

The Council of Europe Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters: an opportunity for progress

Setting the scene

In recent years, many European countries have seen a significant increase in the awareness, development and use of restorative justice within their criminal justice systems. Some governments have helped or permitted criminal justice agencies to adopt and implement restorative justice locally, while others have legislated for or provided national funding to support its use.

Yet, restorative justice is rarely used to its full potential. Many countries do not have the capacity or the desire to afford victims and offenders a right of access to restorative justice. Countries which use restorative justice more often mostly do not systematically inform victims and offenders of their ability to engage in this process. Moreover, many jurisdictions have adopted one or more hybrid restorative-traditional practices, enabling victims and offenders to participate in processes which are described as ‘restorative,’ but which offer no opportunity for dialogue between the parties, nor are designed and delivered in accordance with core restorative principles.

As the terminology of ‘restorative justice’ proliferates around the world, there seems to be a tendency to conceive of many rehabilitative, reparative, diversionary and/or victim-oriented interventions as being inherently ‘restorative’ in nature. This necessitates the updating of international policies which can help to clarify the extent to which a given practice reflects the concept of restorative justice, while ensuring that governments and justice agencies adopt an evidence-based approach to maximising its benefits and minimising its risks.

International restorative justice instruments: a brief history

In 1999, the Council of Europe adopted Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (hereinafter: ‘the 1999 Recommendation’). It argued for an expansion in the use of mediation in criminal justice and outlined a series of standards and principles for those practices to follow. It also discussed the legal basis for penal mediation, safeguards for participants and how mediation services should operate in relation to criminal justice agencies (and vice versa).

In 2007, the European Commission for the Efficiency of Justice (CEPEJ) argued that, within many member states,

there remained a general lack of awareness of restorative justice, a lack of availability of restorative justice at some stages of the criminal justice process and a lack of specialised training in its delivery. These findings were taken to signify that the 1999 Recommendation had not been fully implemented.

Nonetheless, the CEPEJ’s evaluation of the 1999 Recommendation suggested that it had a clear effect in a number of European countries. It also influenced the wording of both the 2002 ECOSOC (UN) Resolution and, in 2012, Directive 2012/29/EU of the European Parliament and of the Council, establishing minimum standards on the rights, support and protection of victims of crime in Europe (hereinafter: ‘the Directive’), although these instruments also reflected a broader transition that was taking place within the field. The use of terminology relating to ‘mediation in penal matters’ was in decline while vocabulary relating to ‘restorative justice’ — encompassing both principles and practices — was gaining ground.

The Directive has stimulated various legislative and policy activities across Europe, requiring European Union (EU) member states to enhance victims’ statutory rights and develop services for victims of crime. With respect to restorative justice, it obliges criminal justice actors to inform victims about any available services and outlines protections for participating victims. It also utilises virtually the same definition as that which was contained within the 1999 Recommendation, although, as noted, it does so in reference to the term ‘restorative justice’ instead of ‘mediation in penal matters.’ However, the Directive stops short of creating a right of access to restorative justice and focuses exclusively on victims’ rights at the expense of protections for offenders. This relatively narrow focus means that it does not explicate the broader themes and innovations in the contemporary use of restorative justice, such as its role in supporting desistance and its applicability beyond the criminal procedure.

Recent developments in the Council of Europe

In 2016, the European Committee on Crime Problems (CDPC), a body within the Council of Europe, asked its advisory body, the Council for Penological Co-operation (PC-CP) to explore whether the 1999 Recommendation should be revised. The PC-CP’s Working Group decided →

to revise the 1999 Recommendation with four key aims (Commentary to the Recommendation, p. 2):

1. To enhance the awareness, development and use of restorative justice in relation to member states' criminal justice systems;
2. To elaborate on standards for its use, thereby encouraging safe, effective and evidence-based practice, and a more balanced approach to the conceptualisation and development of restorative justice than is implied by the Victims' Directive;
3. To integrate a broader understanding of restorative justice and its principles into the (comparatively narrow) 1999 Recommendation; and
4. To elaborate on the use of restorative justice by prison and probation services, the traditional remit of the PC-CP.

In January 2017, I was hired as a Scientific Expert to assist the PC-CP's Working Group in exploring the contemporary restorative justice landscape and drafting this new instrument. Members of the Working Group are criminal justice experts, drawn from prison and probation administrations, academia and Justice Ministries from Council of Europe member states. NGOs, such as EuroPris and the Confederation of European Probation, are also represented. All of these persons contributed to the drafting process, as did the European Forum for Restorative Justice (EFRJ), who were invited to attend some of the Working Group meetings.

The first step involved consultation. With Edit Törzs and Tim Chapman, we used the infrastructure of the Community of Restorative Researchers and the EFRJ to make inquiries regarding how our colleagues from around the world thought the 1999 Recommendation might be further developed. Respondents to these consultations generally considered that the 1999 Recommendation was substantially sound, and that many European countries were yet to reach the high standards detailed in the original Recommendation. Still, respondents identified a variety of ways in which a new Recommendation might go further in delineating evidence-based standards and supporting the development of restorative justice policies and practices. These consultation responses fed into the drafting and redrafting of the new Recommendation, which took place over a series of PC-CP Working Group, PC-CP plenary and CDPC plenary meetings in 2017 and 2018.

In October 2018, Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters was adopted by the Committee of Ministers. This Recommendation (and its associated commentary) go much further than the 1999 Recommendation in calling for

a broader shift in criminal justice across Europe towards a more restorative culture within criminal justice systems and agencies. They seek to provide a definition of restorative justice which encompasses and promotes both its principles and its practices. They outline evidence-based standards for victim-offender dialogue, and strongly urge member states to develop the capacity to deliver this service safely, effectively and to all those who wish to participate. They also reflect some of the recent trends and innovations in the development of restorative justice, outlining how restorative principles and approaches can be used to underpin broader criminal justice reform and noting that they can be applied beyond the criminal procedure, both proactively and reactively. The new Recommendation is clear that there is a role for all criminal justice policymakers and practitioners to promote and enable restorative justice, or otherwise to learn about restorative principles and skills and integrate them into their work.

The wide-ranging nature of the Recommendation gives us a fantastic opportunity to be proactive in encouraging European governments to implement restorative justice in a more significant and systematic way. Indeed, this work has already started: from the development of country-specific briefings and a new European Restorative Justice Policy Network by the EFRJ to various local, national and cross-border initiatives by the EFRJ's colleagues and members, our ongoing efforts to stimulate new activities, underpinned by this new Recommendation, can have a far-reaching impact on European criminal justice systems.

Across Europe, many victims and offenders remain excluded from the well-evidenced benefits of restorative justice. This is due in part to some professional gatekeepers being unaware or unsupportive of restorative justice. Though the Recommendation is not legally binding, its adoption can support our engagement with European governments and professionals working at all levels of criminal justice. Moreover, for those jurisdictions which wish to take this work forward, the Recommendation can be used as a template for their own policies, as has been the case with the Council of Europe's criminal justice instruments in the past. Considering that the United Nations recently passed a new Resolution committing itself to updating its own materials on restorative justice, I am permitting myself to feel somewhat optimistic for the coming years.

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