EIUC European Inter - University Centre for Human Rights and Democratisation

Restorative Justice

A Way of Rehabilitating Offenders and Reducing Crime in Europe

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ABSTRACT

In the last twenty years, restorative justice has experienced strong development throughout Europe. However, the scepticism demonstrated by legal practitioners towards these practices has impeded their full implementation. Supranational policy and legislative frameworks have often disregarded the potential of restorative practices. This thesis examines the relationship between restorative justice and the formal criminal justice systems of European states to better understand points of convergence and divergence. The rehabilitative potential of restorative justice and its capability of reducing crime are analysed. The paper presents a general overview of the International and European (Council of Europe and EU) legislative framework in this field; have offenders' needs adequately been addressed by restorative justice policies and legislation? Issues have also been raised about the compatibility of restorative practices with the human rights of the parties, namely with those of the accused. The informal (or semi-formal) character of restorative initiatives is considered a threat to defendants' legal rights. Through a detailed analysis of the right to a fair trial I will point out the benefits and risks deriving from the use of these instruments, the gaps existing in current legislation and investigate the possible future role of the EU in this field.

TABLE OF ACRONYMS

ADR	Alternative Dispute Resolutions
CoE	Council of Europe
CEPEJ	European Commission for the Efficiency of Justice
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EFRJ	European Forum for Restorative Justice
EU	European Union
FGC	Family Group Conferencing
ICCPR	International Convenant on Civil and Political Rights
NGO	Non-governmental Organisation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
VOM	Victim-Offender Mediation

TABLE OF CASES

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- *Funke v France* (1993) 16 E.H.R.R. 297
- *Heaney and McGuinnes v Ireland* 34720/97 [2000] ECHR
- *Murray v UK* (1996) 22 E.H.R.R. 29
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EUROPEAN COURT OF JUSTICE

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TABLE OF CONTENTS

Introduction.. p. 1

Chapter 1

Restorative Justice: an Introduction

I. The Rise of Restorative Justice .... p. 5

II. Restorative Justice: Elements and Principles .... p. 9

III. Retributive and Restorative Justice... p. 12

IV. Rehabilitative and Restorative Justice .... p. 19

V. The Implementation of Restorative Justice... p. 23

A. Victim-Offender Mediation... p. 24

B. Conferencing .... p. 27

C. Peacemaking Circles .... p. 29

VI. Conclusions.. p. 34

Chapter 2

The International and European Legal framework

I. Introduction.. p. 35

II. The Council of Europe .... p. 36

III. The United Nations .... p. 43

IV. The European Union.. p. 49

V. Conclusions.. p. 56

Chapter 3

Restorative Justice and Offender's Human Rights: Complementary or Irreconcilable Paradigms?

I. Introduction.. p. 57

II. The Right to a fair trial .... p. 59

A. Presumption of Innocence and Right to Remain Silent/Privilege against Self-Incrimination (*nemo tenetur*) .... p. 60

B. Double Jeopardy/ *Ne bis in Idem* .... p. 64

C. Proportionality of Punishment and Legal Certainty.............................. p.67

III. Other Human Rights Concerns .... p. 69

IV. Conclusions.. p. 72

Conclusions …………………………………………………………….....p.75

Bibliography………………………………………………………..……..…p.79

Introduction

In the last twenty years, restorative justice has experienced strong development throughout the world. The term refers to a number of alternative dispute resolution mechanisms applicable to both civil and criminal cases, and often used in post conflict societies as transitional justice instruments. The present work will restrict its analysis to the diffusion of restorative instruments in the area of criminal justice throughout Europe. The re-birth of these ancient practices during the 70s and the 80s has posed numerous problems concerning their exact relationship with the formal criminal system of European states, given the initial scepticism demonstrated by legal practitioners towards both the integration and a coexistence of the two systems.

The scope of this research is twofold. First of all it will analyse the relationship between restorative justice and the formal criminal justice system of European states. Retributive and rehabilitative theories of punishment, which inspire the majority of current criminal justice systems, are often considered to contrast with a restorative approach to justice. In the following pages the existence of similarities among the three above-mentioned approaches will be investigated. The purpose of this comparison is to assess the possible advantages which could derive from a combined use of formal criminal proceedings and restorative justice mechanisms. Restorative theories usually put an emphasis on the benefits brought by such techniques to their main protagonists, namely the victim, the offender and the community involved. The focus of this thesis will be restricted to the analysis of the advantages that such a combined use could have for offenders. Rehabilitation of offenders, which (at least in theory) is one of the principal objectives of Western criminal justice systems, is not considered as one of the main aims pursued by restorative justice. However, practice has repeatedly demonstrated a reduction of recidivism and crime rates following to the adoption of restorative instruments. Does a relationship between restorative justice and rehabilitation of offenders exist? In the last twenty years restorative justice advocates have been rather reluctant to investigate such a relationship; the increasing attention paid by restorative scholars to the role and rights of victims in these processes had as a consequence the taking of attention away from the other parties of the conflict. The fear

that restorative justice could be considered a too lenient treatment for offenders (due mainly to the scarce use of imprisonment) has also contributed to silence the discussion on a possible "restorative model of rehabilitation".

A second and connected aim of this work is analysing the existing international and regional (European) legislation in the area of restorative justice and assessing its compliance with the above-mentioned rehabilitative goal. The doctrinal debate on restorative justice, legislation and policy guidelines in this field has mainly focused on the role of victims in the procedure. Have offenders' needs adequately been addressed by restorative justice policies and legislation? Issues have also been raised about the compatibility of restorative practices with the human rights of the parties, namely with those of the accused. The risk of an infringement of defendants' legal rights is also often addressed by restorative justice opponents. Are human rights of offenders in restorative settings fully protected by the existing legislation?

In order to try to give an answer to the above-mentioned questions the thesis is organised as following. Chapter one, *"Restorative Justice: an Introduction",* gives an overview of restorative, retributive and rehabilitative theories of justice. It begins with a brief history of restorative justice, its definition and the rise of the Restorative Justice Movement in the Western world. The role that social movements such as the International Victim Movement and the Communitarian Movement had in the development of restorative justice is also touched upon. The key characteristics of restorative justice are then presented.

The second part of the Chapter is devoted to the comparison of the three above-mentioned theories of justice. Restorative justice is compared with retributive and rehabilitative justice, with a focus on the different conceptions of punishment adopted by each of them. The key features of these three conceptions are presented, and differences and similarities among them are emphasised. Finally, the last part of the Chapter deals with the implementation of restorative justice and gives an overview of the main restorative instruments applied in Europe, namely Victim-Offender Mediation, Conferencing, and Peacemaking Circles. The Chapter ends with a comparison among these three main models.

Chapter two, *"The International and European Legal Framework,"* deals with the International and European Legal Framework in the area of restorative justice. The work of three institutions is analysed, namely the Council of Europe, the United Nations and the European Union. A chronological order is followed in order to demonstrate the increasing effort put by these supranational bodies in the field. All the initiatives taken by these three bodies in the area of restorative justice are mentioned, while major attention is paid to three important documents; *Recommendation No. R(99) 19 Concerning Mediation in Penal Matters*, issued by the Council of Europe, *The UN Basic Principle on the Use of Restorative Justice,* and the European Union *Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* (Directive 29/2012/EU). An overview of the role of the European Union (the only body capable of issuing legally binding measures) in the field of criminal justice is also given, and the new powers granted by the Lisbon Treaty in the area of Freedom, Security, and Justice are analysed.

Chapter three, *"Restorative Justice and Offender's Human Rights: Complementary or Irreconcilable Paradigms?",* focuses on the relationship between restorative justice programmes and the respect of human rights of defendants. The Chapter begins with an analysis of the right to a fair trial in light of the major international and European treaties protecting it. The following subparagraphs take into account those of its components which are usually considered at stake in restorative settings, namely the right to remain silent, the *ne bis in idem* principle, and the principle of proportionality in punishment. Some other human rights concerns are then presented. The Chapter closes with an overview of convergences and divergences which exist between restorative justice and offender's human rights, and with some suggestions addressed to the main international, regional, and national legislative bodies in order to fill the legislative gaps.

Methodology

As for the methodology of research I will predominately apply a *qualitative* approach, including:

-Analysis of existing literature concerning:

- the evolution of the concept of “restorative justice”;
- scholarship and debate on the implementation of restorative justice (mainly in Western countries) and on the relationship between restorative justice programmes and formal criminal justice systems;
- the conception of punishment, according to retributive, rehabilitative, and restorative theories of justice;
- debate concerning the use of alternative forms of punishment to reduce the high rate of incarceration Western states.

-Analysis of existing legislation such as:

- International Human Rights Treaties;
- European Union Directives and Framework Decisions;
- United Nations Official Documents;
- Recommendations of the Council of Europe.

-Analysis of the Reports of the European Forum for Restorative Justice.

-Analysis of judgments of the European Court of Human Rights and the European Court of Justice.

As for *quantitative* methods I will rely on:

-Statistics comparing the rate of recidivism registered after using formal criminal proceeding and restorative justice programmes.

Chapter 1

Restorative Justice: an Introduction

I. The Rise of Restorative Justice

One of the most criticized aspects of restorative justice has been, since its origins, the lack of consensus among advocates and practitioners on both its definition and its content. The absence of a unique and comprehensive definition has long impeded the development of a single normative theory of restorative justice, while the plurality of interpretations existing among its promoters has had the result of supporting the position of its opponents, particularly of those concerned with procedural and substantive safeguards. At the end of the twentieth century two major definitions of restorative justice emerged; on the one hand the so called "Purist" branch of the Restorative Justice Movement used to look at this new form of making justice as "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future".[1] On the other hand a second, "Maximalist", approach, more outcome-oriented than the first, appeared. It focused on the restorative solution, on the consequences of the process, leaving the communicative interaction between the parties on the background. In 1999 Bazemore and Walgrave qualified as restorative justice "every action that is primarily oriented towards doing justice by repairing the harm that has been caused by a crime".[2] This second definition is, indeed, more respondent to the purpose of this Chapter, which focuses on the impact that restorative justice practices have in the process of offenders' rehabilitation, paying more attention to the outcome than to the process itself. Dealing with the relationship between restorative justice and human rights of offenders, in Chapter 3, the "purist" definition, will instead come in handy, in order to better understand which role do procedural safeguards play in restorative processes. Far from being a stiff core of substantive and procedural rules, restorative justice should better be identified as an "umbrella", referring to a countless number of practices, to be used in

1 Marshall, 1999, p. 5.
2 Bazemore and Walgrave, 1999, p. 48.

many and diverse contexts, capable of taking different shapes in order to adapt both to the participants and to the circumstances of the case.

Despite the skepticism that surrounds some of the measures used by it, restorative justice has been for long the dominant model of criminal justice; Arab, Greek, Roman and Germanic civilizations used restorative approaches to all kind of crimes, even the most serious ones. Acephalous societies usually preferred restorative and ritualistic responses in order to harmonize communities after crime. Only with the rise of monarchies throughout the world, crime was transformed into a matter of loyalty to the king and states acquired a central role in the process of punishing offenders and re-establishing the *status quo ante*.[3] The new rise of restorative justice in Western contemporary societies dates back to the 1970s, namely to the publication of the book "Conflict as a Property" by the Norwegian criminologist Nils Christie, in 1977. In his book Christie points out what, according to him, is a major and unjustified divergence between civil and criminal proceedings, that is to say the different role that the subjects involved in the conflict have in the settlement of the dispute. In particular, the role of victims in criminal proceedings is entirely replaced by the state, which becomes the only real stakeholder besides the offender him/herself. This loss of power by victims, should, according to him, be rectified through the use of new and different victim-oriented models of court, capable of bringing back the conflict to the original protagonists, to say in Christie's words to "return(s) conflicts to their rightful owners".[4]

It is not easy to explain the reasons for the re-birth of a Restorative Justice Movement, in a period in which the majority of criminal justice systems were turning towards a more punitive and penitentiary approach. This new idea of justice found a favorable reception among the various social and political movements engaged with the critique of the existing criminal justice system and benefited at the same time of a series of theoretical and ideological approaches as well as of a right combination of historical factors. The International Victim Movement, supported by the Civil Rights Movement and the Feminist Movement, had already started, between the 60s and the 70s, to challenge the formal criminal justice system, accused of being too much state-centered

3 Braithwaite, 1999, p. 2.
4 Christie, 1977, p. 1.

and of overlooking victims' rights and procedural safeguards in the process. Supporters of the Restorative Justice Movement and the Victim Movement shared, not only the claim for the participation of victims in the process, but also for the provision of new mechanisms of restitution and compensation, which, at least at the beginning, were seen as a sort of welfare program and only later became an instrument to enhance victims' participation in the process and to make societies responsible towards them.[5] The Victim Movement was not the only one which supported and inspired restorative justice. The idea of decentralized forms of autonomous conflict regulation that should substitute State' central administration of criminal justice, was also common to the so called Abolitionist stance. The Penal Abolitionism Movement, which spread both in Europe and in North America during the 60s and 70s, focused on the re-conceptualization of both crime and punishment, questioning in particular their "philosophical justifications and sociological explanations".[6] Moreover a common concern of Restorative and Abolitionist advocates is represented by the idea that the label "crime" is in reality to be connected to a variety of situations which have little if anything in common with each other and which therefore need a variety of different responses. Flexibility is instead lacking in the conventional criminal justice, a very much formalized and professionalized system, with little room for adaptability to the individual's needs and particularities.[7] The mentioned shortcomings of the formal criminal justice system, brought, according to abolitionists, the need for parallel systems encouraging proximity to the parties and engagement of the community, which are in line with a restorative idea of justice.

Very much linked to the community focus was at that time the so called Communitarian Movement, which started growing at the beginning of the 1970s, mainly in the United States but with repercussions at a global level. The triggering event that brought Communitarianism to gain popularity was the huge wave of reactions by many political philosophers to the book "A Theory of Justice", published by John Rawls in 1971. This new movement sought to diminish the universal character of liberal theory, while advancing new measures aimed at protecting and emphasizing minority

5 Young, 2005, p. 4.
6 Ruggiero, 2010, p. 3.
7 Ibidem, p. 4

claims. The communitarian thought was accompanied by a variety of international and national recognitions, which resulted in the introduction of numerous legislative provisions in favour of the preservation of minorities and the protection of cultural (and somewhere even legal) pluralism.[8] Countries such as Canada, the United States, Australia and New Zealand started approving statutes to the advantage of Native peoples on their territories and both the political and judicial sphere of some Western countries started turning towards a so called multicultural paradigm. It is exactly in Canada and Australia that the two first pilot restorative justice projects were established between the 70s and the 90s. The first one, in Kitchener, Ontario, was a victim-offender reconciliation program which constituted the basis for the development of the current formalized Victim-Offender Mediation. In 1991, in Wagga Wagga, Australia, the first conferencing program run by police officers was established on the model of already existing New Zealand youth conferences. These new judicial techniques shared with the Communitarian movement both the "demand for active involvement of citizens in community problem solving and skepticism about the ability of governments to resolve problems".[9] The supporters of Alternative Dispute Resolutions (ADR) moved in the same direction; that is to say, out-of-court methods of settling disputes concerned with the informalisation and de-professionalisation of justice in order both to reduce the workload of courts and tribunals, accelerating the functioning of the judicial system, and to bring justice closer to individuals.

All the above-mentioned new theories and ideologies were linked to each other by a common denominator, namely the dissatisfaction with the current criminal justice system. The critiques directed towards it were many, in particular its limited capacity of dealing with the numerous cases with which it was confronted, the insufficient possibilities for participants to take part in the process, and the high formalities of the existing systems which often caused unreasonable delays in the resolution of even petty cases. One of the most important elements which distinguished these movements (of which restorative justice was part) from the traditional justice system was the

8 See, a.o., UN GA Res 260 A (III) December 9, 1948, UN GA Res 2106 (XX) December 21, 1965.
9 Bazemore, Note 41.

conception of punishment and a less punitive idea of sentencing.[10] In order to better understand this new approach to punishment, it is useful to first analyse the framework of principles and values which characterise the restorative justice ideal.

II. Restorative Justice: Elements and Principles

Restorative Justice does not only represent a new approach to criminal justice, but also a set of principles and values aiming at reforming and transforming the whole legal system and any other settings in which it happens to be applied. The Restorative Justice Movement moves for the elimination of injustices and stigmatization through democratic means and moral precepts rooted in history.[11] Among the values taken as parameters for the evaluation of restorative justice's implementation, there are some general ones and some which can only be brought back to a specific field or context. A secondary distinction that can be made here is one between substantive elements of restorative justice, which represent, according to Braithwaite, “goals in life”, and procedural safeguards, considered as ways of behaving, in charge of protecting participant's rights, especially when a violation of freedom or any other infringement is at risk.[12]

Taking into consideration only the criminal justice field, some first “substantive” elements can be identified. The starting point for the acceptance of restorative justice is an old and shared understanding of wrongdoing, which considers crime as a “violation of people and of interpersonal relations” which creates the obligation of putting to right the wrong.[13] The major reward which is owed to restorative justice is undoubtedly that of transforming the traditional observers of the process into active protagonists (the so called re-personalisation of conflict); victims, offenders and the community that surrounds them gather together with the help of a third party in order to discuss circumstances, causes, consequences and possible responses to crime.[14] The presence of these three subjects and their engagement in the process of assessing the truth is

10 On this point see further in this Chapter.
11 Braithwaite, 2003, p. 1.
12 Ibidem, p. 8.
13 Zehr, 2002, p. 17.
14 Van Ness, p. 9.

fundamental for the success of the program. Although the need for outside authorities and professionals is sometimes felt, the participation of the direct stakeholders and of those who have been impacted by the crime is very much encouraged, in order to get to a more inclusive and consensual outcome. While victims and offenders are usually easier to identify, the meaning of the term “community” is not completely clear. According to Zehr the community of reference must be differentiated from the “society”, a broader concept which can also be touched or have concerns in the event at issue; the “community” in a narrow sense can be represented by those who have either a geographical proximity or a relational link with the parties involved in the dispute or in the criminal conduct itself.[15]

The first restorative model developed around the 70s was the so called Victim-Offender Mediation, also known as dialogue program. Even if not all the new modern restorative instruments involve the *encounter* of the parties, the bringing together of victims and perpetrators is one of the main ideas laying at the heart of restorative ideology. The meeting of the two (or sometimes of their representatives) goes beyond the simple confrontation; the interaction here is much different from the traditional exchange in front of a court and the narratives from both sides bring with them emotions that often lead to the reciprocal understanding and make an agreement possible. Communication, often neglected in traditional justice settings, plays here a fundamental role. Another important element of the restorative process, according to Van Ness, is the *amend*. Amend is very much linked to the outcome of the process, namely to the agreement concluded by the parties, and can take different forms: it goes from the simple apology, which can be accepted or rejected by the victim, to the promise of changing behavior in the future, that can have a particular importance in case of young offenders. Amend can, and normally should, reach the level of restitution, but can also go beyond, and amount to the so called “generosity", when the offender agrees on paying back more than what would be proportionate, even through different forms of compensation as, for example, free work for the victim.[16] All restorative justice programs have, as key element, and ultimate goal, the *reintegration* of victims and

15 Zehr, 2002, p. 26.
16 Van Ness, 2002, p. 4.

offenders into their communities and the removal of stigmatization suffered in the aftermath of a crime. Reintegration for both the offender and the victim requires a mixture of moral and material assistance, to heal the wounds caused by crime and also to regain respect and consideration from the part of the community. Of course in order for restorative goals and principles to be respected, the active and genuine *participation* of all the parties involved is necessary. This inclusive participation differs from the rigid and rational participation in formal criminal processes, where the strategies are predetermined by lawyers and the instruments to be used are restricted to a small number; participation is here is not merely a domain for lawyers.[17] The last key, substantive feature, of the restorative justice approach is that of *accountability*, which accompanies the whole restorative process (and constitute both a precondition and a goal), and which will be dealt with in a more detailed way later in this Chapter.

The previously mentioned second group is instead constituted by those procedural safeguards necessary in a criminal law context in order to avoid, or at least reduce, the risk of infringement of significant freedoms such as personal liberty. The first and foremost concern for restorative justice practitioners is to avoid *domination* from one or more participants on the others. This can be realised during the program both by practitioners themselves and, especially, by other stakeholders which should intervene in case any of the parties takes a predominant position in the discussion. However, in order to minimize the risks of an imbalance during the implementation of restorative instruments, some preventive measures must be taken by the organizers; depending on the kind of crime which took place, the age, sex and personality of participants, the structure of the conference, mediation or circle can be adapted and reshaped. In the case of serious crimes, of special victim's categories (especially women and children) or unusual offender's conditions, the presence of advocacy groups such as NGOs or Associations capable of *empowering* the weakest and less dominant parties can have a central role.[18] From the just mentioned principles two other procedural values can be derived, that is to say a *duty of listening* respectfully to others and the resulting *equal concern for all stakeholders,* which should naturally follow from the

17 Ibidem, p. 6.
18 Braithwaite, 2003, p. 9.

balancing of different roles and tasks, as well as of rights and duties. No favoritism should be shown towards any of the stakeholders and no restorative purpose should prevail on the others (restoration of victims rather than reintegration of offenders or community empowerment).[19] Of course, especially for what concerns punishment, some limits must be stated, capable of impeding the imposition of humiliating and degrading treatments on offenders.[20]

Beside the analysis of pure restorative principles, restorative justice scholars and practitioners have long investigated the relationship between some existing criminal justice theories, such as retribution and rehabilitation and restorative justice itself.

III. Retributive and Restorative Justice

The penal systems of many Western countries have, in the last 30 years, been exposed to two different trends; some of them have expanded the use of formal processes, increased punitivity and prison sentences; others have changed their responses to crime, following new tendencies concerned with victims' and offenders' participation; some others have, instead, tried to merge these two tendencies, increasing the average of sentences and giving at the same time more procedural rights to victims in the process.[21] Conventional justice gives centrality to State's authority and considers crime as a violation of the interest of the State more than a violation of the interest of the victim. Apart from the establishment of more or less developed rehabilitative programmes[22], States have a very limited role in the care of their citizens, and have often adopted a retributive conception of punishment emphasising its deterrent function. Those who started arguing in favor of restorative justice responses to criminal conduct, did so as a reaction towards the existing criminal justice system, considered a monolithic body, interested only in retribution (and partially in rehabilitation) and therefore incompatible with some of the objectives of the restorative justice movement.[23] Howard Zehr, in his *Changing Lenses* (1990) describes the current

19 Ibidem, p. 10.
20 See on this point Chapter 1 Paragraph 3.
21 Morris and Young, 2000, p. 11.
22 See on this point Chapter 1, Paragraph 4.
23 Barton, 2003, p. 15.

criminal justice system as "retributive justice" which "defines the state as victim, defines wrongful relationship as violation of rules, and sees the relationship between victim and offender as irrelevant".[24] In Table 1 Zehr points out the main differences between the existing retributive system and the proposed restorative one.

Table 1. Understanding of Crime[25]

Retributive lens	Restorative lens
Crime defined by violation of rules (i.e. Broken rules)	Crime defined by harm to people and relationships (i.e. Broken relationships)
Harms defined abstractly	Harms defined concretely
Crimes seen as categorically different harms from other	Crime recongnized as related to other harms and conflicts
State as victim	People and relationships as victims
State and offender seen as primary parties	Victim and offender seen as primary parties
Victims' need and rights ignored	Victims' needs and rights central
Interpersonal dimension irrelevant	Interpersonal dimension central
Conflictual nature of crime obscured	Conflictual nature of crime recognized
Wounds of offender peripheral	Wounds of offender important
Offence defined in technical legal terms	Offence understood in full context: moral, social, economic, political

Despite this alleged contrast between the two approaches to crime, scholars soon realized that such a simplistic differentiation was partially misleading and did not take into account the efforts and improvements that the existing criminal justice system had undertaken.

In order to better understand the relationship between retributive and restorative justice, their differences and possible overlapping, it is useful to retrace their origins, adaptations and salient features, focusing in particular on the conception of punishment. One of the main concerns of policymakers dealing with criminal justice is that of *social control*. Exposing offenders to the control of their families, victims and communities can actually have a positive effect on the perception of punishment as a non-punitive,

24 Zehr, 1990, p. 184.
25 Source: Zehr, 1990, p. 184.

integrative solution to crime. This form of broad and informal social control finds its roots in the above-mentioned Communitarian Movement.[26] The fact of empowering the community, including victims' and offenders' supporters, in such a manner not only has a meaning for the parties themselves, but makes groups and communities responsible over other individuals, with the effect of re-distributing powers among civil society and tightening the social network existing in a given context or geographical area. By enlarging this informal network restorative justice narrows state control, often reducing the use of imprisonment or other forms of deprivation of liberty. The building of a stable social order requires a certain degree of social control; a social infrastructure capable of both generating and supervising sanctions, and of building both material and moral bounds, is needed separate from the government.

Offender's *accountability* is another main goal chased by restorative justice. However, the process of accountability is not always an easy task for offenders, who are confronted with victims or victim's supporters and risk being subject to shame and stigmatization. The use of a shaming process which is not oriented to reintegration can be very dangerous and inflict more harm than the traditional prison sentence; for that reason the acceptance of responsibility by the offender, and the will to make amends and repair the damage caused (having of course regard to the personal and economic conditions of the accused), must be guided through a process of so called “re-integrative shaming”.[27] Re-integrative shaming is defined by Braithwaite as a technique through which “expressions of community disapproval.. are followed by gestures of re-acceptance into the community of law-abiding citizens”.[28] The shaming alone usually creates stigmatization and gives rise to a social outcast; in order to prevent this unwanted result, the initial phase of acceptance of responsibility in front of the community must be followed by a ritual of re-acceptance; in this way it is the wrongful behavior to be stigmatized, not the individual him/herself.

These basic assumptions of restorative justice influence the discourse on *punishment*, broadening the gap between a retributive and a restorative conception of it. The concept of retribution has its origins in the so called *Lex Talionis*. Punishment is

26 Roach, p. 260.
27 See in general Braithwaite, 1989.
28 Ibidem, p. 54.

imposed on wrongdoers because they deserve it, as a sort of pay-back for what they have done (from the latin verb *retribuo= pay back)*.[29] This backward-looking conception of retribution finds its origins in the Enlightment, in Hegel's "negation of negation" and in Kant's view of punishment as a "categorical imperative". According to the latter, it would be immoral and disrespectful not to punish wrongs and any deviation from this principle of retribution should be considered as a public violation of justice. The idea of punishment as a compensation for the wrongdoing was later emphasised by Kelsen, through the principle of causality between human action and punishment itself, which stressed the rule of proportionality. However, as Roche points out, the way in which restorative justice practitioners use the term "retributive justice" does not only refer to the theory of punishment itself, but suggests instead a system for delivering punishment, in a retaliatory, desert-based perspective, with all the faults and shortcomings that follow.[30] If we look at crime through retributive lenses this will automatically appear as "a violation of the state, defined by lawbreaking and guilt" and justice will be understood as the determination of blame and administration of pain in a relationship between state and offender. Crime creates moral debts and punishment, inflicted through rigid rules and procedures, is used in order to counterbalance the rupture caused by the offender.[31] Despite the lack of any optimistic results on the deterrent value of incarceration, this desert-based punitive tradition has maintained a dominant influence on criminal justice policies, being the concern of retributivists around restorative justice (too much future oriented and less focused on the seriousness of the offence itself) that of losing the proportionality criteria.

The ethical foundation of punishment itself is the need for enforcing norm transgression through the infliction of pain, in a system which considers the legal and moral order coincident.[32] The need for stressing community disapproval and denounce crime through punitive and burdensome measures has long discouraged and obstructed the adoption of rehabilitative measures, often perceived as too lenient and favorable for

29 Barton, 2003, p. 17.
30 Roche, 2007, p. 78.
31 Zehr 1990, p. 74 and 181.
32 Walgrave, 2004, p. 52.

offenders.[33] Retributivism does not look at the effects and consequences that punishment has on offenders, being retrospective and focused, as already mentioned, on assuring proportionality for the wrong committed. Despite the disagreement existing among restorative justice advocates, there is a consensus on the interpretation of it as a new "lens" through which crime and justice are looked at.[34]

On its rise this new paradigm was developed as an alternative to the existing criminal justice system on the basis that none of its alleged goals was actually able to justify punishment, while restitution could and should become its main purpose. Restorative justice understands crime as a "violation of people and relationships" and justice as a way of healing and restoring these relations. By shifting the harm from the State to the victim and by trying to bring back the victim to the pre-crime status, the position of the offender is also shifted, from the simple acceptance of a pre-determined state-imposed sanction, to "understanding and acknowledging the harm and taking steps to make things right".[35] A key feature of restorative justice is therefore the rejection of punishment as a way of inflicting pain on offenders. The punitive response is considered by many restorative justice advocates "unacceptable and ineffective"[36]; they do not deny the painful experiences to which offenders are exposed during restorative processes, but consider the perspective of those who inflict punishment essential in order to characterize it as such. The question of restorative justice being an alternative to punishment or simply an alternative form of punishment has instigated a lively debate among scholars. Some of them[37] consider restorative instruments and procedures non classifiable as punishments, being "the intentional obligation to make up ethically superior to the intentional infliction of pain".[38] But what does "deliberate infliction of pain" mean? The approach of the mentioned scholars seems to rely on a very narrow definition of it; however in this reasoning the perception that offender has of the punishment itself, as well as the empirical consequences that it is likely to produce, are completely left out from the discourse.

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33 Zernova, 2007, quoting Bazemore, 1998, p. 3.
34 See in general Zehr, 1990.
35 Zehr, 1990, p. 201.
36 Wright, 1996, p. 27.
37 See a.o. Wright and Walgrave.
38 Walgrave, 2003, p. 64.

In general there are two ways in which the term retribution can be interpreted and compared to restoration: retribution as a "justification for punishment" (which results in proportion to the harm caused) and retribution as a specific "form of punishment" (a painful way of punishing usually identified with imprisonment).[39] To what concerns the first meaning, restorative justice advocates do not agree on the place that proportionality has or should have in restorative processes. Some authors[40] take proportionality away from restorative ideals, worried that such a criteria could endanger the flexibility and the individual character of restorative justice itself. Some others[41], instead, recognise a role to proportionality in the restorative process and focus on the second issue, the one regarding punishment and the different forms it can take.

Since its beginning, the restorative philosophy stood against the idea of punishing offenders, being instead closer to a "treatment" response[42] and to the idea of guiding, correcting, educating or instructing offenders.[43] The custom of considering punishment just like imprisonment and classifying other non-custodial or reparative sanctions as non-punitive ones (widening in this way the gap between retributive and restorative justice) has been however, criticised by many. Retribution (in the sense of proportionality and censuring of wrong behavior) is not and should not be the only goal pursued by a criminal justice system. Deterrence, correction, rehabilitation and here especially restoration (the so called consequentialist justifications of punishment[44]), should also be taken into account. This is the reason why, to tell it in the words of Kent Roach "we need pure theories of justice to inspire us, but the real world is one of partial theories and compromises".[45] Restorative justice should therefore be considered as a partial (and not pure) theory of justice, capable of being reconciled and merged with retribution and other consequentialist approaches.

To begin with, the idea brought forward by certain restorative scholars, that the concept of punishment in the actual criminal justice system only responds to retributive

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39 Daly, 2000, p. 37.
40 See a.o. Braithwaite and Petitt.
41 See a.o. Lode Walgrave, Ivo Aertsen and Daniel Van Ness.
42 See next paragraph for a discussion on the relationship between restorative justice and rehabilitative justice.
43 Daly, 2000, p. 38.
44 Barton 2003, p. 17, quoting Walgrave, 1995.
45 Roach, p. 258.

needs, is not entirely true. The just desert is not often mentioned by sentencing judges, who, especially in the last decade, use instead deterrence (so public safety), rehabilitation and correction of offenders as major justifications for convictions.[46] Although the original idea of restorative justice relied to a large degree on an alleged contrast between restorative and retributive ideals, in the last few years this sharp conflict has been reshaped. It has in fact been suggested that an approach combining restorative values with retributive (and rehabilitative ones), could actually have the advantage of bringing restorative justice closer to the formal criminal system, clearing some of the doubts surrounding such an informal (and therefore hardly verifiable) way of doing justice. To keep the focus on punishment, as suggested by Duff, reparative (restorative) justice should be seen as containing “alternative punishments rather than as an alternative to punishment”.[47] Duff's work on the relationship between punishment and restorative justice is an attempt of merging a conception of it as a desert-based censure and a consequentialist understanding of it. According to the author the ideal punishment should have three main features; it should be communicative, not merely expressive, because it should be able of functioning as a bridge between offenders on the one side and victims and communities on the other; it should be retributive, intended as proportionate to what s/he deserves for the crime committed. At the same time, even being retributive it should look forward, in a restorative and re-integrative perspective, but also in a rehabilitative one. These goals are in fact not distinct from punishment, but are themselves goals that punishment should pursue.[48] What Duff describes as “restoration through retribution” is the idea that “offenders should suffer retribution, punishment, for their crimes: but the essential purpose of such punishment should be to achieve restoration”.[49] Duff like many other restorative advocates believes that reparation, reconciliation and restoration are aims that a criminal justice system should pursue, and that deterrence and suffering for the offender should not be primary goals to be achieved through punishment. The existing criminal procedures and sentencing techniques are not in line with the mentioned goals; however this does not mean that

46 Barton, 2003, p. 18.
47 Daly, 2000, p. 40, quoting Duff, 1992.
48 Ibidem, p. 42.
49 Duff, 2002, p. 82.

punishment itself constitutes a wrong response to crime. It is the responsibility of the state (and the community) to bring criminals to justice and to punish them to the extent they deserve; restorative punishment is not incompatible with retributive aims, while at the same time punitive retribution can, if conveyed through the right channels, also achieve restoration.[50] The process the offender should undertake starts with being confronted with his/her wrongdoing, recognising it, apologizing and finally making reparations; both the censuring of his/her behavior by the community and the repentance are painful paths, inborn in the restorative process, which can easily be identified as (different) forms of punishment.

Both restorative and retributivist advocates should therefore stop putting retribution and restoration in contrasts; retributive, restorative and rehabilitative principles[51] are intertwined and could work together in order to given to offenders a broader space to explain crime's dynamics and to victims the possibility of taking part in the determination of the sentence. It is therefore the process, more than the sanction, that distinguishes restorative (informal) justice from retributive (formal) one, a process in which punishment should keep its role and help making restoration possible.[52] It is not about questioning the use of punishment, but about to render it more humane.

IV. Rehabilitative and Restorative Justice

The criticism addressed by restorative justice advocates towards the formal criminal system touches upon all its parts, including its rehabilitative components. The criminal justice system aims in fact at reducing recidivism by a combination of retributive punishment and rehabilitative instruments. The treatment programs provided to offenders are highly personalised, depending on the individual level of risk and criminogenic needs. Reducing offending is, instead, rarely identified as a goal for restorative justice; however, even if often ignored by theorists and scholars, empirical studies on restorative programmes demonstrate their attitude to reduce recidivism.[53] The

50 Ibidem.
51 See next paragraph for a discussion on the relationship between restorative justice and rehabilitative justice.
52 Daly, 2000, p. 48.
53 Ward & Langlands, 2009, p. 206.

reason for such a reluctance in including rehabilitation among restorative goals is partially due to the fear that demonstrating too much care towards offenders, would risk overlooking at victims' and communities' needs. Some scholars have, however, pointed out the proximity and similarities between the two theories of justice and encouraged a combined use of the two.

The two most common rehabilitative models used by the criminal justice system are the so called Risk-Need-Responsitivity Model (RNR Model) and the Good Lives Model.[54] The first one is probably the most utilised model in correctional domains and is based on the individuation and monitoring of an offender's risk factors, in order to detect the degree of threat for the surrounding community and try to reduce this risk factors. Three are the underlying principles of the mentioned correctional technique: risk, need, and responsitivity. The first of these principles, the risk, suggests that correctional responses to offenders should be determined according to the “level of risk they pose to society”; the second, the need, focuses instead on the detection of criminogenic needs which are normally related to criminal conducts; finally, the responsitivity principle makes sure that the chosen treatment is actually tailored on the personal characteristics of the accused, in order for the treatment itself to be better understandable and to give better results.[55]

Despite the large use made of this model by the criminal justice system, some critiques have arisen, which have contributed to underline the distance between the RNR Model and the restorative paradigm. The RNR is in fact accused of being too narrow and of failing to adopt a positive, constructive approach; human goods, such as experiences or activities usually connected with well-being and personal satisfaction, should be further emphasised. One of the first expectations of individuals undertaking a rehabilitative path is that of a better life; some positive rewards brought by crime desistance must be presented to them and these rewards depend of course on their personal characteristics and capacities, and must be capable of going so far as to envision a better future without crime.[56]

Better respondent to this need is the second referred rehabilitative model, the so

54 Ibidem, p. 207.
55 Ward & Langlands, 2009, p. 207, quoting Andrews & Bonta, 2003.
56 Ward & Maruna, 2007, p. 22.

called Good Lives Model (GLM). This approach is more focused on the achievement of personal goals, giving importance to individual values and bringing to the offenders the necessary internal (competencies) and external (opportunities) conditions to orient the correctional plans towards the predetermined goals. Primary goods, such as emotional equilibrium, physical health and mastery, increase self-esteem and happiness, while secondary goods are the means used in order to achieve primary ones. The latter are usually the most problematic ones, being offenders often in lack of the skills, values and resources necessary to pursue a different kind of life. By focusing on offenders' primary goods and trying to equip him/her with the capabilities needed to achieve them, the GLM appears as a more inclusive approach to rehabilitation, close to the re-integrative ideal of restorative justice.[57]

Restorative advocates' approach to rehabilitation has indeed always been very controversial. On the one side stand those scholars who minimize the importance of rehabilitation, affirming the superiority of restorative justice in reducing recidivism. Once again, concerns about the rehabilitative model being too much focused on offenders and too lenient towards them, as failing to hold them accountable, brought theorists to label it as a soft response, insufficient to address victims' and communities' needs. However, not all restorative advocates share this position; some authors recognize the coincidence of many restorative values with rehabilitative ones; making amends, encounter, inclusion, and re-integration can be seen as goals for both restorative and rehabilitative practices.[58] Moreover the idea that the restorative process is a zero-sum-game is an outdated and wrong conception of it. The possibility for victims' and offenders' needs to co-exist is actually concrete; steps forward by the offender (such as the promise of abstaining from committing other crimes in the future) can and often do have beneficial effects for victims.[59] Some scholars[60] and practitioners get to the point of considering restorative justice more effective than rehabilitative justice at reducing re-offending, taking both statistics and offenders' personal experiences as a proof of this alleged superiority.

57 Ibidem.
58 Ward & Langlands, 2009, p. 209.
59 Robinson & Shapland, 2008, p. 340.
60 See a.o. Gerry Johnstone , Kathleen Daly, Declan Roche and Margarita Zernova.

That being said, the only attempt to merge rehabilitative and restorative justice theories has been that of Bazemore and O' Brian, known as "relational rehabilitation". According to the authors in spite of the fact that restorative justice remains a victims' oriented approach primarily aimed at reparation and not at offender's rehabilitation, it can in many cases lead to such an outcome.[61] The idealized "restorative model of rehabilitation" should embrace a collective idea of reintegration, aimed at rebuilding damaged relationships, and should present four essential features. First of all the theorized model should be a "naturalistic approach", involving informal support and social control, emphasising community participation in offender's transformation and discouraging professionals' intervention. Second, unlike pure rehabilitative models, this mixed approach should not be offender-focused, but instead involve all the relevant stakeholders of the typical restorative process (victims, offenders and communities). The need for de-compartmentalizing justice functions is another important component of the proposed restorative-rehabilitative model. Finally, very much linked to the already mentioned "naturalistic approach", is the attention paid to the community level, understood as neighborhood level, in the form of social support and social control, to stress the difference between a rehabilitative idea of offender's "reparation" and a more comprehensive attempt of restoring relationships (and community) as a whole.[62] Therefore, as stated later by Bazemore and Bell[63], three are the principles of restorative justice capable of improving the effectiveness of rehabilitative treatment while increasing reintegration of offenders: the principle of repair, the principle of stakeholder participation and the principle of transformation of community's and government's roles and relationships (both by modifying the role of criminal justice professionals and by increasing the capacity of citizens and community groups of participating and monitoring the whole proceeding).

The advantage of such an approach would be, on the one hand that of increasing victims' and offenders' satisfaction, while on the other that of significantly reducing recidivism.[64] However some scholars remain skeptical about the idea of merging the

61 Bazemore & O' Brien, 2002, p. 32.
62 Ibidem, p. 33-34.
63 Bazemore & Bell, 2004, p. 121.
64 Ward & Langlands, 2009, p. 211, quoting Latimer & Dowden, 2005.

two models of justice at issue. According to Ward and Langlands assimilation would not help the efficiency of the two systems, but would instead increase the gap existing between the two. The most suitable solution, they suggest, is a coordinated approach capable of putting rehabilitation and restoration on the same level, giving them the same weight on an overall evaluation.[65] An example of a rehabilitation model which should well fit within restorative justice premises is the already mentioned Good Lives Model. "The ethical theory at the heart of the GLM is rooted in human rights principles and the obligation of all human beings to respect the inherent dignity of others"[66] and this mutual respect helps offenders understanding that self-interest and community integration are strictly connected to each-others. GLM and restorative justice are therefore seen as "complementary but distinct"; the first one aims at promoting reintegration of offenders by providing them with the necessary internal and external resources, while restorative practices brings reparation and inclusion into the program.

The term *restoration* acquires here two distinct meanings: restoration of offenders (rehabilitative) and restoration within the community (restorative), two complementary but different concepts. The authors suggest then that besides compensatory actions the offenders be offered correctional programs in order to increase their skills and capabilities of living in a community.[67] As it will be clear from the next paragraph, empirical data and evidence-based guidelines also contribute to shrink the alleged distance existing between restorative justice and the formal criminal justice system.

V. The Implementation of Restorative Justice

The principles and values described in paragraph 2 are implemented in different ways depending on the restorative practice model used. Three are the main referential models: mediation, conferencing and peacemaking/sentencing circle; however no unitary version of them exists, but lots of variants have developed through practice.

65 Ibidem.
66 Ibidem, p. 212.
67 Ibidem, p. 213.

A. Victim-Offender Mediation

Since the rise of restorative justice in the 70s, Victim-Offender Mediation (VOM) represented the most important restorative practice at a global level, especially in Europe. VOM consists of a meeting between victim and offender facilitated by a trained mediator. With the assistance of the mediator, victim and offender begin to resolve the conflict and to construct their own approach to achieve justice in the face of their particular crime.[68] The Mediator (one or even more than one) can be seen as a neutral and impartial third person responsible for creating the space for a constructive dialogue between the parties, and capable of removing them from their respective disempowered/powered positions. One of the most important characteristic of Mediation is the consensual nature of it; the parties must themselves agree both on the use and on the terms of the agreement itself, without any imposition from the part of the mediator. The main general goal of the agreement is the reparation of the harm (both the material and the emotional one) caused by the offence and the development of a strategy requiring obligations for the offender aimed at preventing future re-offending. The encounter of victim and offender in a neutral and safe environment enhance the dialogue between them. With the assistance of the mediator the parties are able to share their views of the crime and of the consequences this has caused in their lives; they can both make suggestions to what concerns restorative actions to be taken or possible rehabilitative or re-integrative initiatives the offender should take part in.[69]

According to Bazemore and Umbreit, the main specific goals of mediation are three:

> "Supporting the healing process of victims by providing a safe, controlled setting for them to meet and speak with offenders on a strictly voluntary basis; allowing offenders to learn about the impact of their crimes on the victims, and take direct responsibility for their behaviour; providing an opportunity for the victim and the offender to develop a mutually acceptable

68 Van Ness and Strong, 1997, p 69.

69 Developing alternative understandings of security and justice through restorative justice approaches in intercultural settings within democratic societies-Deliverable 3.1 Report on Restorative Justice models, 2013, available at http://www.alternativeproject.eu/assets/upload/Deliverable_3.1_Report_on_RJ_models.pdf, p. 21 and 16 (From now Deliverable 3.1 Report on Restorative Justice models, 2013).

plan that addresses the harm caused by the crime".[70]

Of course the achievement of one or more of these goals largely depends on the way mediation is implemented. The crucial difference which gives rise to different kinds of VOM is whether or not victim and offender physically meet each other. The so called "Indirect Mediation" takes place when victim and offender decide not to meet each other; the communication is driven through different channels, such as videos, letters or reported speeches. In this case the role of the mediator is of course an essential one, being s/he able to influence the parties presenting the message in a certain way. Even if the indirect mediation can appear a distort version of VOM, it is actually very useful in cases in which the physical encounter between victim and offender risks undermining the already weak position of one of the two (especially in case of sexual abuse or domestic violence where the victim would be further harmed or humiliated by a face-to-face with the offender).[71] In all other cases, the two parties involved in the conflict (crime) are invited to meet each other at the presence of a mediator and, possibly, some support persons that can include family members, lawyers, or people maintaining with the parties any kind of relationship; none of them is allowed to intervene in the discussion, but can only be present as auditor. Given the delicate character of the instrument and the higher risks to which the parties are exposed, this type of mediation is usually preceded by meetings and communications, having the function of organising the encounter and preparing psychologically and emotionally the subjects.[72]

In 2000, the American mediator Zena Zumeta[73] classified those that according to her were the main existing approaches used in mediation. The so called "Facilitative Mediation" is the first and most common type which developed already in the 1960s/1970s and therefore presents a more defined and detailed structure. This model of mediation is probably the most neutral one. Parties who are normally present at the meeting are not influenced or recommended by the facilitator (mediator) who is only in charge of informing them and guiding the process and is not required to have any special expertise in the topic. A second approach, the "Evaluative mediation", is closest

70 Bazemore & Umbreit, 2001, p. 3.
71 Deliverable 3.1 Report on Restorative Justice models, 2013, p. 17.
72 Ibidem.
73 Zumeta, 2000.

to a formal proceeding; this kind of mediation was born as a court-referred mediation, therefore, it often involves formal professionals, such as attorneys or experts playing a much more decisive role as third parties. The goal of this model is that of reaching an outcome being as similar as possible to what a formal court would have established, with special attention paid to the procedural rights of the parties. Finally, a third and newest approach is the so called "Transformative" one based on the Empowerment model which takes into account the needs and points of view of the parties and aims at transforming both the victim and the offender and through them the whole society.[74]

Despite the variety of styles and approaches, VOM usually presents some general procedural features which distinguish it from other existing restorative instruments. The triggering factor which determines the beginning of a mediation process is the so called "referral" which can come either from a formal agency or from one of the parties involved in the conflict. Pursuant to the referral, the preparatory phase begins; during this phase the mediator explains separately to the parties both the goals and the structure of mediation itself, giving them also the possibility of consenting to the instrument and of telling their version of the story and their perceptions about it. Then, as mentioned before, the choice between direct and indirect mediation has to be made. In the first case the parties are invited to sit together in a neutral place and after an agreement on the rules which will govern the process they are given time to explain their points of view. Only after that, the real phase of communication between them starts, and an attempt of building at least a partial consensus on what has happened is made; here the issue of restoration arises and parties are asked to advance some proposals on the steps to take in order to find an agreement capable of being "SMART", that is to say specific, measurable, agreed, realistic and time-framed. The follow-up phase is totally concerned with the fulfillment of the agreement, in which the mediator can or cannot play a role.[75]

74 Ibidem, p. 1-2.
75 Deliverable 3.1 Report on Restorative Justice models, 2013 p. 20.

B. Conferencing

Restorative Justice Conferencing emerged in Europe much later than mediation and is currently used mainly for cases involving youth offenders in countries such as Belgium, the Netherlands, Great Britain, Ireland and Norway. It has its origins in Australian and especially New Zealand aboriginal traditions which contemplate the involvement of families and communities in the decision-making process. Despite the existence of different types of conferencing, the European Form for Restorative Justice (EFRJ) has recently adopted a common definition which identifies the core features that characterise this instrument and distinguish it from other restorative techniques. According to the EFRJ:

> “...conferencing is a restorative justice process which, with the help of a facilitator, brings together the victim(s) of a crime (directly or not), the offender(s) and their support persons, who may include family members and friends. In a conference a number of other persons may participate such as a police officer, a lawyer, a community worker, or a social worker. They come together in order to find an acceptable resolution for all parties to the above mentioned crime.”[76]

In 2001, Bazemore and Umbreit have stated three main goals that restorative conferencing should and actually does pursue, objective which are very similar to those chased by VOM. Conferencing provides an opportunity for the victim to be involved in the discussion on what has happened and on the sanctions to be applied; it increases the awareness of the impact of his/her actions; facilitate the shaping of offender's future behaviour by engaging his/her supporters in the discussion and monitoring of the follow-up phase. [77]

Two are the main conferencing models currently used in criminal settings: the Family Group Conferencing (FGC) and the Police-Led Conferencing Model. The so called FGC emerged in New Zealand in 1989 in order to respond to the over-representation of young Maori in the criminal justice system and had four main goals: enhance the participation of those affected by the offence in the determination of an appropriate response; reaching a decision in a meeting led by a facilitator; holding

76 Ibidem, p. 23, quoting Zinsstag.
77 Bazemore & Umbreit, 2001, p. 5.

offenders accountable for their wrongdoing; and taking victims' needs into account.[78] The main characteristic that differentiates this type of conferencing from other restorative techniques is the involvement of state's representatives. Police officers and/or other practitioners from the formal criminal justice system (e.g. lawyers) are invited to take part in the proceeding in order to ensure the correct implementation of the instrument, and to underline the state's interest in the settlement of the dispute. Moreover in certain countries, such as New Zealand, this instrument is formally integrated in court-proceedings.[79] The preparatory phase is usually similar to that of VOM, with the facilitator (usually an employee of the Department of Social Welfare) contacting the victim, the offender, and the other parties and explaining to them how the conferencing will develop. The conferencing itself starts with the police officer (as representative of the society) reading the facts. After the reading the parties may accept the police officer's version and intervene in order to give their point of view on the event, in terms of emotional and physical consequences of it or, on the contrary, oppose it and ask for a referral to a court. If the conferencing is able to go on, the so called restorative phase starts.[80] A discussion involving the understanding of the harm caused by the crime, and in some cases the apology by the offender take place; this can be followed by some "private time" during which the offender and his/her supporters alone try to find possible solutions to the crime. This solution is then presented to the victim and analysed with him/her until a common solution is found. The central role given to the offender in the proposal and determination of the solution to be adopted (which of course implies an acknowledgment of responsibility) is much more likely to lead to non-custodial forms of punishment. Material and emotional restitution, together with community-based solution (often accompanied by rehabilitative measures) will for sure be fostered, to the advantage of both the victim, the offender, and the community.[81]

The second type of conferencing, the so called Police-Led Conferencing, finds its origins in the southern Australian model established by the police in Wagga Wagga in the early 1990s, only later exported in Europe, especially in Norway and the UK. The

78 Zinsstag & Teunkens, 2011, p. 53.
79 Deliverable 3.1 Report on Restorative Justice models, 2013, p. 25.
80 Zinsstag & Teunkens, 2011, p. 55.
81 Ibidem, p. 56.

main difference with the previous described model is the department of coordination; the organisation of this second form of conferencing is in fact left to the Police Department (instead of the Department of Social Welfare), which is also the first contact for the (often young) offenders. Other variances can be found in the conferencing process. The conference itself is much more structured (including questions and positions of the parties); offenders and their supporters are obliged to speak first, as the focus in this precise instrument is more on them and less on victims; no "private time" is granted to the parties and their family or friends; facilitators (namely police-officers) are not neutral but participate actively often influencing the parties. Both these models of conferencing are based on the above-mentioned theory of "re-integrative shaming", developed by the Australian criminologist John Braithwaite in 1989. A comparative study, conducted by the Australian National University, named "Reintegrative Shaming Experiment" demonstrated the effectiveness of restorative conferencing in reducing re-offending. Similar surveys have been recently conducted on a global scale; the majority of European countries or provinces implementing restorative justice have given similar results.[82]

C. Peacemaking Circles

The third and absolutely most recent restorative justice instruments introduced in Europe are the so called Peacemaking circle, also known as Sentencing Circle, as they are often used, especially in North America, in order to develop a sentence scheme, followed by judicial approval. The content of this agreement normally contains the obligation for the offender to undertake a personal development and desist from re-offending (together with some other forms of punishment usually supervised and monitored by the community of support). Peacemaking circles started to be systematically applied in Canada and then in the United States in the 1990s, and took their origins from Native cultures, which often use talking circles to orally judge some types of crime. Since the 1980s Canadian First Nation People and formal justice agencies have signed agreements to apply Sentencing Circles inside the Native

82 Ibidem, p. 59 & following; Deliverable 3.1 Report on Restorative Justice models, 2013, p. 26.

communities in order to reduce the high representation of Natives in prisons, especially for crimes linked to sexual abuses, theft and drug's or alcohol's consumption. In the last decade Peacemaking circles began to be adopted in Europe not only in common law countries, where the sentence itself can be influenced by the outcome of the circle, but also in civil law systems (see, among others, Germany, Belgium and Hungary), where the influence that instruments other than judge's discretionary power and strict normative provision have little room in the determination of the sentence.[83]

This instruments incorporate some of the elements already present in VOM and Restorative Conferencing; community participation, face-to face interaction between victim and offender, and involvement of parties' families and friends as a support and monitoring body.[84] According to Pranis, five are the elements that characterize a Peacemaking Circle as such.[85] First of all the ceremony which includes reading, listening to music or to a prayer, opens and closes the process and gives a time frame to the circle. A series of guidelines and values are set up directly by the participants on an *ad hoc* basis, and differ, therefore, from circle to circle; however, there is a certain number of values that lay at the basis of the idea of a circle itself and cannot be left out of the process. The *respect* for the other participants and a certain *empathy* towards them makes the smooth development of the process possible; listening to other participants and taking into serious consideration the content of their speeches, without interrupting them or leaving, is fundamental (even if not sufficient) in order to ensure the equality among the people involved, and the successful outcome of the Peacemaking Circle. All this requires that each individual challenges his/her own assumptions and points of view on the facts, and undertakes a *humble* attitude in regards of the others. *Inclusivity* is another core principles which must be favoured by the circle-keeper with the help of the so called talking piece.[86] To conclude, *honesty*, in terms of speaking from the heart, and *trust*, which keeps confidentiality on what happens in the Circle, facilitate the dialogue and encourage people to tell the truth and be as complete as possible.[87] The

83 Coates, Umbreit & Vos, 2003, p. 1; Deliverable 3.1 Report on Restorative Justice models, 2013, p. 30.
84 Coates, Umbreit, & Vos, 2003, p. 1-2.
85 Pranis, 2005, p. 33-37 and 12-13.
86 See infra in this Paragraph.
87 Pranis *et al.*, 2003.

above mentioned “talking peace” enables those who hold it in their hand to speak, and oblige the others to listen respectfully; the use of an object as a regulator of speech ensures to all equal opportunities to intervene, and prevents other participants from interrupting the person who is speaking. The presence of a circle keeper helps monitoring the respect of guidelines and values (without enforcing them); the difference with the previous mentioned restorative instruments is that the circle keeper is not neutral (as it is in the case of Mediation or Conferencing), but is actually able of interacting with and even influencing the participants. Finally, decisions are made by consensus, in terms of participation and agreement of everybody in the final solution; of course there cannot be a complete convergence on all the conditions put in the agreement, but in order to strengthen the democratic character of the circle it is necessary that everybody be able to “live with it and support its implementation”.[88]

To sum up, the main feature capable of distinguishing this restorative instrument from Victim-Offender Mediation and Conferencing, is the broad character of the circle, which is not strictly limited to the parties directly involved in the crime, but takes instead into consideration secondary victims, states and communities and gives them larger chances of intervening in the settling of the dispute. This is made through the participation of anybody who has an interest in the resolution of the case, being it a representative of the state judicial system (lawyer, judge, prosecutor, police officer, etc.), a normal citizen or a neighbour, both in the decision and in the follow-up of the agreement, especially when community-based sanctions are provided for the offenders. This involvement contributes to create an informal net, representing an alternative form of social control, capable, in certain cases, of preventing or at least reducing future offending. In Table 2 a schematic comparison of the three presented model is provided.

Table 2. Comparison of Mediation, Conferencing and Peacemaking Circles[89]

	Mediation	**Conferencing**	**Peacemaking circles**
Facilitator	Mediator.	Facilitator (in some models police officers, called coordinators).	Circle keeper (usually two).

88 Pranis *et al.*, 2005, p. 33-37 and 12-13.
89 Source: Deliverable 3.1 Report on Restorative Justice models, 2013, p. 40

	Mediation	Conferencing	Peacemaking Circles
Role of the Facilitator	Impartial and neutral, sets the rules and creates structure.	Impartial and neutral, sets the rules and creates structure.	Impartial but not neutral.
Participants	Mediator, victim, offender are standard participants. Parents of minors are often involved. Others occasionally present but not always involved in the dialogue.	Facilitator identifies key participants. Close kin of victim and offender invited. Police, social services, or other support persons also invited. Broader community not encouraged to participate.	Judge, prosecutor, defence counsel participate in serious cases. Victim(s), offender(s), service providers, support group present. Open to entire community
Process and Protocols	Usually the victim speaks first. Mediator facilitates but encourages victim and offender to speak, does not adhere to script. Consensus decision-making.	Australian Wagga Wagga model: facilitator follows script in which offender speaks first, then victim and others. New Zealand: model not scripted, usually the offender speaks first, allows consensus decision-making after private meeting of family members.	Keeper opens session and allows for comments from judge. Prosecutors and defence present legal facts of case (for more serious crimes). All participants allowed to speak when "talking piece" (e.g. feather or stick) is passed to them. Consensus decision making.
Preparation	Face-to-face or phone call/letter preparation with victim and offender to explain process.	Phone, letter or face-to-face contact with all parties to encourage participation and explain process. New Zealand model requires face-to-face visits with offender, offender"s family, and victim.	Extensive work with offender and victim prior to circle. Invitation and preparation of community members. Explain process and rules of circle.
Who sets the rules	Mediator – participants have to agree.	Facilitator – participants have to agree.	By consensus of the circle participants.

	Mediation	**Conferencing**	**Peacemaking Circles**
How the Dialogue is Managed	Mediator manages with open ended questions.	Facilitator manages, in some models following a script of questions.	After keeper initiates, dialog managed by process of passing talking piece.
Understanding of the conflict in general	Interpersonal.	Interpersonal with affected family and community members.	Community issue.
Primary outcome(s) sought	Allow victim to relay impact of crime to offender, express feelings and needs; victim satisfied with process; offender has increased awareness of harm, gains empathy with victim; agreement on reparative plan.	Clarify facts of case. Denounce crime while affirming and supporting offender; restore victim loss; encourage offender reintegration. Focus on "deed not need" (i.e. on offense and harm done, not offender"s needs). Some emphasis on collective accountability.	Increase community strength and capacity to resolve disputes and prevent crime; develop reparative and rehabilitative plan; address victim concerns and public safety issues; assign victim and offender support group responsibilities and identify resources.
Other aspects		- Some models give time for the offender and his/her family for private discussion. - In some models an informal refreshment section follows the conference.	Community members are not present as supporters – they can either support any sides (balancing role) or give a voice to the community implications of the issue.

	Mediation	**Conferencing**	**Peacemaking Circles**
Elements of particular importance for intercultural settings	Intense dialogue between a few people; safe environment; confidentiality strictly respected.	Active role of extended family and community of care; support by social services, schools, …; involvement of police might offer security but might also hinder communication.	Starting point: „it is *our* problem", fundamentally a community approach; initiated by a search for common values (and differences); presence of public prosecutor/judge a strength or a weakness.

VI. Conclusions

Despite the existence of common features and guiding principles in the field of restorative justice there seems to be a great variety in the way of implementing them. In the last few decades, the informal character which has distinguished since its origins the restorative approach to justice has been tempered by the attempts of international, regional, and national bodies of codifying these procedures in order to bring them closer to the criminal justice system. This has contributed to make the restorative process less distant from the formal criminal procedure and its funding principles closer to the typical retributive and rehabilitative paradigms. In the next Chapter these attempts of coordinating, if not assimilating the two systems, will be analysed, with particular emphasis on the work done in the field by the United Nations, the Council of Europe, and the European Union.

Chapter 2
The International and European Legal Framework

I. Introduction

As already mentioned in Chapter 1, the majority of the current restorative justice programmes have their origins in Australian, New Zealand and North American traditions. However, between the 1980s and the 1990s, a growing number of pilot projects and legal instruments directed mainly towards young but also to adult offenders started to appear in many European countries. The most common restorative practice was, and is still now, Victim-Offender Mediation, while only recently other forms such as Conferencing and Peacemaking Circles have been shyly brought into Europe. The resistance encountered towards this new approach to justice was high; this was mainly due to the importance that criminal justice has in national judicial systems. Recognising informal or semi-formal dispute resolution mechanisms is equivalent to giving up part of state's sovereignty and brings with it dangers in terms of minimum standards of rights for the parties involved in the proceeding. The difficulties encountered had the effect of rendering the development of restorative justice in Europe very slow and fragmentary; while some countries, such as Germany, Norway, France, Austria and Belgium were, at the beginning of the 1990s, already equipped with a legislative framework promoting the referral of cases to restorative justice instruments, in many other states it took much longer to see the rise of such practices.

Despite the differences remaining among the legislation of European countries, some attempts have been made, both at international and at European level, in order to harmonize, at least partially, the use and regulation of restorative justice techniques. In this Chapter the measures adopted in this field by the United Nations (UN), the Council of Europe (CoE) and the European Union (EU) will be analysed; the majority of them, however, are non-binding, soft law instruments, with little or no enforcing mechanisms available. It will be clear from this analysis that the focus of the mentioned instruments is mainly on victims' rights, while the advantages for the perpetrators are often left in the shade. Chapter 3 will instead deal with the relationship between restorative justice

and human rights of offenders (especially those protected at the international level), underlying the compatibility and proximity between the two.[90]

II. The Council of Europe (CoE)

The Council of Europe is an inter-governmental organization with headquarters in Strasbourg, having as a primary aim the creation of a "common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law".[91] In 1958 a European Committee on Crime Problems (CDPC) was created, in order to enhance the activities of the CoE "in the field of crime prevention and crime control".[92] As a primary task, the CDPC

> "identifies priorities for intergovernmental legal co-operation, makes proposals to the Committee of Ministers on activities in the fields of criminal law and procedure, criminology and penology, and implements these activities", and "elaborates conventions, recommendations and reports".[93]

It is precisely through the instrument of the Recommendation that the CoE started, in 1985, to raise the issue of restorative justice and to encourage Member States to adopt, in parallel with the traditional criminal justice proceedings, practices, such as Victim-Offender Mediation, which were capable of fostering the position of victims in the proceeding[94] and reducing the load and therefore delays in the criminal justice system.[95] The first Recommendation completely focused on the use of mediation in

90 See in general JLS/2006/AGIS/147.
91 Council of Europe Official Website, available at http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en.
92 European Committee on Crime Problems Official Website, available at http://www.coe.int/t/dghl/standardsetting/cdpc/CDPC_en.asp.
93 Ibidem.
94 See Recommendation No. R(85) 11 On the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=605227&SecMode=1&DocId=686736&Usage=2 and Recommendation No. R(87) 21 On Assistance to Victims and the Prevention of Victimisation, 17 September 1987, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=608023&SecMode=1&DocId=694280&Usage=2.
95 See Recommendation No. R(87) 18 Concerning the Simplification of Criminal Justice, 17 September 1987, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=608011&SecMode=1&DocId=694270&Usage=2 and Recommendation No. R(95) 12 on the Management of Criminal Justice, 11 September 1995, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImag

penal matters is, however, *Recommendation No. R(99) 19 Concerning Mediation in Penal Matters*, adopted on 15 September 1999.[96] In 1995, a Committee of Experts in Penal Mediation, made of practitioners, legal professionals, academics and policy makers was set up under the authority of the European Committee on Crime Problems. The committee was in charge of investigating the use of mediation in Europe, under different perspectives, especially its potential to arrive at shared conflict solutions, the role and training of professionals, possible areas of application, the degree of integration in the criminal justice system, and the implementation of due process requirements.[97] This panel of specialists, which will form later the funding team of the current European Forum for Restorative Justice, gave birth, three years later, to the first international document attempting to encourage and regulate the use of mediation in criminal settings throughout Europe.[98] The document is composed by the Recommendation itself (introduced by a Preamble), an Appendix and the Explanatory Memorandum. The first part (the body of the Recommendation itself), recommends the Member States take into consideration the general principles set out in the Appendix when implementing mediation for the settlement of penal cases; some considerations are also made on the advantages of using mediation "as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings" capable of recognising the interest of victims and favouring offenders' rehabilitation and reintegration.[99] The Appendix to the recommendation, gives, first of all, a general definition of "mediation"[100] and settles on, in the second paragraph, the general principles which should guide the application of this emerging practice; namely the *consensual nature* of the participation, *confidentiality*, *general availability* at all stages of the *criminal proceeding*, and *sufficient autonomy* within the

e=536554&SecMode=1&DocId=527282&Usage=2.

96 Recommendation No. R(99) 19 Concerning Mediation in Penal Matters, available at https://wcd.coe.int/ViewDoc.jsp?id=420059&Site=DC.

97 Recommendation No. R(99) 19, Explanatory Memorandum, available at https://wcd.coe.int/ViewDoc.jsp?id=417217&Site=CM, p. 4.

98 JLS/2006/AGIS/147, p. 60.

99 Recommendation No. R(99) 19.

100 Appendix to Recommendation No. R(99) 19, Paragraph 1: "These guidelines apply to any 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)".

criminal justice system.[101] Paragraph 3, 4 and 5 of the same document provide the input for the adoption of adequate legislation, capable of facilitating the use of mediation while at the same time respecting fundamental procedural safeguards[102]. Some operational guidelines are proposed, directed mainly at the protection of victims' and offenders' substantive and procedural rights, but also at rendering the implementation of mediation in the different Member States more homogeneous and harmonised.[103] The Appendix closes with a further recommendation for states in relation to the development of a common understanding of penal mediation, assisted by research on, and evaluation of such programmes.[104] The following Explanatory Memorandum gives a brief explanation of what mediation is by describing it as an idea that:

> "unites those who want to reconstruct long foregone modes of conflict resolution, those who want to strengthen the position of victims, those who seek alternatives to punishment, and those who want to reduce the expenditure for and workload of the criminal justice system or render this system more effective and efficient".[105]

It then addresses a variety of existing programmes which, despite the differences existing among them, can all be categorised as "mediation", namely *informal mediation, traditional village or tribal moots, victim offender mediation* (which is considered the most common model and therefore described in more details), *reparation negotiation programmes, community panels or courts, family and community group conferences*.[106] In the ensuing Commentary on the Preamble of the Recommendation an explicit reference to the advantage of mediation for the offender is made; the fourth paragraph of the Commentary reads as follows:

> "From the offender perspective, the chance of facing the victim and being able to explain and make an apology is an important element in sensitising the offender to the harm he/she has done and to the pain and suffering he/she has inflicted upon the victim. In addition, through mediation the offender is given the possibility of having direct involvement in resolving the conflict and agreeing reparation (such as financial compensation), which may help to reestablish relations with the community. Thus, the offender's rehabilitation and

101 Ibidem, Paragraph 2.
102 See Chapter 3 on the compatibility of Restorative Justice with Offender's human rights.
103 Appendix to Recommendation No. R(99) 19, Paragraphs 3, 4 and 5.
104 Ibidem, Paragraph 6.
105 Recommendation No. R(99) 19, Explanatory Memorandum, p. 3.
106 Ibidem.

re-integration into society are promoted by mediation”.[107]

The Memorandum finally closes with an analysis of the desirable mediation's outcome, which should contain some characteristics aimed at protecting the offender. The agreement should in fact be *voluntary* (in contrast with other forms of dispute settlement, like arbitration), *reasonable*, in terms of a correspondence between the offence and the type of obligation inflicted to the perpetrator, and *proportional*, having regard to the seriousness of the offence.[108]

Between 2000 and 2006 some other initiatives were taken by the CoE, often on the proposal of the European Committee on Crime Problems, in order to tackle the problem of prison overcrowding and to reduce the delays of the criminal justice systems in Europe. The implementation of community sanctions was encouraged through *Recommendation Rec(2000) 22*[109] and later through *Recommendation Rec(2003) 20*[110] where “mediation, restoration and reparation to the victim” are mentioned among the possible alternatives to traditional forms of punishment. An undisputed relevant measure, taken by the CoE with regard to the use of restorative justice in connection with crime prevention, is *Resolution No. 2 On the Social Mission of the Criminal Justice System*[111], adopted at the end of a Conference held in Helsinki in April 2005, having restorative justice as the central focus. Before the conference a questionnaire consisting of ten questions dealing with restorative justice had been distributed to governmental agencies, in order to trace the degree of implementation of such practices among different Member States. From the answers to those questions, it was clear that a great deal of attention was put on offender's reintegration and therefore on the prevention of re-offending; this emphasis on reintegration and prevention of re-

107 Ibidem, p. 4.
108 Ibidem, p. 7.
109 Recommendation Rec(2000) 22 On Improving the implementation of the European Rules on Community Sanctions and Measures, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534373&SecMode=1&DocId=377888&Usage=2.
110 Recommendation Rec(2003) 20 Concerning New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice, 24 September 2003, available at https://wcd.coe.int/ViewDoc.jsp?id=70063.
111 Resolution No. 2 On the Social Mission of the Criminal Justice System-Restorative Justice, adopted at the 26th Conference of European Ministers of Justice in Helsinky, 7-8 April 2005, available at http://www.coe.int/t/dghl/standardsetting/minjust/mju26/MJU-26(2005)1E.pdf .

offending appears to show a misunderstanding of the concept of restorative justice.[112] Reintegration of offenders and prevention of re-offending are, in fact, considered by many as important objectives to be pursued by a criminal justice system, and are distinguished from traditional restorative justice goals; the answers given by the majority of Member States focus on a number of programmes existing independently from the adoption of restorative mechanisms in the same countries and dealing mainly with corrections, which have little if any to do with a restorative justice approach.[113] As stated in Resolution No. 2, correctional programmes cannot, as they stand, be understood as part of a restorative approach, as they have often failed to accomplish the objectives that restorative justice is determined to pursue; therefore "new programmes and new approaches with explicit restorative objectives have been designed and are in the process of being developed".[114] However, a too neat distinction between the above-mentioned practices (correctional and restorative ones), would risk undermining the position of offenders in restorative settings, by putting too much emphasis on victim's support and protection (as it recently happened in the restorative justice legislation issued at the European Union level[115]) and overlooking offender needs and fundamental rights. Traditional criminal justice systems have often failed in their rehabilitative attempts; restorative justice approaches should take these mistakes into consideration, in order to avoid them and be consistent with human rights standards.

The third and most recent relevant document, adopted by the CoE with express reference to the practice of penal mediation, is the so called *Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters*, issued by the European Commission for the Efficiency of Justice (CEPEJ), in December 2007.[116] The CEPEJ was established in 2002 with a Resolution of the Committee of Ministers of the CoE and its aim is the "improvement of the efficiency and functioning of justice in the Member States, and the development of the instruments

112 See on this point JLS/2006/AGIS/147, p. 66.
113 Ibidem.
114 Resolution No. 2, p. 14.
115 See on this point Paragraph 4.
116 Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters, CEPEJ (2007) 13, Strasbourg, 7 December 2007, available at https://wcd.coe.int/ViewDoc.jsp?id=1223865&Site=COE.

adopted by the Council of Europe to this end".[117] In 2005 the CEPEJ decided to create a Working Group on mediation (CEPEJ-GT-MED), in order to facilitate the implementation of the existing recommendations concerning this practice; in particular *Recommendation R(99)19*. The Working Group started its job by assessing, through a detailed questionnaire which was sent to 16 representative countries[118], the development of penal mediation, and the general awareness about it throughout Europe.[119] A scientific expert, Julien Lhuillier, was appointed by the group to analyse the responses to the questionnaire and to write a report containing an evaluation of the situation of penal mediation in Europe. Despite the huge differences observed in the 16 national legal systems, Mr Lhuillier, suggested in his report that quality standards, aimed at harmonising the exercise of such practice, be adopted at three levels: Council of Europe, European Union and Non-governmental Organisations.[120] On the basis of this report and of the results of the survey, the above-mentioned guidelines were formulated and adopted by the Working Group.

Three are the main recommendations made by the CEPEJ to the states in order to better implement penal mediation. The first one concerns the *availability* of the service; it is made clear that, in order to promote the use of mediation, any measure should be taken to extend both the geographical availability and the possibility of resorting to it at any stage of the procedure (including the execution of sentences). Of course this availability requires a certain number of efforts on the part of Member States; they should, in fact, grant the financial support to establish and maintain mediation services, and encourage communication between them and the criminal justice authorities; they should recognise social authorities and organisations engaged in the promotion of restorative justice, and set as a preliminary obligation for lawyers to suggest the use of restorative practices to the parties. Then, some indicators on the quality that mediation should maintain (such as the need for special consideration for

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117 Council of Europe Official Website, European Commission for the Efficiency of Justice, available at http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp.

118 The countries were Armenia, Austria, Bosnia and Herzegovina, Czech Republic, Finland, France, Germany, Hungary, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Sweden and United Kingdom.

119 CEPEJ (2007) 13, p. 1; JLS/2006/AGIS/147, p. 70.

120 The Quality of Penal Mediation in Europe, CEPEJ-GT-MED (2007) 8, Strasbourg, August 2007, p. 6.

victims) are stated; the need to respect confidentiality is reiterated, while some minimum standards that training programmes should observe are mentioned; special protection is also needed in case of participation of minors in mediation programmes.[121] The second recommendation made by the Working Group is on *accessibility*. Once more, attention is paid to the rights of the parties, in particular to the right of being informed about the programme, its effects and possible consequences (with a major emphasis on the rights of the victims). Moreover, in order to render mediation accessible, costs should be reduced and become proportionate to the income of participants. The third point touched upon by the Guidelines is *awareness*. From the survey conducted by the Working Group, the lack of awareness about restorative justice instruments both among practitioners and the general public appeared to be one of the main factors impeding the full and homogeneous implementation of them throughout Europe. This awareness should reach different levels: the general public should be informed through newspapers, academia, conferences, info points and any other suitable media (also by translating the relevant provisions in the different languages of all Member States); victim and offender should be informed at the early stage of the proceeding by the criminal justice authorities or by any body cooperating with them of the possibility of opting for a restorative program in alternative to the traditional criminal proceeding, and of the advantages that could derive from this option. Professionals such as police officers, prosecutors, judges, lawyers and social workers, should be all trained and encouraged to maintain connections with restorative services in order to spread the awareness of such practices.[122]

From a first observation of the action taken by the CoE in the field of mediation, some have derived the use of a balanced approach; to a certain number of provisions in favour and protection of victims, the same number dealing with possible advantages for the offenders correspond.[123] However, as already mentioned, the definition of restorative justice is not always interpreted in the same way by experts and practitioners; the risk of considering some of the initiatives (in favour of the offender) taken by the CoE in the last fifteen years as falling outside the scope of restorative

121 CEPEJ (2007) 13, p. 1-3.
122 Ibidem, p. 3-5.
123 JLS/2006/AGIS/147, p. 77.

justice will exist till a common definition and understanding of this term will be agreed upon.

III. The United Nations (UN)

The United Nations Office on Drugs and Crime (UNODC) was established by the UN in 1997 in Vienna. The office works in the area of Criminal Justice Reform, which includes police reform, prosecution service, judiciary, access to legal defence and legal aid, prison reform and alternatives to imprisonment, and restorative justice.[124] Through its activity the UNODC supports the adoption of global strategies by intergovernmental bodies such as the UN Commission on Crime Prevention and Criminal Justice (a subsidiary body of the Economic and Social Council), and contributes to the monitoring of their implementation. The majority of instruments used by these UN bodies are not legally binding; measures used such as principles, guidelines, standards and recommendations have no direct legal effect. Their influence however, should not be underestimated; the consensus reached among Member States on certain objectives and on the way of reaching them allows these instruments to fulfill other important tasks such as guiding states in the adoption of common policies and legislation.[125]

Since 1985 (much earlier than the establishment of UNODC), the United Nations started to take into consideration the importance of informal mechanisms of dispute resolution and to strive for the adoption of such practices in national legislation. In that same year the *Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power* was adopted by the General Assembly; when dealing with Access to Justice and Fair Treatment at paragraph 7 the Declaration states that:

> "Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims".[126]

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124 UNODC Official Website, available at http://www.unodc.org/unodc/en/justice-and-prison-reform/criminaljusticereform.html#restorative.

125 JLS/2006/AGIS/147, p. 77.

126 Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, available at http://www.un.org/documents/ga/res/40/a40r034.htm, Paragraph 7.

This Declaration was accompanied, many years later, by two further documents, aimed at assessing and facilitating the application of the principles contained in it through guidelines and instructions addressed to both policymakers and practitioners.[127] The second document, the so called *Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power,* contains a very detailed explanation of the application of the 1985 Declaration, with a special attention to the implementation of victim-centered programmes including restorative justice. It becomes clear already from the Table of Contents that the focus of the entire Handbook is only on one of the parties involved in the proceeding, namely the victim; each aspect of mediation and other restorative practices is analysed mainly, if not only, from the victim's perspective, while the sanctioning of offenders is not treated in details and seems to be considered merely as a way of favouring the victim him/herself.[128]

In order to face the above-mentioned criticism, the General Assembly on the one hand and the Economic and Social Council (ECOSOC) supported by the UNODC on the other, started during the 1990s to develop new measures and instruments focused on the role of offenders in the criminal justice system, both in connection with, and independently from restorative justice initiatives. In 1990 the General Assembly passed a resolution entitled *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*[129], providing a set of principles guiding the use of non-custodial measures and minimum safeguards for individuals subject to them. Despite the lack of a proper reference to restorative justice, the importance given to community involvement in the treatment of offenders and the provision of the possibility for the prosecution services of discharging them (offenders) when appropriate, make the

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The same concept was reiterated more recently in UN Doc. S/2004/616, 23 August 2004 later implemented by UN Doc. S/2011/634, 12 October 2011.

127 See Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principle on Justice for Victims of Crime and Abuse of Power, New York 1999, available at http://www.uncjin.org/Standards/policy.pdf; see also Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power, New York 1999, available at http://www.uncjin.org/Standards/9857854.pdf.

128 JLS/2006/AGIS/147, p. 79.

129 United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), G.A. Res. 45/110, available at http://www1.umn.edu/humanrts/instree/i6unsmr.htm.

declaration compatible with a restorative approach to crime.[130] Moreover, since 1985, every five years a UN Congress on Crime Prevention and the Treatment of Offenders takes place, in order to facilitate the discussion among Member States on topics such as crime, criminal justice, victims and offenders and to enhance the drafting of transnational joint agreements on related issues. During the 1990s, thanks to the pressure of several NGOs, the topic of restorative justice started to be addressed in the Congresses, and the interest in it grew very quickly. As a result of the 1995 Congress held in Cairo, a Working Party on Restorative Justice was set up by a group of NGOs.[131] This was mainly formed by representatives of NGOs in consultative status with the UN and by individuals with some kind of practical or academic expertise in the field of restorative justice; in the agenda of the Working Party was the objective of creating awarness, on the international level, of this relatively new conception of justice, but also of establishing, with the help of experts and practitioners, guidelines and criteria in order to lead work in the field.[132] In parallel with the drafting of handbooks and working papers, the group of consultants, influenced by the position taken by inter-governmental and non-governmental organizations, began to focus on a study of basic principles which should guide Member States in the implementation of restorative justice measures. As criminal justice is a very sensitive and problematic area of law, the needs that had emerged during the UN Congresses held in 1995 and 2000, were the competing needs of, on the one hand, creating a set of minimum standards which could counterbalance the flexibility typical of restorative processes, while on the other that of letting states and practitioners free from strict obligations in such a new and still unclear setting.[133]

There are two resolutions, resulting from this process, specifically referred to as restorative justice practices, passed respectively in 1999 and 2002 by the ECOSOC. In 1999, a resolution on the *Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice* was adopted[134]; this document is the

130 JLS/2006/AGIS/147, p. 79.
131 Van Ness, p. 2 .
132 Ibidem.
133 Van Ness, p. 3.
134 Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice, ECOSOC Resolution 1999/26, 28 July 1999, available at

first UN document entirely devoted to restorative justice, which was seen as a possible alternative to criminal justice mechanisms, even if only in case of minor offences, family and community problems or problems involving children and youth.[135] The second, and most important document released by the UN in the field of restorative justice is undoubtedly the resolution on *Basic principles on the use of restorative justice programmes in criminal matters.*[136] The document was inspired by a number of activities undertaken in the previous years by researchers and policymakers within the Council of Europe and several other national and supranational bodies active in the field.[137] The approval of the document, posed, however, some problems which influenced the end result and the formal legal status acquired by it. During the discussion, held at the tenth Congress in 2000, it became clear that State members of the UN Commission on Crime Prevention and Criminal Justice[138] were not ready yet to adopt the principles laid out by the experts. The solution found was to approve a resolution containing the work of the group and encouraging states to use this as a basis to develop new guidelines for restorative justice programmes at the national level, in order not to disregard the work of the experts, but without imposing heavy burdens on Member States.[139] The result is a list of 23 principles, grouped into different sections which should serve as a top-down framework containing both procedural safeguards and substantive aims, as well as other definitions and technicalities useful to speed up the implementation of restorative programmes. The five sections of the document deal mainly with definitions, use of restorative justice programmes and operation of

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http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ-ECOSOC/CCPCJ-ECOSOC-90/CCPCJ-ECOSOC-99/B_-_Draft_resolution_IV_-_ECOSOC_Resolution_1999-26.pdf.

135 Ibidem, Paragraph 4.

136 Basic Principles On the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Resolution 2002/12, 24 July 2002, available at http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf.

137 See a.o. The Restorative Justice Consortium (now: Restorative Justice Council, at http://www.restorativejustice.org.uk/), Victim Offender Mediation Association (http://www.voma.org/), The American Bar Association (http://www.americanbar.org/aba.html).

138 "The Commission on Crime Prevention and Criminal Justice is the central body within the United Nations system dealing with crime prevention and criminal justice policy...(it) offers Member States a forum to exchange expertise, experiences and information, to develop national and international strategies and to identify priorities for combating crime" (UNODC Official Website, available at http://www.unodc.org/unodc/commissions/CCPCJ/).

139 JLS/2006/AGIS/147, p. 79.

restorative justice programmes; besides some of the above-mentioned values[140], others are stated such as the voluntary basis of the programmes - that is, the parties must consent to the use of such instruments and this consent must remain for the whole duration of it. Other important procedural guarantees, especially for offenders, are the prohibition of using participation as evidence of admission of guilt in a possible subsequent formal proceeding and the right to be fully informed of their rights before agreeing to the programme.[141] The role of facilitators is also touched upon; the impartiality of the person performing this role is obviously the most important feature, but it is not enough; the facilitator (or mediator in case of Victim-Offender Mediation) should demonstrate a good knowledge and understanding of local cultures and local communities, in order for the programme to go to the advantage of both the parties and the community as a whole.[142]

After the adoption of the resolution on the Basic Principles some other attempts were made by the UN in order to enhance the use of restorative justice in domestic (and also international) jurisdictions and the protection of human rights connected to their use[143]; besides the adoption of resolutions and recommendations directed to governments and policymakers, a few handbooks addressed to practitioners were also drafted in order to create not only the legal framework, but also make the empirical application of restorative justice programmes more homogeneous. The first, issued in 2006, was the so called *Handbook on Restorative Justice Programmes*[144], which gives an overview on the state of restorative justice around the world and tries to provide practitioners with definitions, guidelines and references to applicable legislation, covering all and every stage of implementation of such programmes, from the referral to the monitoring of the follow-up phase. The following year a *Handbook of Basic*

140 See Chapter 1, Paragraph 2.

141 ECOSOC Resolution 2002/12, Paragraphs 7, 8 & 12. For a more detailed explanation of the rights of offenders see Chapter 3.

142 Ibidem, par. 17.

143 See, among others, the Bangkok Declaration, stipulated during the eleventh UN Congress on Crime, in 2005, which at paragraph 32 mentions the importance of developing restorative justice "To promote the interests of victims and the rehabilitation of offenders" (available at http://www.unodc.org/pdf/crime/congress11/BangkokDeclaration.pdf).

144 *Handbook on Restorative Justice Programmes*, UNODC, Vienna, 2006, available at http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.

Principles and Promising Practices on Alternatives to Imprisonment[145] was published, always under the supervision of the UNODC; the manual, while dealing with alternatives to imprisonment, mentions restorative justice as a way of reducing prisons' population:

> “the use of mediation and alternative dispute resolution in meetings with offenders, victims and community members to deal with matters that would otherwise be subject to criminal sanctions has the potential to divert cases that might otherwise have resulted in imprisonment both before trial and after conviction”.[146]

More recently, growing attention started to be paid to restorative justice in connection with offender's reintegration and rehabilitation. In 2012 an *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*[147] was released by the UNODC. In the book, continuous reference is made to the role that restorative justice programmes and values can play in alternative to or together with imprisonment (during incarceration or upon release), in the path towards “re-entry”. Restorative practices are, during the whole text, assimilated to and considered together with other forms of alternative sanctions, especially probation and community service[148]; moreover, an entire section is devoted to the relationship between restorative justice and social reintegration[149], where “restorative probation” is analysed and considered more effective than standard probation in reducing recidivism's rates. The handbook exists within a broader framework, which includes the planning of a strategy for the UNODC for the period 2012-2015, the evaluation of the twelfth UN Congress on Crime Prevention and Criminal Justice (held in Salvador in 2010) and the preparation for the thirteenth one (to be held in Doha in 2015), which will extensively refer to

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145 *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment,* UNODC, Vienna, 2007,available at http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf
146 Ibidem, p. 15.
147 *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders,* UNODC, Vienna, 2012, available at http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Introductory_Handbook_on_the_Prevention_of_Recidivism_and_the_Social_Reintegration_of_Offenders.pdf.
148 The term “restorative community justice” is used at p. 84.
149 See Chapter VI, Paragraph F, p. 101.

restorative justice practices.[150]

This brief overview of the initiatives taken by the UN in the context of restorative justice shows an increasing engagement of the international community in the topic; the huge potentiality of these initiatives is reflected both in their broad geographical impact (192 countries around the world) and in their wide content (all the existing restorative practices are covered). On the other hand, however, the high potential impact of the guidelines elaborated by the UN is partially weakened by the lack of adequate enforcing mechanisms and often by the use of non-binding measures. Even if with a narrower geographical impact, the European Union could, since the adoption of the Lisbon Treaty[151], adopt measures capable of overcoming this obstacle.

IV. The European Union

In the last few years the new discipline of European Criminal Law, having as ultimate goal the harmonisation (or at least approximation) of national criminal legislation of EU Member States, has emerged. This harmonising attempt concerns both substantive criminal law (conduct to be criminalised, sanctions to be applied) and criminal procedures (investigative measures, procedural safeguards for victims and offenders) and requires the cooperation of judicial authorities both on the horizontal (between Member States) and on the vertical (between EU and national organs) level. Since 1992, with the adoption of the Treaty of Maastricht, the EU started to consider, besides the common market, the issue of security and freedom in Europe. However, as the area of criminal law is extremely sensitive, the extension of the existing legislative instruments to this field required many more steps and is not completely achieved yet. Given the reluctance demonstrated by States, an intermediate solution was found in 1992; the passage from a European Community to a European Union saw the introduction of the so called "pillar structure", formed by a first "community pillar", a

150 See the draft discussion guide for the regional preparatory meetings to the Congress, January 2013, available at http://www.unodc.org/documents/commissions/CCPCJ_session22/ECN152013_CRP1_eV1380049.pdf.

151 Treaty of Lisbon, 17 December 2007, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF.

second one devoted to the “common foreign and security policy” and a third one named “justice and home affairs”, subject to a different regime characterised by the use of conventions and framework decisions, and adopted through inter-governmental procedures requiring unanimity, signature and ratification by all States. It is exactly this third pillar that in 1997 with the Treaty of Amsterdam gave rise to the so called “area of freedom, security and justice”, dealing with police and judicial cooperation in criminal matters and having as a goal the approximation of criminal norms and cooperation among national police and judicial authorities.[152] A last and decisive step in the area of EU criminal law was the adoption of the Lisbon Treaty in 2009. [153] The abolition of the pillar structure that the treaty introduced led to the automatic application of community rules to the three areas, including the area of freedom, security, and justice. This means not only that directives and regulations became suitable instruments for anything related to criminal matters, but also that the European Court of Justice became competent for any infringement of European Union Law, including provisions falling under the former third pillar.[154]

It follows from this picture that the European Union is giving, in the last few years, increasing importance to harmonisation in the area of criminal law through legally binding, enforceable instruments. Some initiatives have also been taken in the field of restorative justice, unfortunately not always in the context of the mentioned legal framework, but mainly through research and study projects or guidelines for both the Commission and Member States; the EU has principally focused its attention on victims, somehow neglecting the benefits these programmes can have in the rehabilitation of perpetrators. The starting point of the EU interest in restorative justice was the European Council held in Tampere in 1999 and the resulting Tampere Programme; this was the first of a series of meetings of the European Council, aimed at elaborating policy programmes providing guidelines and legislation for Member States

152 See European Union official website, available at http://www.unodc.org/documents/commissions/CCPCJ_session22/ECN152013_CRP1_eV1380049.pdf.

153Treaty of Lisbon, 17 December 2007, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF.

154 For this specific area a five-year transitional period was forseen; the European Court of Justice will acquire full competence starting from the 1st of December 2014.

in the area of freedom security and justice.[155] In the Conclusions to the Tampere Programme, the Council mentions, at paragraph 30, the need for Member States to create "alternative, extra-judicial procedures" accompanied by adequate minimum standards for the protection of victims concerning their access to justice, compensation for damages, assistance and protection.[156]

Due to the negligence of both EU institutions and Member States in the implementation of the mentioned guidelines, the Belgian Ministry of Justice in collaboration with the European Forum for Restorative Justice[157] organised a meeting in 2001 with the representatives of some EU countries particularly interested in restorative justice. The idea was that of setting up a network of national contact points for restorative justice, in order to facilitate and institutionalise the exchange of information in the field. Despite the lack of an agreement, due mainly to financial issues, in 2002 the Belgian ministry of Justice decided to submit a proposal for a Council Decision on the same project. The proposal contained an explanation of the task that the hypothetical network would have, including that of collecting, analysing, evaluating and distributing information and data throughout Europe, promoting research on the topic, organising conferences and seminars, providing expertise and regularly reporting to the EU institutions. Once again, however, due to the lack of support by the majority of Member States and to the appearance of other overcoming issues, the proposal was not even discussed in the EU Council.[158]

The Tampere Council of 1999 set another important principle which should function as an alternative to harmonisation in such areas where Member States were not yet ready to a full delegation to EU legislative instruments. Mutual trust became the principle inspiring cooperation among Member States and mutual recognition of judicial measures replaced the request-based cooperation model. Of course, in order to assure protection to individuals and to promote good practices among Member States, some mechanisms, such as the provision of minimum standards and the predisposition of

155 See also the Hague Programme (2004-2009) and the Stockholm Programme (2009-2014).
156 Tampere European Council, Precidency Conclusions, 15 and 16 october 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm, Paragraphs 30 & 32.
157 See on this point further in this Chapter.
158 JLS/2006/AGIS/147, p. 91.

contact points (as the just mentioned network) should be established. Some initiatives in this direction were taken in the field of alternative sanctions, especially in 2000, with the *Communication from the Commission to the Council and the European Parliament: Mutual Recognition of Final Decisions in Criminal Matters*[159] and in 2004 with the *Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union*[160], where restorative justice, especially mediation, is extensively dealt with as an instrument capable of playing an important role in rehabilitation of offenders and therefore in prevention of crime. Question 15 of the Green paper deals with the need for taking measures at the EU level, in order to harmonise and facilitate the use of mediation; steps taken by the EU in the field were at the moment (and are still now) not sufficient and not adequately detailed to provide Member States with the tools necessary to fully implement these programmes.[161]

The only legislative provision on restorative justice existing at that time at EU level, was, in fact, the *Council Framework Decision on the Standing of Victims in Criminal Proceedings*[162] (2001), which was recently replaced by the *Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*[163] (2012). Substantial differences exist between the two documents. The Framework Decision of 2001 only referred to mediation practices, defined as "the search, prior or during the criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person"[164]; an invitation to Member States to promote these practices through laws, regulations and administrative provisions was then reiterated in article 10 and article 17 of the document. The Framework Decision was, however, highly criticised for being too vague

159 Communication from the Commission to the Council and the European Parliament: Mutual Recognition of Final Decisions in Criminal Matters, Brussels, 15 January 2001, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2000&nu_doc=495

160 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, Brussels, 30 April 2004, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0334en01.pdf

161 Ibidem, p.55.

162 2001/220/JHA, 15 March 2001, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0220:EN:NOT

163 2012/29/EU, 25 October 2012, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF.

164 2001/220/JHA, Article 1(e).

both in the definition of penal mediation and in the setting of minimum standards for victims; article 10 and 17 have been considered in contrast with the general aim of the directive, namely that of providing guarantees of assistance and protection for victims of crime, and the instrument of the Framework Decision not suitable to reach this purpose.[165] For this reason, and thanks to the changes brought by the Lisbon Treaty, the Decision was replaced, in 2012, by the above-mentioned Directive. The new instrument represents a partial innovation, first of all because of its binding effect on Member States, which, in case of failure of compliance with it, can be subject to an infringement procedure in front of the European Court of Justice.[166] Moreover the Directive deals in more detail with the issue of restorative justice, in order to respond to the critics of vagueness addressed towards the previous Decision. In both its preamble and its body, restorative justice is extensively referred to, not only as mediation services but also as family group conferencing and sentencing circles. Article 2 letter (d) provides a definition of restorative justice which reads as follows:

> "'restorative justice' means any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party"[167].

Already from this definition some additional guarantees (in comparison with the 2001 Decision) can be found; the consent of the parties is needed in order for the restorative programme to be launched, while the third party that is given the role of mediator (or facilitator) must necessarily be "impartial". Article 12 continues with a list of safeguards which must be assured to victims taking part in restorative justice programmes; in order to prevent "secondary and repeat victimisation" and to avoid "intimidation and (..) retaliation" a certain number of conditions must be satisfied. Restorative justice programmes shall be used only if they are "in the interest of the victim" and (once again) with his/her "free and informed consent"; before giving his/her consent, the victim must be informed about the process, the potential outcomes and the implementation procedure of the possible agreement; the offender shall acknowledge

165 JLS/2006/AGIS/147, p. 88.
166 Starting from the 1st December 2014.
167 2012/29/EU, Article 2(d).

the "basic facts of the case" before any restorative process is initiated; the agreement must be concluded voluntarily and can be taken into consideration in any subsequent criminal proceeding; discussions held during restorative justice programmes are confidential and may be disclosed only with the agreement of the parties or in case of overriding public interests.[168] A brief reference to the training of practitioners in the field of restorative justice is finally made by Article 25.

Beside this (poor) legislative engagement, the EU has, since the end of the 1990s, promoted and financed parallel initiatives in the field of restorative justice. In 1998 the European Commission in the context of the Grotius Programme (a programme enhancing the cooperation among European countries in the area of Justice and Home Affairs) decided to fund a group of experts in mediation, coming from different Member States, committed to spread awareness and favour the development of restorative justice practices throughout Europe. The group was provided with a secretariat in Leuven, Belgium and two years later it turned into a non-governmental organisations, which took the name of European Forum for Victim-Offender Mediation and Restorative Justice, now converted into European Forum for Restorative Justice (EFRJ).[169] As stated in the constitution, in order to reach the mentioned goal, the EFRJ promotes the international exchange of information and mutual assistance, encourages the development of restorative justice policies, services and legislation, supports research in the field and develops principles, trainings and good practices.[170] To do so, the Forum maintains close contacts with numerous non-governmental and intergovernmental organisation, such as the Council of Europe. A privileged relationship exists, however, with the European Union; the main instruments used by EFRJ to evaluate the *status quo* and enhance the development of restorative justice programmes in Europe, are, in fact, the research projects. These projects usually consist of cooperation among different Member States, and involve both academics and practitioners with experience in the field; they touch upon different topics, and can have different duration, depending on

168 2012/29/EU, Article 12(a)-(e).

169 European Forum for Restorative Justice, Official Website, available at http://www.euforumrj.org/home.

170 European Forum for Restorative Justice Constitution, Article 5, available at http://www.euforumrj.org//assets/upload/Constitution_EFRJ.pdf.

the funding received. A large part of the funding for these studies, comes from the European Commission, namely from the Seventh framework Programme, in the context of the Community Research and Development Information Service.[171]

A few conclusions can be drawn from this brief analysis of the activities taken by the EU in the field of restorative justice. In spite of the acquisition of new competences in the criminal justice area, the EU seems, so far, quite reluctant to adopt legally binding provisions in this context. Very recently, increasing attention has been paid to particular categories of crimes (such as environmental or organised ones) which for their characteristics and dynamics deserve to be treated at transnational or international level.[172] Such an impulse is so far lacking, however, in relation to restorative justice; the only binding instrument adopted until now is the above-mentioned Directive on Support and Protection of Victims of Crime (and the previous, repealed Directive). This document demonstrates, nonetheless, an incomplete and biased approach. Restorative justice appears here only in a subordinate position, being a focus on the protection of victims in the criminal justice system as a whole; no detailed explanation of the restorative justice approach to crime is provided, and no reference is made to the role that other parties, namely offender and community, play in the restorative process. On the other hand a great deal of effort has been put by the European Commission to promote research projects touching upon different aspects of restorative justice, with the help of the EFRJ. The activity of the Forum is shyly moving from a victim-centred perspective, to an all-embracing approach, as demonstrated by the recently concluded project on “Restorative Justice and Crime Prevention”[173] and the current one on “Desistance”, which will investigate the mechanisms within restorative justice that reduce the likelihood of re-offending(even if with a great deal of attention on the reduction of victimisation).[174] The influence that these projects have on national

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171 The Seventh Framework Programme (2007-2013) will be replaced, on the 1st January 2014, by the new funding program Horizon 2020 (2014-2020). For a more detailed explanation on Eu research, see the European Commission Official Website, available at http://cordis.europa.eu/home_en.html.

172 See, a.o., Directive 2008/99/CE; Directive 2009/123/CE.

173 Restorative Justice and crime Prevention, available at http://www.euforumrj.org//assets/upload/Restorative_Justice_and_Crime_Prevention_Final_report.pdf

174 Desistance and Restorative Justice: Mechanisms for Desisting from Crime within Restorative Justice Practices, available at http://www.euforumrj.org/projects/current-projects/desistance-and-restorative-justice/

policies should not be underestimated; the EU, however, should not wait for Member States to take autonomous steps towards a better and full implementation of restorative programmes, but should instead start to take adequate measures, having in mind the high and more developed standards adopted by some EU countries.

V. Conclusions

The analysis of the European legislative framework made so far demonstrates an increasing engagement of the Council of Europe and the European Union in the field of restorative justice. The responses given by these bodies are, however, not always detailed and complete. The risks connected to the informal (or semi-formal) character of these instruments are sometimes overemphasised. Nevertheless, in order to assure the compatibility of such practices with the rights of the participants a strong legislative framework is needed, both at national and at supranational level. The European Union should use its new competencies in the criminal area and step in.

Chapter 3

Restorative Justice and Offender's Human Rights: Complementary or irreconcilable paradigms?

I. Introduction

The repeated attempts by international and national organisations for the increased use of alternative dispute resolution mechanisms, characterised by out-of-court settlement of conflict, pose serious issues in terms of participants' rights' protection. The intellectual movement that, in the seventeenth and eighteenth centuries, brought about the adoption of formal documents containing provisions aimed at limiting State judicial power and guaranteeing rights and freedoms to citizens, set a limit to arbitrary state power that, in the past, led to injustice and equally arbitrary sentences.[175]

According to Skelton and Sekhonyane[176], informal justice systems can be divided into three different categories. The first of these consists of customary courts, typical of countries with a high indigenous population. An example of such a situation are African traditional courts, completely independent from the criminal justice system and therefore problematic in terms of standards of rights. In these kind of proceedings, some of the basic guarantees which characterise the notion of a fair trial[177] are lacking; people are often presumed to be guilty and the right to silence is infringed, while little or no space is left to women and children given the patriarchal character of the society. Customary courts can, to a certain extent, be assimilated to restorative justice practices, especially for the role that victim and offender play in the process and for the importance that restitution and restoration have in the final agreement.[178] The second model presented by the authors is characterised by a collapse of the state judicial system, which is replaced by non-state forms of justice. This is, for example, the case of countries such as Northern Ireland, South Africa, and other places which share with restorative justice the ideal of a subsidiary and marginal role for the state in the criminal

175 Weitekamp and Kerner, 2002, p. 205.
176 Skelton and Sekhonyane, 2007, p. 586.
177 On this point see further in this Chapter.
178 Skelton and Sekhonyane, 2007, p. 586.

justice field. The last and probably more worrisome kind of non-state justice is so called "vigilantism". This is the result of a combination of different causes, which go from the weakness of the criminal justice system to high levels of crime in a certain area, via a wish for harsher punishments for perpetrators; in this case some members of the community usually decide to replace the role of the state in punishing criminals and defending their neighbourhoods, especially in poor and marginalised districts.[179]

None of the three mentioned models corresponds completely to a restorative model of justice; the three of them, however, share certain characteristics with the restorative ideal. What does matter for the purpose of this chapter is the relationship that these informal realities (and restorative justice itself) have with the conventional criminal justice system, with regard to the protection they offer to victims and, especially, offenders. In 1990 Zehr described three possible relations between restorative justice and the criminal justice system; this "new" approach to justice could in principle be inserted in the conventional system and used to render it more "civilised", that is to say more sensitive to the needs of victims and offenders than the adversarial system had been. On the contrary, a second possibility for restorative justice programmes is to represent an alternative to the criminal justice system, to be practiced independently, without having any interaction with it.[180] The third and more desirable solution, which seems to be preferred by the majority of restorative justice advocates, is an interdependence between the two different systems. Andrew Ashworth, in analysing the attitude that states should have towards restorative justice, points out that, notwithstanding the role that communities have in these processes, the fact that their decisions result in obligations to be imposed on offenders, make it necessary for states to take responsibility in assuring consistency of responses to offences and procedural safeguards to offenders.[181] Other scholars[182] reach similar conclusions, through a different path; Braithwaite, for example, considers restorative justice as a synergy between civil society and state justice, rather than a conflict between the two. The need for procedural rules is also pointed out, but a slightly different solution is proposed;

179 Ibidem.
180 Skelton and Sekhonyane, 2007, p. 586, quoting Zehr, 1990.
181 Ashworth, 2002, p. 581-582.
182 See, a. o., Heater Strang and John Braithwaite.

guarantees are needed in order to avoid power imbalances and to prevent the imposition of punishment which goes beyond the maximum established by the law or risks resulting in humiliating or degrading treatment for the accused. These safeguards, however, should not be imposed (as suggested by Asworth) by the state through existing formal mechanisms; an active and democratic participation of the whole community in the setting of such standards is instead suggested, in order for the restorative programmes to maintain their independence from the criminal justice system, proving at the same time to be complete and reliable.[183]

II. The Right to a Fair Trial

When the compatibility of restorative justice with human rights standards has to be determined, the right of offenders to a fair trial is the first that comes into mind. The right to a fair trial, also known as "due process", reflects the principle of the rule of law in democratic societies; it consists of a long list of principles common to Western legal systems which guarantee procedural rights of the defendant in criminal proceedings. Being a result of Enlightenment ideology, the right to a fair trial was codified in all major international human rights instruments, even if with different nuances and sometimes different interpretations. Key provisions for the recognition of due process at international level are article 10 of the Universal Declaration of Human Rights[184] (UDHR) and article 14 of the International Covenant on Civil and Political Rights[185] (ICCPR). Regional treaties, such as the European Convention on Human Rights[186] (ECHR) and the Charter of Fundamental Rights of the European Union[187] (the Charter), have also codified the right, sometimes even enlarging its scope. Article 6 ECHR, following the structure of article 10 ICCPR, contains a list of minimum rights and

183 Skelton and Sekhonyane, 2007, p. 591.
184 Universal Declaration of Human Rights, Paris, 10 December 1948, G.A. Res. 217A (III), available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.
185 International Covenant on Civil and Political Rights, New York, 19 December 1966, G.A. Res. 2200A (XXI), available at http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.
186 European Convention on Human Rights, Rome, 4 December 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.
187 Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, 2000/C 364/01, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

principles inherently linked to the right to a fair trial, which must necessarily be granted in order to assure its full and coherent protection; the Charter dedicates instead a whole Title[188], consisting of articles 47, 48, 49 and 50, to the issue of justice, referring to the right to fair trial and all its corollary rights. In order to determine convergences and divergences between the rights of defendants and restorative practices, it is useful here to analyse separately the numerous legal principles linked to the concept of due process. The core content of the right is:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[189]

Many other provisions constitute, however, an integral part of the right to a fair trial; for reasons of space only a few of them will be analysed in the following paragraphs, namely those which are considered the most problematic in light of restorative justice programmes.

A. Presumption of Innocence and Right to Remain Silent/Privilege against Self-incrimination (*nemo tenetur*)

The right of accused to "be presumed innocent until proved guilty according to the law" is recognised by all the above-mentioned international instruments.[190] A typical goal of the adversarial trial is proving the accused's guilt beyond a reasonable doubt of the alleged crime. Procedural safeguards exist in order to help the offender against the overweening state power embodied in the prosecution; contrasting prosecution, first of all through the right to be assisted by a lawyer[191] and the right to remain silent.[192] Even if not explicitly guaranteed by international treaties, the right to silence can, nevertheless, be inferred by other provisions expressly recognised, namely the already mentioned presumption of innocence and the "privilege against self-incrimination"

188 Title VI- Justice, 2000/C 364/01.
189 Article 6 (1) ECHR.
190 See Article 11(1) UDHR; Article 14 (2) ICCPR; Article 6 (2) ECHR; Article 48 (1) Charter.
191 See next paragraph on this point. ?
192 Strickland, 2004, p. 21. (However note that the United Kingdom allows a jury to make an adverse inference against you if you choose not to say something in court that you had previously said in the course of an investigation)

(*nemo tenetur*). While the ICCPR[193] already mentioned the right of the accused "not to be compelled to testify against himself or to confess guilt", regional bodies have preferred to develop such rights with the help of their courts' jurisprudence. The European Court of Justice (ECJ) was the first, in 1989, to recognise the existence of such right; in *Orkem v Commission*[194], dealing with competition law, the ECJ refers to the laws of Member States, to the ECHR and to the ICCPR and concludes that

> "the Commission may not compel an undertaking to provide it with answers which might involve an admission on it part of the existence of an infringement which it is incumbent upon the Commission to prove".[195]

The European Court of Human Rights (ECtHR) proved to be moving towards the same direction. In *Murray v UK* the ECtHR stated that the right to remain silent and the privilege against self-incrimination are "generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6".[196] In the same year the ECtHR, following the decision taken in *Funke v France*[197], recognised, in *Saunders v UK*[198], the link existing between the right to remain silent and the privilege against self-incrimination. It seems therefore that a right to silence, strictly connected to the principle of *nemo tenetur* is indisputably recognised at the international level; issues arise, however, when it comes to determine the nature of the right, in order to understand if a denial of the right would result in an infringement of the broader right to a fair trial.[199] In *O'Halloran and Francis v UK*[200] the ECtHR focused, in a more detailed way, on the issue of *coercion*. Recalling some previous cases[201], the Court confirmed the non-absolute character of the right to remain silent and went beyond, considering the

193 Article 14 (3) (g) ICCPR.
194 *Orkem v Commission,* Case 374/87, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987CJ0374:EN:HTML.
195 Ibidem, Paragraph 35.
196 *Murray v UK* (1996) 22 E.H.R.R. 29, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57980#{"itemid":["001-57980"]}, Paragraph 45.
197 *Funke v France* (1993) 16 E.H.R.R. 297, available at http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57809.
198 *Saunders v UK* (1996) 23 E.H.R.R. 313, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58009#{"itemid":["001-58009"]}, Paragraph 69.
199 Skinnider & Gordon, 2001, p. 23.
200 *O'Halloran and Francis v UK* (2007) ECHR 545, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81359#{"itemid":["001-81359"]}.
201 A.o, *Funke v France; Murray v UK; Saunders v UK; Heaney and McGuinnes v Ireland.*

criteria necessary in order to consider a coercive measure capable of interfering with the right of not incriminating oneself. At Paragraph 52, quoting a case recently discussed, four criteria are presented: the nature and degree of compulsion used towards the accused; the existence of any relevant safeguard in the procedures; the use to which any material so obtained is put; and the weight of the public interest.[202]

It is precisely the issue of coercion that comes to attention when analysing the compatibility of restorative justice with the right to remain silent. The majority of current restorative justice programmes have as a precondition the acknowledgment of responsibility from the part of the offender, which entails the total renunciation to the right to remain silent and the *nemo tenetur* principle (in addition to the waiver of the presumption of innocence). Even if the offender is voluntarily renouncing his/her right in order to undertake a different path, the concern of many scholars and human rights defenders is that s/he may be coerced to do so by Prosecutors or other legal practitioners.[203] The way in which legal practitioners, such as prosecutors, judges, lawyers and mediators (or facilitators) put the different options to the accused, has, of course, an influence on the choice that he/she will make; the offender should not be obliged to choose an informal procedure in order to satisfy the needs of practitioners, nor should s/he opt for such a solution only because of the alleged advantages (for example the application of non-custodial measures) that this could bring in comparison to a process in front of a formal criminal court.

Some solutions can, however, be found (and have already been found) in order to limit the risk of a scenario in which the accused is compelled undergo a restorative programme. Essential to neutralise the risks of coercion and therefore of an arbitrary violation of the right to remain silent is the right of the accused to be fully informed. The right to be informed concerns not only the "nature and cause" of accusation, as stated in Article 6 ECHR and Article 14 of the ICCPR, but also the rights available to the individual and the different legal options s/he has. The legislation examined in Chapter 2 has already foreseen some guarantees for the offender regarding this issue; the *CEPEJ Recommendation* contains references to the need for the parties to be

202 *O'Halloran and Francis v UK*, Paragraph 52.
203 Skelton & Frank, 2004, p. 205; Skelton & Sekhonyane, 2007, p. 583.

informed about the programme, its effect and possible consequences ("not only the potential benefits but also the potential risks"), before agreeing to it.[204] The same provision had already been made clear in the *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.[205] Strictly connected to the right to be informed, and an integral part of the right to a fair trial, is also the right to legal advice and representation. Some restorative justice advocates[206] do not support the right of the accused to be represented by a lawyer in this kind of programme; however, restorative justice does not, in principle, preclude defendants such a possibility and indeed there seems to be an agreement on the possibility for them to consult with an attorney before acknowledging responsibility, in order to decide whether to take part in the programme or to be subject to a conventional criminal trial. Many restorative justice initiatives nowadays allow parties to be legally represented, and even international standards foresee the right to legal assistance.[207] Of course, in order for participants to take advantage from this assistance, lawyers and other practitioners should be adequately trained; in this way they would be fully aware of the procedures and of the rights of defendants and would be capable of describing the options in an impartial way and advise them without any risk of coercion.[208] Another guarantee, hypothetically consistent with the criteria developed by the ECtHR in *O'Halloran and Francis v UK* (regarding "the use to which any material so obtained is put") is the general prohibition on using participation as evidence of admission of guilt in a subsequent formal proceeding. The *UN Basic Principles* added a further guarantee for the offender, stating at Paragraph 7, that "restorative processes should be used only where there is sufficient evidence to charge the offender"[209] with the clear intent of limiting the possible violation of the right of offenders to not incriminate themselves.

All in all it seems that the renunciation of the defendant to part of his/her legal rights (namely to the right to remain silent) in order to participate in a restorative justice initiative, closely resembles to the so called "plea bargain", largely used in formal

204 CEPEJ (2007) 13, Paragraph 2.1.
205 ECOSOC Resolution 2002/12, Paragraph 13 (b).
206 See, a. o., John Braithwaite.
207 See Recommendation R(99) 19, Paragraph 8 & ECOSOC Resolution 2002/12, Paragraph 13 (a).
208 Skelton & Frank, 2004, p. 205; Skelton & Sekhonyane, 2007, p. 583; Strickland, 2004, p. 29.
209 ECOSOC Resolution 2002/12, Paragraph 7.

criminal justice in order to obtain lower sentences; the risk run in such a situation is therefore no lower than that presented by a restorative solution.[210] If we consider the lively debate among scholars on the issue and the initiatives already taken at international level in order to make people aware of and to limit the consequences for the accused, it can be concluded that the principle of *nemo tenetur* can, as many other non-absolute rights, be subject to a balance with other interests.

B. Double Jeopardy/*Ne bis in Idem*

The *ne bis in idem* principle, also known as "double jeopardy", is a general principle of law recognised by many national legal orders and international treaties. Article 14 ICCPR recognises, at Paragraph 7, the *ne bis in idem* principle as a corollary of the right to a fair trial; other regional bodies, such as the CoE and the EU, have provided for a judicial elaboration of it and have later on included the principle in their human rights instruments, even if not always giving it a binding character.[211] While historically it was considered applicable only within states' borders and restricted to the criminal field, the principle saw, in the last few decades, a strong development and a more zealous application by national and international bodies. The core content of the principle is a prohibition of trying somebody twice for the same act, but the meaning of "trying" has itself been widely debated among scholars. The reason for the uncertainty around what should and what should not be covered by the principle is the transformation undergone by its own *rationale*.[212]

Since its origins the principle has been linked to the sovereignty and legitimacy of the state and it was used in order to symbolize the superiority and uniqueness of the state's judicial power, which rendered unquestionable any judicial decision taken under its authority. More recently, thanks once again to the heritage of ideologies such as the Enlightenment, the principle acquired a second and more important function, namely that of protecting citizens against the state's punitive power, becoming therefore a

210 Skelton & Frank, 2004, p. 205; Skelton & Sekhonyane, 2007, p. 583.
211 See Article 50 Charter & Article 4, Protocol No. ECHR (so far ratified only by 25 countries).
212 Vervaele, 2009, p. 2.

proper human rights principle, an integral part of the right to a fair trial.[213] Increasing the protection of the accused means, of course, enlarging the range of situations that can be covered by the principle, that is to say giving a broader interpretation of the words *idem*[214] and *bis*. It is precisely the interpretation of the term *bis* that has triggered the debate about the applicability of the principle to restorative justice programmes and other alternative methods of dispute resolution. It is therefore useful to analyse, in the following paragraphs, the legislative and (especially) judicial evolution of the term.

The term *bis* entails the existence of a prior instance of something, in this case a prior prosecution concluded with a final decision; according to the CoE a decision can be considered final "if, according to the traditional expression, it has acquired the force of *res judicata*".[215] From the mentioned provision and from the jurisprudence of both the ECtHR and the ECJ, it seems clear that the applicability of double jeopardy is not limited to double punishment, but it includes double prosecution, independently from the type of sentence imposed on the accused. In regard to restorative justice initiatives it becomes necessary to establish whether an out-of-court settlement, such as the agreements concluded during mediation, conferencing or circles, can be considered likewise a judgment and therefore capable of barring further prosecution. *Recommendation No. R(99) 19*, was the first, and only international instrument to deal precisely with this issue, stating at Paragraph 17 that "Discharges based on mediated agreements should have the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts (*ne bis in idem*)".[216] Only three years later, the *UN Basic Principles* provided for a quite different regime, imposing an additional condition; in order for the agreements resulting from restorative justice programmes to acquire the same status as a judicial decision, and therefore preclude

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213Ibidem.

214 For example not considering only the legal definition of the offence as capable of barring a second trial, but instead its essential elements, in terms of "factual circumstances involving the same defendant and inextricably linked together in time and space". (See EctHR judgement *Sergey Zolotukhin v. Russia*, [GC] 1/02/2009, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91222#{"itemid":["001-91222"]}, Paragraph 84.)

215 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, available at http://conventions.coe.int/Treaty/EN/Reports/Html/117.htm, Paragraph 22.

216 Recommendation No. R(99) 19, Paragraph 17.

prosecution in respect of the same facts, they "should be judicially supervised or incorporated into judicial decisions or judgments".[217]

A more complete overview of the issue is given by the ECJ, in 2003, in the joined cases against *Gözütok* and *Brügge*[218] dealing with the interpretation of the *ne bis in idem* clause provided for by the Convention implementing the Schengen Agreement.[219] In the opinion given by the Advocate General Colomer on the preliminary ruling referred to the Court by a German and a Belgian tribunal, two major questions are dealt with; the first is whether the double jeopardy principle applies when the criminal action is extinguished through a decision to discontinue a proceeding (taken by the Public Prosecutor Office), after the offender has fulfilled the conditions imposed upon him/her; the second is whether the approval of such a decision by a court is needed.[220] Even if the reasoning of the Advocate General does not exclusively focus on restorative justice practices, while dealing with the interpretation of the term *res judicata* and of the expression "finally disposed of" (indicating the closure of a case for the purpose of barring new prosecutions) it extensively refers to penal mediation.[221] The whole opinion given by the Advocate General is permeated by a conception of the principle of the *ne bis in idem* as one of the fundamental rights which lie at the basis of the legal system of the European Union and its Member States, and which deserves, therefore, a broad interpretation in the interest of the citizens. In his conclusions, entirely recalled by the ECJ, the principle of double jeopardy is deemed to apply even though no court is involved in the procedure and the decision in which the procedure culminates does not take the form of a judicial decision, provided that

> "1. The conditions imposed are in the nature of a penalty; 2. The agreement presupposes an express or implied acknowledgement of guilt and, accordingly, contains an express or implied decision that the act is culpable; 3. The agreement does not prejudice victims and other injured parties, who may be

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217 *Un Basic Priniciples on the Use of Restorative Justice*, Paragraph 15.
218 *Hüseyin Gözütok* (Case C-187/01) and *Klaus Brügge* (Case C-385/01), (2003) ECR I-5689, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0187:EN:PDF.
219 Article 54 Convention implementing the Schengen Agreement, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):en:HTML.
220 Vervaele, 2009, p. 9.
221 Opinion of the Advocate General Ruìz-Jarabo Colomer, deliverred on 19 September 2002, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CC0187:EN:PDF, see a. o., Paragraph VI 4-5.

entitled to bring civil actions".[222]

It seems so far that agreements concluded during restorative justice programmes satisfy the three above-mentioned conditions and are therefore suitable to impede further prosecution without the need of supervision by a court or incorporation into a formal judicial decision. A risk, however, still exists for defendants; there is the possibility that these programmes can be interrupted before an agreement is reached or alternatively before the offender has completely met its requirements. This circumstance is briefly referred by both the *Recommendation No. R(99) 19*[223] and by the *UN Basic Principles*[224] which suggest the referral of the case back to the restorative programme or to the criminal justice authorities without taking any clear position on the issue. Especially in those cases where the defendant has already partially complied with the agreement, in order to avoid a violation of the *ne bis in idem* principle, some safeguards should be set.

C. Proportionality of Punishment and Legal Certainty

As already mentioned in Chapter 1, one of the major concerns of restorative justice's opponents is the fact that such programmes risk resulting in disproportionate outcomes. Programmes which are victim- or community-centred, are in fact much more exposed to emotions, which sometimes tend to replace other guiding criteria, such as the seriousness of the offence committed by the accused. The matter of concern is therefore double; on the one hand there, is in fact, the risk of an internal inconsistency, which leads to the infliction of punishments that are not proportionate to the gravity of the conduct penalised; on the other hand solutions given by restorative justice and by formal courts in the handling of similar cases may substantially differ.[225] Legal certainty and equal treatment are important corollaries of the rule of law, undeniable in a democratic state; some solutions can, however, be found in order to make restorative justice abide by these fundamental principles and assimilate it to traditional criminal justice. Beside those who consider proportionality as unnecessary and subordinate to

222 Ibidem, Paragraph 134; (2003) ECR I-5689, Paragraph 47.
223 Paragraph 18.
224 Paragraphs 16-17.
225 Skelton & Frank, 2004, p. 206; Strickland, 2004, p. 30.

other more important objectives of restorative justice, there has been a huge pressure, on the part of scholars and practitioners, for the introduction of standards aimed at putting superior and inferior limits on the level of punishment to be imposed through restorative programmes. Guidelines could be useful in order to avoid pressure and coercion by some participants that result in the imposition of an excessive punishment for the offender, especially when dealing with minors. Taking as the only criteria the damage caused by the offender to the victim and the community can, in fact, give rise to unbalanced and unfair outcomes; for instance, the majority of the offences committed by minors involve acts of vandalism, such as writing on walls or damaging public places and schools. If the restorative response only took into consideration the material damage, a petty offence would result in a heavier punishment than a more serious one, committed, for example, by an adult with a greater capability of restoring and paying back.[226]

The need for proportionality does not, however, require the adoption of a fully retributive conception of it; some authors have, instead, suggested the adoption of an intermediate solution. Taking retributive limits, based on the seriousness of the offence, as a minimum and a maximum level of punishment would have several advantages; first of all it would put the offender and the victims in a more balanced position. One of the critiques which is levelled at restorative justice is the lack of equality between the parties and the risk that, the community and the victim often moved by anger and retaliatory feelings, the outcome will result in a humiliating and degrading treatment for the offender. With a minimum and a maximum penalty standardized, the risk of unjust and excessive sentences would be reduced to the advantage of the whole restorative process, which could be led in a more harmonious and trustful way.[227] Secondly, a framework for sentencing would be helpful in case no agreement was reached and the case was referred to a court for the initiation of a formal proceeding; the outcomes presented to the defendant, even if different, would not be that distant between each other, at least in the rationale underlying them. This would be particularly evident in the case of minors (where restorative solutions are sometimes harsher than court decisions)

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226 Eliaerts and Dumortier, 2002, p. 210.
227 Ibidem.

and would have, once again, the advantage of partially levelling both the internal and external inconsistencies in sentencing.[228] Some official documents have already embraced the need for proportionality in restorative sentencing; *Recommendation No. R(99) 19* and *UN Basic Principles* when dealing with mediation's possible outcomes, points out the need for agreements to contain only "reasonable and proportionate obligations".[229] The Explanatory Memorandum to *Recommendation No. R(99) 19* contains a list of criteria that an agreement reached through a process of mediation should satisfy; it should be voluntary, reasonable and proportionate. Both the conditions of reasonableness and proportionality require the mediator to take into consideration the seriousness of the offence in order to determine the amount and type of punishment and prevent the imposition of excessive punishments on the offender.[230] However, the expression "within wider limits" used in the same paragraph demonstrates the lack of appropriate standards, a gap that so far has not been filled.

III. Other Human Rights Concerns

Apart from the above-mentioned procedural rights, which are considered by some to be at stake in restorative justice programmes, some other issues have worried human rights activists in the last few decades. Starting with the so called "net-widening" effect, there has been a worry that restorative justice initiatives would broaden the net of social control, therefore increasing the number of suspects that are finally brought to justice. In the absence of sufficient evidence or in particularly petty cases, the Public Prosecutor would, according to this theory, refer the case to a restorative justice programme instead of dismissing the case.[231] There are, however, counter-arguments that demonstrate that the effect produced so far by restorative initiatives is exactly the opposite. Public Prosecutors have, in fact, always taken the practices of mediation, conferencing and peacemaking circles very seriously; the net of social control is not broadened by restorative justice systems, but is instead, shifted from the state to the

228 Ibidem.
229 Recommendation No. R (99) 19, Paragraph 31 & ECOSOC Resolution 2002/12, Paragraph 7.
230 Recommendation No. R (99) 19, Explanatory Memorandum, available at https://wcd.coe.int/ViewDoc.jsp?id=417217&Site=CM, Paragraph 31.
231 Eliaerts and Dumortier, 2002, p. 211.

community level. This has brought, indeed, numerous advantages; when the community is much more connected with the victim and the offender, both the implementation and the monitoring of the sentences inflicted on the latter become easier and more effective, with clear advantages also for the victims. Moreover it has been widely demonstrated that restorative justice not only reduces the level of imprisonment, so lightening the workload of the judicial apparatus as a whole, but contributes to the reduction of re-offending, having a long term positive effect on delinquency and crime rates.[232]

A second major concern, always linked to the involvement of the community in the process, is the so called "risk of power imbalances". Differences in sex, age, race, gender, culture, class, etc. are likely to exist among the members of any community. This community dimension has been largely criticised, especially in Western liberal states, for the supposed danger which it represents for the single individuals, namely for the weakest participants, such as women and children. There appear to be two main risks that could derive from empowering the community without the predisposition of adequate safeguards for its individual members.

On the one hand the great power left to the community in the determination of the level of punishment/reparation due by the offender risks violating his/her human rights and depriving him/her of substantial and procedural safeguards if the community involved is not adequately composed. As mentioned in Chapter 1, there is no agreement among restorative justice advocates on the definition of the term "community", which can either be conceived as a "community of care" (involving those who are emotionally or physically connected with the parties) or as a "geographical community", which, however might be not emotionally linked to the victim and the offender and therefore give rise to different (even negative) outcomes. The ultimate goal of the community, in the view of restorative justice advocates, should be that of educating the offender and take responsibility during the follow up phase, as expressed by Schiff:

> "developing and maintaining forum to discuss crime and its impact; identifying and communicating normative standards of collective living; conveying censure when such norms have been violated; and developing collective ownership of the problems that crime presents in a context of informal social control and support"[233]

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232 See in general Latimer, Dowden, & Muise, 2005.
233 Schiff, 2007, p. 241.

This is, however, not always the case. There is, in fact, the risk that in order to preserve the communitarian dimension, offenders are exposed to serious punishments and deprived of their elementary rights; there is a substantial difference between community/restorative justice and formal criminal justice; even being both forms of "geographical justice", the latter is guided by values and procedures which are generally recognised at national (and often international) level and are binding on the totality of practitioners playing a role in the process. Instead, the fear of "standardisation" and the intrinsic nature of restorative justice practices have, so far, impeded the development of "common practices", which would, of course, contribute to the creation of safeguards and standards for offenders and other participants. What should be ensured is, therefore, that the interest of the community (and the victim) to safety and restoration do not override the rights and dignity of offenders.

On the other hand, and very much linked to what has been said so far, the issue of cultural relativism also constitutes a threat to the human rights of the offender (and also of other participants, especially the victim). A justice system that incorporates cultural values in the settlement of disputes, can of course, have certain advantages in terms of both individual and collective rights. Not only would it contribute to the maintenance of the specific traditions at issue, but could also contribute to render the sentence more suitable to the offender's set of values and therefore better understood and more effective for his/her rehabilitation. There is, however, the possibility that these same values are used in a way which is detrimental for the offender him/herself. This is especially the case when, for example, a woman finds herself to be judged according to the patriarchal values of her community of belonging, or when the offender belongs to a different culture and does not share the values and believes of the community which is asked to judge him/her.[234] A conception of human rights as a mean of "ensuring that each person has the capabilities to realise their goals concerning the kind of life they would like to live and also possess certain well-being goods"[235] is in line with a culturally sensitive idea of justice; the core set of values identifying the specific culture according to which the offender will be judged, should, however, be made clear, in

234 Ward & Langlands, 2008, p. 368.
235 Ibidem, p. 369.

order for the community to be shaped without prejudice to offender's own believes and impeding any form of discrimination.

IV. Conclusions

Both informal systems and community-based ones have, for long, been considered a threat for individuals' human rights. Despite the Western individualised approach that partially still characterises the codification of human rights in international instruments, some points of convergence can be identified in order to minimise the gap existing between restorative justice and human rights of offenders. On the one hand, the emphasis put by formal judicial systems on procedural rights (such as the right to a fair trial), reflects a narrow conception of the human rights framework; the advantage of giving up some procedural safeguards can sometimes be that of having other rights, such as the right to equality and the human dignity, enhanced (for example, as mentioned in Chapter 1, through a process of re-integrative shaming).[236] Different rights, and different safeguards, correspond to different procedures; we cannot, therefore, pretend to apply the same set of rights to formal criminal proceedings and to restorative ones. A different conception of justice, based on values such as peace, reconstruction and reconciliation, must be adopted in order to accept the partial denial of certain rights to the advantage of other, equally important guarantees. This is what Humbach describes as "a justice of right relationships", which favours the maintenance of mutual relationships on the full realisation of individual rights.[237]

On the other hand the good for the individual must not be opposed to that of the community; the contrast between liberal and communitarian conceptions of right has somehow been tempered by the position of those who, considering themselves liberals, recognise the importance of a cultural identity. According to the so called "liberal-culturalists" the demand for specific rights linked to the culture of origin of a determined group does not necessarily contrast with a liberal conception of rights, rather it reinforces the sense of freedom and equality of the individual.[238] Of course the vice

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236 Skelton & Sekhonyane, 2007, p. 592.
237 Ibidem, quoting Humbach, 2001, p. 41-61.
238 Kymlicka, 1997, p. 31.

versa could also be affirmed, as certain liberty and civic rights constitute necessary preconditions in order for the individual to enjoy some social and cultural rights. There seems to be an interdependence between the two dimensions of the individual, and restorative justice involves both of them; offenders must be held accountable in order to give them (and the community as a whole) the possibility of restoring the damaged relationship, but the recognition and protection of his/her fundamental rights by the community is a prerequisite for the legitimation of such practices.[239] If the idea of a complete incorporation of restorative justice programmes into the formal criminal justice system (with the resulting application of due process standards to all its procedures) is considered detrimental to its very nature, a different solution may be found. The development of independent and informal (or semi-formal) set of guarantees, aimed at ensuring the protection of participant's human rights, can represent a good alternative. However, despite the “geographical” nature of some of these initiatives and the deep roots they have into local practices, the diffusion they are experiencing and the impact they have on the lives of individuals (especially on offenders that are diverted from the criminal justice system) make it necessary to take into account the developed international human rights standards to elaborate, also the European Union level, some new guidelines and safeguards to be put at the basis of restorative justice initiatives.

239 Ward & Langlands, 2008, p. 370.

Conclusions

From the analysis conducted in the thesis, some conclusions can be drawn on the state of restorative justice programmes in Europe and the impact these programmes have on offenders.

The lack of a common understanding of the ideology of restorative justice, and the existence of a plurality of internal trends and conceptions of it represents the major obstacle to its widespread diffusion and its regular implementation in Europe. The alleged contrast between restorative values and the values inspiring European criminal justice systems had the effect of making legal practitioners sceptical about a possible implementation of such programmes within or in parallel to formal criminal justice. However, a comparative analysis of restorative, retributive and rehabilitative justice revealed the partial falseness of this supposed contrast. The restorative conception of wrongdoing, which sees crime as a violation of relationships (and not only as a violation of the law and therefore of the state), obviously leads to a different understanding of the role that punishment should have. Far from being a "fixed payback" for the offence committed, restorative punishment should have the function of restoring the victim and the community affected by crime, re-establishing the damaged relationships by way of reintegration of the offender into the society. This automatically entails a reduction of custodial sentencing in favour of a large use of alternative sanctions, such as community service and probation.

The use of such forms of treatment attracts criticisms on the part of those who consider these lenient sentences in contrast with a retributive conception of punishment. However, also formal criminal justice systems have increased the use of non-custodial punishments in the last few decades. These forms of treatment are, in fact, more respondent to the current needs of the criminal justice systems, namely that of reducing the high rates of imprisonment (and its damaging consequences) and facilitating the rehabilitation of offenders Despite the absence of an explicit rehabilitative goal, restorative practices cause, in the majority of cases, a reduction of recidivism rates, aligning themselves with both retributive and rehabilitative theories of punishment.

Other concerns, mainly due to the informal character of such programmes which represents a risk of infringement of the rights of participants, are partially comforted by

the attempts made by supranational (and national) bodies to codify restorative justice in legislative and policy documents. The Council of Europe was the first to take steps in the field of Restorative Justice. *Recommendation No. R(99) 19* is the first international document which gives an input towards the adoption of mediation (in criminal matters) in European states. Through a series of following document the CoE has demonstrated an increasing commitment towards the diffusion of such instruments to complement the criminal justice systems of its Member States. The work of the CoE goes mainly in two directions: on the one hand it tries to increase awareness about restorative justice among legal practitioners and the general public; on the other it points out both benefits and risks linked to the adoption of these programmes. To what concerns this last point three are the perspectives adopted by the Coe; a certain number of recommendations were adopted, having as a focus the protection of victims during the implementation of restorative procedures. In parallel many instruments dealing with crime prevention and alternative treatments for offenders were realised. Finally, the advantages brought by restorative practices to the community and to the formal criminal systems are underlined. It seems therefore that the group of experts working at the Recommendation managed to bring together, under the umbrella of restorative justice, the needs of both victims and offenders, always considered contrasting and irreconcilable.

The United Nations, through the work of the United Nations Office for Drugs and Crime, took steps in this same direction. With the 2002 *UN Basic Principles on the Use of Restorative Justice*, and the Handbooks released in the following years, the UN gave an overview of restorative justice practices around the world. Both victims' rights and Offenders' needs were taken into account in the work of the Office and the broad scope of the studies realised had the advantages of highlighting the variety of restorative programmes and approaches existing throughout the 192 Member States. The importance of the instruments adopted in the restorative field by the CoE and the UN must be emphasised. Recommendations and Handbooks have, in fact, a double function. On the one hand they are capable of reaching the government level, influencing therefore criminal policies and judicial reforms; on the other hand they address practitioners, increasing awareness on the topic and contributing to ameliorate the implementation of such practices. As already mentioned in Chapter 2, the strong

potential of such instruments is somehow diminish by the lack of enforcing mechanisms and (often) monitoring bodies.

This is the reason why action by the European Union is required in the field. In the last fifteen years, the majority of EU Member States have adopted national legislation on restorative justice. However, strong disparities still exist among different countries, due to the lack of a central harmonising policy. EU competencies in the area of criminal justice have been strengthened by the Treaty of Lisbon, adopted in 2009.[240] The need to combat crime within EU boundaries has increased cooperation among national agencies and has led to the creation of new EU bodies entirely devoted to the prevention of crime.[241] The idea of combining restorative justice and crime prevention has been largely addressed in recent policy guidelines, often together with the need for providing offenders with alternative measures capable of reducing high prison rates. The EU has demonstrated a strong engagement in the field, by both including restorative justice in policy programmes and by financing research projects on the subject. However, as in many other areas of criminal justice, European Institutions have always been reluctant to adopt specific legislation. The only directive which expressly mentions restorative justice is Directive 29/2012/EU *Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*[242], dealing entirely with the right of victims without going any further in the exploration of restorative programmes.

Many are the reasons for the caution demonstrated by EU institutions. The lack of a unified approach to restorative justice both at scholarship and at practitioners level makes it difficult to reach an agreement on common lines to be followed at national level. The proposal of introducing a network of national contact points for restorative justice was advanced in 2002. The network would facilitate the institutionalization and exchange of information among Member States and would contribute to the harmonization of restorative policies and legislations inside the EU; however, due to the lack of financial resources the proposal was never taken into consideration. Also the

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240 Treaty of Lisbon, 17 December 2007, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF.

241 See, for instance, the European Crime Prevention Network, at http://www.eucpn.org/

242 2012/29/EU, 25 October 2012, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF.

relationship between EU institutions and agencies and NGOs or research centers (such as the European Forum for Restorative Justice), working in the field of restorative justice and fostering its development and harmonization in Europe, is rather poor. The punitive culture which characterized, for long, the majority of criminal justice systems of EU Member States also constitutes an obstacle for the implementation of restorative practices; professionals were very sceptical about the opportunity of adopting such mechanisms in the criminal area, and when it happened it was always as the result of a compromise. The risks that restorative justice entails with regard to the legal rights of offenders is often used in order to reject the adoption of common policies and legislation in the field. Nevertheless, as demonstrated in Chapter 3, a balance among offenders' rights and needs seems to prove the compatibility of restorative initiatives with human rights of offenders. Of course, some risks linked to the informal character of such programmes arise. The solution, however, cannot be an entire dismissal of the restorative paradigm and of the benefits it brings to both the participants (victim, offenders and community) and the criminal justice system as a whole (for example, in terms of reduction of workload for courts, reduction of recidivism, and widening of the social control). A better solution would be that of reaching an agreement on those principles and objectives of restorative justice which are compatible with the values laying at the basis of the formal criminal justice system. Having in mind both the advantages and the risks of restorative programmes it would be easier to develop common policies and legislation capable of enhancing the benefits while at the same time developing adequate safeguards and minimum standards in order to prevent violations of participants' rights. The EU should use the new competences provided for in Title V TFEU[243] to take steps in this direction.

243Treaty of Lisbon, Title V.

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