, *Scotland* and *Turkey*). Where official statistical sources are available, the role of RJ can be reflected in such data sources only difficultly. Sometimes all that is registered in official justice statistics is the legal provision that is applied (forms of diversion from prosecution, court or sentencing that can have restorative elements attached as conditions), while the conditions that were attached to that decision (for instance, that reparation be made, community service be rendered, or VOM be undertaken) are not. Equally, statistics do not record the mitigating factors that courts take into account in sentencing. This issue is particularly pronounced when the definition of RJ is drawn widely to include the making of reparation or the delivery of restitution to victims without the involvement of a restorative process, as in such cases – unless reparation is made in the context of a statutory intervention or there are special reparation schemes in place whose performance is monitored – reparation as a means of achieving reconciliation often occurs in an entirely unregulated and informal fashion that cannot be measured. Or rather: how reconciliation was achieved, whether reparation was made, is rarely statistically discernible.

In interpreting the available data, the degree of "coverage" always has to be borne in mind. For instance, in many countries the legal "access point" (for instance prosecutorial discretion to drop the case in certain circumstances) is available nationwide, but providers of RJ or VOM services have only been established in certain regions of the country (for instance in *Bulgaria*, *Croatia*, *Ireland*, *Montenegro*, *Serbia*, *Russia* and the *Ukraine*). An example for a need of caution in interpreting data is *Russia*, where 20% of all court cases were dropped due to successful "reconciliation" in 2011 (200.000 in absolute figures). In practice, however, victim-offender mediation or other processes em-

[122] See MIERS/WILLEMSENS 2004, 155 ff., WILLEMSENS 2008, 22 ff. and PIGGOTT/WOOD 2019, 367 ff. for some challenges in "measuring" RJ in practice.

ploying impartial facilitators are used only very rarely, as their availability is limited to certain geographical or administrative regions.

In practice, unless provided by a monitored state service, the task of counting the frequency to which *restorative processes* like VOM played a role in a case would come down to the service providers of the respective processes in the context of monitoring their own performance[123]. However, in their data they do not always differentiate between the authority or body making the referral or the legislative basis that the referral was based on. Where there are different providers involved, it becomes less likely that the picture is precise, complete, or even comparable in itself as they may count in different ways (number of referrals, number of sessions, number of offenders, number of victims etc.). In *Belgium* for instance, depending on the programme, "cases" are counted on the basis of the number of offenders involved, the number of victim-offender relations, or the number of judicial files. Keeping elaborate statistics is a costly undertaking that many smaller VOM initiatives/programmes might have difficulties bearing in the long term.

In some countries, all that is available in terms of data are results from accompanying research or studies linked to individual pilot projects or the like, often dating back a number of years to the beginnings of RJ in the country. For example, in *Denmark* the last study providing a respective insight stated that from 1998 to 2002 there were on average only 40 cases of VOM each year. In *Norway*, the most recent data available are from 2001. Considering the pace of development and expansion in the field of RJ, it is quite possible that the state of affairs will well have changed in the meantime.

Finally, the figures provided – whatever the source – do little to give a sense of the true extent to which RJ is used – they are seldom refined to take into account the total population of the country, the total number of offenders brought to justice etc. Therefore, just because an absolute number is high in international comparison, it need not be an indicator for RJ being used more to its full potential. 11,953 successful mediations in *France* (with a 2008 population of over 63 million) do not have

[123] In this regard, see VANFRAECHEM/AERTSEN 2010, 273.

the same weight as 2,600 successful mediations in *Slovakia* (with an estimated population of about 5.5 million). Likewise, while 2,469 referrals of juveniles to VOM by the courts sound like a promising number for less greatly populated countries, in *Germany* it accounted for only 2% of all court sentences in 2011.

6.2. Data on the quantitative use of restorative justice in practice

With these shortcomings in mind, overall it can be said that, both for adults and for juveniles, RJ plays a major role in the criminal justice practice of only a small handful of countries[124]. In terms of restorative measures that seek the making of reparation to the victim or the community (an "outcome"-oriented definition of RJ), the statistical situation is bleak (as already explained above). Where data are available, they predominantly cover statutory interventions, most frequently community service. Due to this and the conceptual reservations towards community service stated in *Section 4.5* above, the number of reports in which data on the use of community service in practice were provided was very small. What can be said, based on the data available, is that in many countries it is used predominantly in the context of juvenile justice. In some, it is the primary form of intervention used for responding to the delinquency of juvenile offenders. For instance, in *Germany* in 2010, 43.8% of all court sanctions and measures handed down against juveniles and young adults were community service. At the same time, its availability for adults (aged 21 and over) is limited to being an alternative sanction for fine-defaulters in order to avoid imprisonment as substitute sanction. In *Latvia*, in 2011 29% of all sanctions against youth were to community service. In *Switzerland*, 46.5% of all juvenile cases dealt with by prosecutors or courts ended in community service being ordered in 2010, compared to just 4.3% among adults.

In terms of restorative processes, the clear leaders are *Finland* – where 9,248 adult offenders and 4,311 persons under the age of 18 (including persons under the age of criminal responsibility (!)) were referred to VOM in 2011 – and *France*, where 11,953 adult offenders

[124] See for the following data DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 1059 ff.

successfully participated in VOM in 2010, and 1,294 juveniles did so in 2009 (plus an additional 9,383 reparation orders). Naturally, *Russia's* 200,000 cases that were dropped due to "successful reconciliation between victim and offender" in 2011 would easily trump the Finish efforts, but as already stated above, the share of those cases that actually involved a restorative process cannot be ascertained and is likely to be rather low considering the restriction of VOM service providers to only a few regions of a very large country. Similar reservations (speaking from a "process"-oriented definition of RJ) regarding the restorative value of the process apply to the 5,622 cases of "reconciliation" in *Lithuania* in 2012. These figures could, however, imply a large number of cases in which reparation was delivered, which according to a wide definition of RJ would be an indicator for a more central role.

In *Austria* (estimated 2008 population: 8.5 million), 6,181 adults and 1,286 juveniles were referred to mediation in 2010 – roughly 5-6% of all juveniles who come to the attention of the prosecution service are referred to VOM. In *Belgium*, about 5,500 juveniles were referred to mediation services in 2011, a further 153 were referred to conferencing by the courts. More than 2,300 adults were referred to mediation in the context of "penal mediation provisions", and a further 3,200 cases were referred to mediation for redress (about 700 of which while the offender was serving a prison sentence). In *Germany* (about 82 million inhabitants in 2008), 2% of all youth court interventions in 2011 were referrals to VOM (2,500 in absolute terms), and a further 3.2% were Reparation Measures. Data on pre-trial referrals are however not recorded, implying that the role VOM plays in *Germany* is higher than the statistics suggest. In *Norway* (about 2.2 million inhabitants in 2008), about two thousand young offenders are referred to VOM each year. By contrast, only about 1/10th that number of adults are referred. In *Hungary*, (with an estimated total population in 2008 of 10 million) 3,874 referrals of adults to mediation, and a further 370 juveniles were recorded. In *Slovenia* (2 million in 2008 approx.), in 2011, 1,532 adult offenders and 88 juvenile offenders were referred to mediation. In *Latvia*, a country with a population of around 2.2 million, 450 VOM referrals were made in the first half of 2013. The report from *Slovakia* (with a population of roughly 5.5 million in 2008) stated that 2,600 VOM referrals were

made in 2009. 417 referrals to VOM were recorded in *Estonia* (estimated population of 1.3 million in 2008) in 2011, accounting for 8% of all cases of prosecutorial diversion in that year. The authors from the *Netherlands* (estimated population of 16.5 million in 2008) presented data indicating that in 2011 about 50 restorative conferences and 1,100 VOMs were conducted with young offenders. *Poland* (about 38 million inhabitants in 2008) reported of 3,604 cases of VOM in 2011, and in the *Czech Republic* 1,200 cases of VOM were reported (accounting for 3.5% of all diversionary decisions), which appears rather low considering the nationwide provision of services and the population of roughly 10 million people. In *England and Wales*, 33% of all court sanctions are "Referral Orders". The "Referral Order" implies the referral of young offenders who are convicted for the first time upon a guilty plea to a Youth Offender Panel comprising community volunteers, the offender, the victim and other supporters of the parties, who together draft a "contract" that outlines how to respond to the offence and how the offender can make amends. However, speaking in a narrow sense, the restorative value of the *Referral Order* remains to be discussed, with a victim participation rate of only 12% and only 7% of agreed reparation actually being made to the direct victim.

In the remainder of the countries who were able to provide data, regardless of the source, the annual caseloads are at best in the very low hundreds, and not representative for the whole country due to the localized availability of VOM and other restorative processes/practices. However, the picture remains that they are used only sparingly, or rather, not to their full quantitative potential. While no data are available in *Bosnia and Herzegovina*, *Bulgaria*, *Croatia*, *Denmark*, *Greece*, *Italy*, *Macedonia*, *Montenegro*, *Romania*, *Serbia* and *Switzerland* there is an appearance that restorative processes play only a very minor quantitative role according to the authors. *Malta* only introduced VOM on a nationwide basis (for all offenders, i.e. juveniles and adults in the same way) in 2012, so statistical data are not yet available.

6.3. Trends in the use of Restorative Justice in practice

Based solely on the data provided, there is no clear-cut trend in the development of the quantitative role of RJ in the context of criminal justice practice. The numbers of referrals to VOM rose in *Estonia* from 32 in 2007 to 450 in 2011 – in 2007 VOM accounted for 2% of all court sanctions compared to 8% in 2011. *Finland* has witnessed a 35.5% increase in the number of referred adults. In *Germany*, the absolute number of offenders referred to VOM by the courts rose from 1,134 in 2004 to 3,594 in 2010, +317%[125]. *Hungary* (2007: 2,451; 2011: 4,794), *Latvia* (2005: 51; 2013: est. 950; use of Community Service increased from 1.059 to 3.951 in same time span) and the *Netherlands* (2007: 400; 2010: 1,150) reported to have witnessed similar increases. In *Russia* (again to be regarded with caution), the share of juveniles being discharged from criminal liability due to successful reconciliation with the victim has increased dramatically from 3.7% in 2002 to 31.5% in 2011.

In other countries the opposite development can be observed. The absolute number of referrals to VOM decreased in *Austria* by 15.9% for adults and 20.1% for juveniles, parallel to a rise in the use of community service for juveniles. In *Portugal*, the absolute number of adults referred to VOM dropped from 224 in 2009 to just 90 in 2011. *Slovakia* reported a decline of 29.8% in the number of referrals to VOM from 2007 to 2009. *Spain*, *Slovenia* and the *Czech Republic*, too, reported similar developments. Besides the expansion of the available alternatives at key stages of the criminal procedure that appear to be more attractive to criminal justice practitioners (see *Section 5* below), many of these countries pointed to the effects of the European economic crisis as

[125] As mentioned above, VOM in Germany mostly occurs on the pre-court level (diversion), for which no clear statistics are available. Data reported by KILCHLING 2012, 169 f. indicate that about 4% of prosecutorial diversion cases include mediation, another 5% a compensation (reparation) order. The courts can also practice diversion: about 2% of court-diversionary decisions in 2005 included mediation, another 11% were compensation orders, see also DÜNKEL/PĂROŞANU in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 312 f.

being central to these decreases. It is thus likely that their use will increase again once the economic situation has settled.

These absolute figures do not reflect changes in the overall caseloads of the justice system or demographic developments and thus need to be taken more as an indicator than as hard evidence. While these countertrends balance each other out to a certain degree, taking into account the significant number of countries that were unable to provide data but that have nonetheless witnessed growth in the number of practice initiatives "on the ground" over the past few years, and taking into consideration that many of the countries that have witnessed declines stated to have been affected in particular by temporary economic constraints, it would be fair to conclude that the absolute number of cases in which decision-makers deem RJ appropriate – whatever the reasons – has been on the increase in Europe, but has yet to find its way into mainstream practice in most of the continent.

Finally, it needs to be stressed that a minor *quantitative* role does not automatically imply that RJ is not being used to its full potential, or that the outcomes that are aspired to are not being achieved. Rather, the quality of services, the satisfaction of participants, the reparation of harm and a positive reintegrative effect on the offender should be the primary benchmarks for such an assessment, rather than impressive numbers. Quality of services should not be compromised to increase caseloads.

7. Research and evaluation into restorative justice in Europe

Restorative processes are a promising approach as they provide benefits to all stakeholders in an offence. As *Liebmann* sums up, victims

> can learn about the offender and put a face on the crime; ask questions of the offender; express their feelings and needs after the crime; receive an apology and/or appropriate reparation; educate offenders about the

> effects of their offences; sort out any existing conflict; be part of the criminal justice process; put the crime behind them[126].

At the same time,

> offenders have the opportunity to own the responsibility for their crime; find out the effect of their crime; apologise and/or offer appropriate reparation; reassess their future behaviour in the light of this knowledge[127].

There has been a growing body of research-evidence over the last decades that indicates that these outcomes can in fact be achieved in practice, and that make a strong case for regarding restorative practices as promising and desirable means for resolving criminal conflicts and for achieving a number of different outcomes in doing so.

Research has, for instance, measured high rates of satisfaction among victims and offenders who have participated in restorative processes. *Latimer/Dowden/Muise* conducted a meta-analysis on studies that sought to examine more than thirty restorative justice programmes (VOM and conferencing) in terms of effectiveness, which showed that restorative programmes achieved higher rates of satisfaction among both victims and offenders than traditional criminal justice responses[128]. Another meta-study, by *McCold/Wachtel*, came to similar conclusions, indicating elevated levels of satisfaction and perceptions of fairness[129]. These experiences imply that VOM and conferencing can be implemented in a fashion that meets the needs and interests of both victims and offenders very well.

What also emerges from the research literature is that restorative practices are often associated with promising effects on recidivism[130],

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[126] LIEBMANN 2007, 28.

[127] LIEBMANN 2007, 29.

[128] LATIMER/DOWDEN/MUISE 2001; see also *UMBREIT/COATES/VOS* 2008, 56 f.

[129] MCCOLD/WACHTEL 2002. Further studies include CAMPBELL ET AL. 2006; BRAITHWAITE 1999; 2002; 2009; UMBREIT/COATES 2001; UMBREIT/COATES/VOS 2008, 56 f.; HARTMANN 2019, 132 ff.

[130] It has to be highlighted that reducing recidivism is not the primary aim of RJ-processes, see HAYES 2007, 440, but instead to arrive at a restorative agreement, the

as evidenced by a growing pool of research results[131]. Despite certain methodological shortcomings[132], the overall impression stemming from the studies is that RJ does not have a *negative* impact on re-offending[133]. In a comprehensive meta-analysis, *Sherman* and *Strang* concluded that in two projects in the United Kingdom a 25% reduction in recidivism among violent offenders after participation in restorative justice processes could be observed[134]. The effects of restorative justice programmes produced less consistency and magnitude of effects on recidivism than was found for violent crime. Effects are even smaller or non-existent if restorative justice takes place for "non-victim crimes" such as shoplifting, drink-driving or offences against public order[135]. Beyond

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fulfilment of contracted obligations by the offender and the satisfaction of the victim. In this regard there is a broad consensus that for the selected participants of mediation etc. the results in the large majority of evaluation are very positive, see e.g. HOPT/STEFFECT 2008, 77; BRAITHWAITE 2002; 2009, 502; HARTMANN 2019, 132 ff. However, the question of evaluating RJ measures by looking at the criteria of future recidivism cannot be neglected, at least insofar as increased recidivism rates can be excluded (which is the case). On the other hand, we should not expect too much from a short-term mediation procedure of 60-90 minutes, see HAYES 2007, 440. As to a loss of (possible) deterrent effects of punishment, there is clear evidence that RJ does not undermine such effects, which anyway are highly overestimated, see KURY 2016, 270 with further references.

[131] See for instance BRAITHWAITE 1999; 2002; 2009; SCHÜTZ 1999; UMBREIT/COATES 2001; SHERMAN/STRANG 2007; SHAPLAND ET AL. 2008; LATIMER/DOWDEN/MUISE 2005; HAYES 2007; BONTA ET AL. 2008; UMBREIT/COATES/VOS 2008, 56 f.; SHAPLAND/ROBINSON/SORSBY 2012; SHERMAN ET AL. 2015; 2015a; for a summary see also KURY 2016, 269 ff.

[132] In this regard, see BONTA ET AL. 2008; see for methodological issues how to evaluate RJ also BAZEMORE/ELIS 2007; PIGGOTT/WOOD 2019, 363 ff.

[133] AERTSEN ET AL. 2004, 38 f.; PIGGOTT AND WOOD summarize the research on this aspect by stating that the large majority of the evaluation studies come to positive findings only a few to negative effects, these mixed results being "attributed to substantial differences between RJ programmes in policy and practice", PIGGOTT/WOOD 2019, 359; they come to the conclusion the question if RJ "reduces reoffending cannot withstand the problems of variation in practice and methodological limitations inherent in much much of the existing research" (372).

[134] SHERMAN/STRANG 2007, 69; SHERMAN ET AL. 2015a, 12 f. (comparing effect sizes for juveniles versus adults a slightly stronger effect size was to be seen for adults, see 13).

[135] SHERMAN/STRANG 2007, 69 f.

a need for more in depth-evaluation, the authors emphasise that negative effects of RJ compared to other sentences and in particular imprisonment were nowhere to be found and that restorative justice works better with more serious offences. The reason for this may be consistent with the apparent emotional basis for RJ: that offender remorse for having harmed a victim – perhaps especially victims "like them" rather than socially distant by class, race or income – is what drives any reduction in repeat offending that follows restorative Justice[136].

Bonta et al., who also conducted a meta-analysis of restorative programmes, state that «restorative justice interventions, on average, are associated with reductions in recidivism. The effects are small but they are significant. It is also clear that the more recent studies are producing larger effects»[137]. A recidivism study conducted in *Northern Ireland* by *Lyness/Tate* (2011) found that court-ordered youth conferences held in 2008 were linked to lower re-offending rates (45.4%) compared to community-based disposals (53.5%) and youth discharged from custody (68.3%)[138]. Diversionary youth conferences had a rate of 29.4%, though again, there is a need for caution in weighting these findings due to selection-biases and offender-intrinsic characteristics.

A study by *Schütz* covering VOM with adult offenders who had committed minor assaults found that, over a three year period, the reconviction rate for VOM participants was significantly lower than for the control group (14% vs 33%)[139]. Finally, research has evidenced that the best outcomes are achieved when a restorative process is involved[140] and if post-intervention experiences are positive[141].

Sherman and *Strang* point out that RJ also has potential to reduce the costs of criminal justice[142]. On the one hand, restorative practices in the context of diversion can reduce court caseloads and thus the ex-

[136] SHERMAN/STRANG 2007, 70; see also SHERMAN ET AL. 2015; 2015a.

[137] BONTA ET AL. 2008, 117. Small but positive significant effects on re-offending have also been reported by BERGSETH/BOUFFARD 2007.

[138] LYNESS/TATE 2011.

[139] SCHÜTZ 1999.

[140] VAN NESS/STRONG 2010, 43.

[141] See for this aspect JOHNSTONE 2007a, 598.

[142] SHERMAN/STRANG 2007, 86.

pense involved in bringing offences to justice. Furthermore, reducing the number of offenders coming before the courts can have down-tariffing effects on overall sentencing practices, as has recently been experienced in *England and Wales* with the Youth Restorative Disposal and Triage Programmes[143]. These deflationary effects can spread across the entire sentencing spectrum and thus reduce the use of costly custodial sentences[144]. Finally, the potential positive effects on recidivism can imply lower costs occurring to society at large in the future. This is underlined by the research conducted by *Shapland et al.* (2008), who state that restorative justice can deliver cost savings of up to £9 for every £1 spent. According to a model cost-saving analysis by *Victim Support* (2010) for England and Wales, the savings that flow from the contribution made by restorative justice to reducing reoffending rates are impressive. According to *Victim Support* – if RJ were offered to all victims of burglary, robbery and violence against the person where the offender had pleaded guilty (which would amount to around 75,000 victims, albeit including adults), the cost savings to the criminal justice system – as a result of a reduction in reconviction rates – would amount to at least £ 185 million over two years[145]. Direct cost savings for the prison budget could amount to £ 410 million[146]. "The £ 59 million it would cost to offer restorative justice conferencing only to those 75,000 victims of burglary, robbery and violence against the person pales in

[143] See the report on *England and Wales* by Doak in DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015. See also BATEMAN 2010; HORSFIELD 2015.

[144] See HORSFIELD 2015.

[145] See VICTIM SUPPORT 2010, 29.

[146] See VICTIM SUPPORT 2010, 30: "Trials of restorative justice conferences have been shown to give sentencing magistrates and judges better information about effective sentencing options. Working with the Restorative Justice Council we estimate that it could also generate a saving of 11,000 full-year prison places - the equivalent to saving £ 410 million of the prison budget (this calculation is based on: a 23 per cent diversion from custody rate; a randomised, control trial funded by the Ministry of Justice; the experience in Northern Ireland; and the Appeal Court cases where case law now states that taking part in restorative justice is a mitigating factor; as well as an assumption that those diverted have the average sentence length)".

comparison to the savings that could be made if a comprehensive restorative justice system were put in place"[147].

8. Summary and recommendations

8.1. Summary

Overall, it can be said that all countries covered both in the study of *Dünkel/Horsfield/Păroşanu* (2015) and of *Dünkel/Grzywa-Holten/Horsfield* (2015) provide, in legislation or practice, forms of RJ in the context of resolving criminal conflicts. The landscape is dominated by VOM, however the degree of actual service coverage varies substantially throughout Europe, with nationwide coverage of service provision only in place in *Austria*, *Belgium*, the *Czech Republic*, *Denmark*, *Finland*, *Germany*, *Hungary*, the *Netherlands*, *Latvia* and *Norway*. In all other countries VOM services (not legislation) are limited to certain geographical areas where local partnerships and initiatives have been established. By contrast, conferencing is far more seldom in Europe, being available on a nationwide scale in only five countries (*Belgium*, *England and Wales* (with major reservations), *Ireland*, the *Netherlands* and *Northern Ireland*). Taking a step back and applying a maximalist perspective, criminal justice legislation in the vast majority of EU and non-EU European countries makes provision for forms of community service. Likewise, most countries have channels in place through which the making of reparation without a preceding restorative process can factor into decision-making in the criminal procedure (diversion, sentence mitigation, and court ordered reparation like "reparation orders").

There are a number of predominant and interconnected themes when looking at the key driving factors for restorative justice to be implemented. The first relates to abolitionist thinking, in that the criminal justice system is an inappropriate forum for resolving conflicts between offenders and victims. Accordingly, in some countries (particularly those in which the first experiences with RJ have been made in Europe,

[147] See VICTIM SUPPORT 2010, 30.

like *Austria* and *Finland*) the focus was on providing an informal forum that better meets the needs of those affected by the crime. This ties in to a second impetus, namely that RJ is regarded as a means for improving the standing of victims in criminal cases in the context of strong victim's movements in some countries. In other jurisdictions, RJ came to be regarded as a promising element in a general shift in criminal justice thinking, away from retribution and punishment towards rehabilitation and reintegration, objectives to which restorative ideal can cater very well if implemented correctly due to its focus on positive reintegration. Such developments were particularly prominent in the field of juvenile justice. Likewise, juvenile justice reform in Europe has served to provide gateways into the criminal procedure, as the focus has increasingly been on diversion away from formal into informal processes and the use of rehabilitative and educational measures. The influence of international instruments and the drive for EU membership are further prominent factors that cannot be ignored. International standards are regarded as depicting "best practice" and thus provide the template for a criminal justice system that is "up to the standards" of Western society. Numerous countries, particularly in Eastern Europe, indicated that such instruments provided vital guidance to harmonizing their systems to western standards, and this also covered standards relating to RJ.

The driving forces for reform will naturally have shaped the outcome of that reform, and thus how RJ has been connected with or placed alongside the criminal justice system. Juvenile justice reform has seen expansions in the powers of decision-makers throughout the criminal justice system to divert cases from prosecution, conviction and/or sentencing into alternative procedures and measures that bear superior reintegrative and rehabilitative potential than purely retributive intervention. Prosecuting agencies have seen expansions in their statutory discretion to divert criminal cases by dropping charges subject to certain conditions. In most of Europe (both EU and non-EU), among such conditions we find having "made reparation" to or having "reconciled" with the victim, or having shown "effective repentance". Thus, where an offender has alleviated the harm caused by the offence (potentially through VOM or conferencing), either by his own initiative or upon the making of such a requirement by the prosecuting agencies, he

can be released from criminal liability. Furthermore, albeit not quite as widespread, courts, too, have powers to divert cases on similar grounds, while a mitigation of sentence on the grounds of reparation having been made or reconciliation having been achieved (potentially through VOM or conferencing) is theoretically possible in about half of the countries covered in both studies. In most countries, courts are equipped with special sanctions or measures that reflect restorative justice thinking, most prominently community service, but also forms of court-ordered reparation like "reparation orders" and court-ordered restorative processes. Finally, only less than 50% of countries covered in the studies made any reference to the use of RJ in prison settings, with only a handful (particularly *Germany*, *Portugal*, and some cantons in *Switzerland*) making legislative provision that seeks to incorporate reparation and a focus on victims' needs into correctional programming. Overall, the big picture that remains is that the availability of RJ decreases the deeper one delves into the criminal procedure. There are only a few exceptions to this rule that provide access to VOM or conferencing regardless of the stage of criminal proceedings and regardless of offence and offender characteristics (the *Netherlands*, *Belgium*, *Denmark*, *Germany*, *Norway*, *Sweden* and *Finland*).

Generating a picture of RJ in terms of the quantitative role it assumes in criminal justice practice is a difficult task, as many countries face significant data shortages. The use of RJ in practice is difficult to measure, as statistics do not record mitigating factors in sentencing, or often only state the statutory provisions on which diversion is based, without stating what the offender was diverted into. Often the only sources available are descriptive research studies that are outdated as no follow-up studies have been published. Overall, though, despite these shortcomings, the picture that remains is that – except for some countries like for instance *Belgium*, *Northern Ireland*, *Austria* and *Finland* – RJ plays only a marginal role in most of Europe in practice, albeit with a slightly upward trend if one takes the "dark figure" of restorative action into account.

There is a vast and ever expanding pool of research and literature on the benefits and potentials of RJ – therefore the potential that RJ brings to the table is well known. The role that RJ justice plays in the practice

of the criminal justice system, by contrast, does little to underline this view. What has indeed also become clear is that there is great potential for RJ to gain a more prominent role in the criminal justice systems in Europe than is the case today in most countries. All countries covered in the present paper provide legislative access-points through which RJ can enter into the criminal procedure. Likewise, all countries can draw on experiences of their own with restorative justice services like VOM or conferencing, albeit to strongly differing degrees. Yet in practice, in most countries in Europe RJ plays only a peripheral role in the context of the criminal and juvenile justice system.

In light of these positive experiences with restorative practices, and set against the assumption that RJ is a promising and desirable strategy that achieves the best outcomes when restorative processes are involved, the question arises as to why they play such a peripheral role in the criminal justice systems of most countries in Europe.

The reasons for an often reluctant and restricted use of RJ are manifold. In some countries, implementation is difficult as judges and prosecutors are reluctant towards new alternatives, which lack the traditional elements of punishment. The lack of will among judicial gatekeepers to use RJ can be based for example on the distrust in the legitimacy of mediators as deliverers of justice. The judiciary claims a "monopoly of conflict resolution". In some countries inappropriate, unclear or a lack of legislative basis reduce the faith in RJ. Finally, the availability of other diversionary options that are more in line with traditional understanding of appropriate intervention may play a role and (in some jurisdictions) the strict application of the principle of legality reduce the possibilities for extra-judicial conflict resolution[148].

Another reason for the only small numbers of RJ in practice is the lack of information and awareness of the benefits of RJ among legislators, politicians, judicial gatekeepers and the general public. In addition, in some jurisdictions a lack of will among legislators and politicians can be seen (in turn connected to issues of poor/lack of statutory basis, funding, lack of information/awareness and a punitive climate). As the good practices in Belgium, Finland or Northern Ireland demonstrate,

[148] See in summary DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 1064 ff.

these obstacles may be overcome if the political climate is favourable for RJ-ideas and values (in Northern Ireland e.g., after a long period of civil war RJ was in line with the general peace-making approach in politics).

Another challenge, however, has to be addressed. Implementing RJ-elements into the criminal justice system may also bear the risk of "institutionalization" that legislation brings with it, in that the values underpinning RJ could come to be "watered down" so as to be able to be accommodated within the criminal justice system[149]. In practice, this implies that certain key ideals and values that underpin RJ are sacrificed to the benefit of achieving outcomes that are geared more towards the aims of criminal justice rather than RJ[150]. *Umbreit* speaks of the "risk of McDonaldization" in this regard[151]. Therefore, careful implementation strategies and professional standards must be provided.

Based on the results of *Dünkel/Horsfield/Păroşanu* (2015) and the discussions in the International Juvenile Justice Observatory (IJJO)[152] *Chapman* has developed a "European Model of RJ with children and young people", which provides for RJ on four levels:

> Level 1: Restorative parenting, family group conferences, mediation and restorative relationships in schools, restorative circles, and mediation in the community.
> Level 2: Mediation to divert from entry into the criminal justice system.
> Level 3: Restorative conferences and circles of support and accountability to divert from detention.
> Level 4: Restorative culture and practices in detention and for reintegration[153].

[149] See in this regard in particular AERTSEN/DAEMS/ROBERT 2006 with further references.

[150] See VANFRAECHEM/AERTSEN 2010, 274.

[151] UMBREIT 1999; see also DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 1066.

[152] The IJJO is an NGO and lobby organisation to promote European juvenile justice policies and practices, see FOUSSARD 2011, 23 ff.; the research of DÜNKEL/HORSFIELD/PĂROŞANU (2015) was co-funded by the EU, the University of Greifswald and IJJO.

[153] CHAPMAN 2017, 82 f.; see also http://www.ejjc.org/eumodel.

8.2. Recommendations[154]

Restorative justice is not yet available to all offenders at all stages of the criminal procedure in all countries, as is recommended in Article 4 of Recommendation No. R. (99) 19. Rather, access is usually restricted along the lines of proportionality and public interest, as RJ enters into the system via diversionary pathways in most cases, or is a matter of discretion for decision-makers in the criminal procedure. It therefore tends to be restricted to less serious forms of offending from the outset, and whether or not it is applied lies in the hand of practitioners who are likely unaccustomed to what RJ entails and what benefits it can bear for victims, offenders, communities and society. As a consequence, many victims are implicitly regarded as having suffered too much to be eligible for an opportunity to receive reparation for the harm they have endured, or to achieve closure and healing, which appears rather paradoxical. Even more victims are excluded by the fact that there is a strong predominance of provision for young offenders and their victims, or rather: they are excluded because their assailant was too old. Experience has shown that VOM for instance can indeed be implemented in a fashion that achieves promising outcomes with adult offenders and their victims.

> Therefore, it is to recommend that access to restorative justice not be restricted on grounds of offence severity and age. Instead, countries should seek to introduce restorative processes and practices as a generally available service that is offered to all victims and offenders. Decision-makers should be able to take the outcome from such processes into consideration in their decisions.

There is a need to provide forms of RJ that are promising for resolving conflicts between offenders and victims in cases of a greater severity, and that involve the community in a greater fashion than is the case with VOM. In this regard, conferencing has proven to be a viable and promising tool, particularly for young offenders. Recent experiences in

[154] The following recommendations have been extracted from DÜNKEL/GRZYWA-HOLTEN/HORSFIELD 2015, 185 ff. and further developed for the present publication.

Europe (*Northern Ireland*, *Ireland* and *Belgium*) have shown that positive outcomes can be achieved through conferencing in terms of satisfaction with processes and outcomes, perceptions of fairness, and re-offending[155]. However, to date very few countries have sought to apply conferencing in Europe. The same applies to experiences with peace-making circles. «Therefore, it is to recommend that countries seek to promote initiatives to introduce conferencing and peace-making circles into their criminal justice systems».

An often-neglected stage of the procedure is the serving of prison sentences. Only rarely is the situation in theory and practice simultaneously such that RJ can come into play in correctional settings. This is regrettable, since prisons represent a large pool of yet "untapped conflict", and are at the same time increasingly coming to be regarded as institutions of rehabilitation in which restorative approaches could be promising elements in sentence planning and programming. Offenders who are in prison will usually have committed offences that made them ineligible for diversion, and thus for restorative practices. At the same time, RJ can be a viable means for resolving conflicts within prisons, between either prisoners or prisoners and staff.

> Thus, it is to recommend legislative provision be made that provides for the making of reparation and raising awareness of victims' needs as an element in sentence planning. Likewise, it is recommended to explore ways of reforming the penitentiary climate and culture using restorative practices. Increasing empathy of offenders towards victims (e.g. through victim awareness programmes) is an appropriate rehabilitative means for preventing further victimisations after release.

Another widely untouched source of potential for RJ is community service, which is only very rarely implemented or legislated for in a fashion that can be regarded as truly restorative in Europe today. In the majority of Europe, it is used as a substitute sanction for offences of a certain severity (in terms of the term of imprisonment defined by law), as an alternative sanction introduced as a stand-alone option as a means of avoiding custody particularly for young people, and/or as an educa-

[155] See for an evaluation of the Northern Ireland conferencing schemes DOAK/O'MAHONY 2019; CHAPMAN 2017 with further references.

tional/alternative measure as a condition for diversion from prosecution or court punishment. In most countries, it is to be regarded as a punitive sanction.

> It is to recommend that initiatives and strategies be sought that seek to enhance the restorative value of community service by employing restorative processes to determine the work to be performed (for instance individualized project-based work), and/or that seek to allow the making of reparation to direct victims of crime through work.

A recurring problem stated in many national reports, on which this paper is based, has been that there is a lack of political will to pass legislation and/or to implement or fund restorative justice initiatives, either because there is a lack of information on behalf of politicians and legislators, or because of a predominating punitive climate in society, or both. There is, therefore, a need to generate pressure "bottom-up" on legislators to implement the aforementioned recommendations by establishing local initiatives that involve partnerships between the justice system and NGOs, universities and research institutes. Such endeavours need to be evidence based in their approach and subject to continuous evaluation. Likewise, they need to be linked to strategies for raising awareness of the benefits of RJ, for all involved that extend from relevant criminal justice practitioners to the media and to the public, to generate public demand for RJ. Even where there is a political will to implement RJ on a wider scale, any legislative endeavours should be based on knowledge and experiences of "what works". Countries that have seen the best experiences with RJ, in terms of introducing and sustaining a network of nationwide coverage and yielding decent caseloads (for example *Germany*, the *Netherlands*, *Northern Ireland*, *France*, *Finland*, *Belgium* and *Austria*), provide a strong legislative basis for RJ. What these countries all have in common is that their legislation is based on years of experience with systems that have gradually grown from local initiatives to nationwide practices that have been subject to evaluation and adaptation. Therefore, a sound, evidence-based legislative basis will more likely be adequate for achieving the desired outcomes in its given context, and at the same time can increase faith in decision-makers to refer to it.

> Thus, it is to recommend that restorative justice initiatives be conducted in a "what-works"-ethos and subject to continuous monitoring and evaluation to optimize the outcomes achieved. Parallel, such projects should include strategies for building support for restorative justice at all levels. Legislation should be based on tested experiences and not in blind attempts of international or even interregional policy transfers.

Finally, one should emphasize that restorative justice values and procedures are not restricted to criminal justice systems, but they are part and should be further developed in conflict regulations in general, in schools, civil and administrative law litigations and in the society in general. RJ "is not a panacea against all social evils"[156], neither in criminal justice nor in other areas where RJ is practised, but its values may contribute to a more humane and peaceful society[157]. As to criminal justice reform, it should be noted that RJ is in line with modern penal theories emphasizing the human rights perspective of victims and offenders (victims' protection and rehabilitation of offenders). It will not totally overcome all repressive punishment oriented dimensions of criminal law, but it may contribute to «making criminal law more civilized»[158].

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[156] See the headline of the chapter of WALGRAVE 2017, 95, who presents an excellent summary of the critical aspects of RJ. Social injustices, gendered and racial violence, social inequalities and other structural social problems, cannot be expected to disappear if RJ is further expanding, but it "should set the conditions to begin the gradual attainment of full participation of all stakeholders in social life", WALGRAVE 2017, 108.

[157] BRAITHWAITE 2019, 2 f.

[158] WALGRAVE 2013, 359 FF.; 2017, 99 FF.; MAZZUCATO 2017, 243.

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