



# REVIJ

Reparation to the victim in the European  
Juvenile Justice System

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## FINAL REPORT

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REVIJ

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## PREFACE

Different studies have noted that the reparation of the victims within criminal proceedings plays an important role in satisfying their interests and needs, repairing the damage caused and avoiding secondary and repeated victimization. Furthermore, reparation is especially relevant when it is developed in the field of juvenile justice, because it offers the opportunity for the juvenile offender to take responsibility for their actions and the consequences of the crime for the victim, this is mainly due to the plasticity of the evolutionary stage in which they find themselves.

Thus, within the past thirty years, different International bodies have highlighted the importance of developing new restorative practices within juvenile justice systems in order to promote the diversion of young offenders and their social reintegration.

Since the eighties, United Nations, via different resolutions and observations of the General Assembly, the Committee on the Rights of the Child and the Economic and Social Council, has been focusing on the importance of developing alternative measures to detention within the juvenile justice systems. The main documents in this regard are as follows:

UNITED NATIONS, *Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, adopted by General Assembly resolution 40/33 of 29 November 1985. Rule 11 refers to the diversion of cases as an appropriate response to suspend the criminal proceeding, giving such authority to police, the prosecution or other bodies as well as courts, boards or councils. Likewise, it indicates that such a referral is to be carried out with the consent of the minor, the supervision and guidance of the minor is also necessary along with restitution and compensation programs for the victim.

UNITED NATIONS, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 November 1985. This Declaration states that in order to facilitate the conciliation and reparation of victims, whenever possible problem solving mechanisms, including mediation and arbitration will have to be used.

UNITED UNION, *Convention on the Rights of the Child*, adopted by General Assembly resolution 44/25 of 20 November 1989. Articles 40.3 b) and 40.4, highlight the diversion of proceedings involving minors in contact with the law. In particular, the resolution states that Member States must have a catalogue of alternative measures to institutionalisation that includes options such as care, guidance, supervision, counseling, etc.

COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 10 (2007), Children's rights in juvenile justice*. This includes the referral of cases as a basic component in juvenile justice policy, urging national authorities to develop and implement alternative measures to detention that promote social reintegration of young offenders as a result of the suspension of criminal proceedings.

UNITED NATIONS, *Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, adopted by General Assembly resolution 45/110 of 14 December 1990. The main goal is to increase the community participation in managing criminal justice, and urge Member States to promote the development of alternative measures to the deprivation of liberty in all phases of criminal proceedings. It also establishes a wide catalogue of non-custodial measures in the different stages of the procedure, ranging from cautions or economic sanctions to imposing community services.

UNITED NATIONS, *Guidelines for the prevention of Juvenile Delinquency (Riyadh Guidelines)*, adopted by General Assembly resolution 45/112 of 14 December 1990. This refers to the need to prevent the criminalisation of young people using the referral of cases whenever appropriate.

ECONOMIC AND SOCIAL COUNCIL OF THE UNITED NATIONS, *Resolution 1997/30. Guidelines for Action on Children in the Criminal Justice System* 21 July 1997. This resolution stresses the need for comprehensive juvenile justice systems that facilitate the adoption of alternative measures at all stages of the criminal proceedings as a way to prevent recidivism and facilitate the social reintegration of the minor.

UNITED NATIONS, *General Assembly resolution 65/230, XII United Nations Congress on Crime Prevention and Criminal Justice, 2010*. This promotes the development of restorative processes in the juvenile justice systems as well as the referral to resources outside the criminal justice system.

UNITED NATIONS, *Resolution adopted by the Human Rights Council 24/12 of 26 September 2012, on human rights in the administration of justice, including juvenile justice*. This urges States to develop and implement a comprehensive juvenile justice policy that includes the use of alternative measures, focusing on restorative practices.

With respect to the European Union, documents that reference restorative justice in the field of juvenile crime come mainly from the Committee of Ministers of the Council of Europe, the Economic and Social Committee and the European Parliament:

THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Resolution No. 78 (62), social transformation and juvenile delinquency, 29 November 1978*. This resolution stresses the importance of having educational measures imposed on young people in the field of juvenile justice, and limiting the deprivation of liberty including the involvement of the community in implementing alternative measures.

THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Recommendation R 87 (20), "Social reactions to juvenile delinquency" adopted by the Committee of Ministers on 17 September 1987, during the 410th meeting of the Ministers' Deputies*. point II. Diversion encourages the development of alternative proceedings to prevent minors being inserted into the criminal justice system. Point IV states that interventions should support the increased use of alternative measures, providing special attention to repair the damage incurred.

THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Recommendation R 20 "New ways of dealing with juvenile delinquency and the role of juvenile justice" adopted by the Committee of Ministers on 24 September 2003 at meeting 853 of the delegates of Ministers*. In addition to preventing crime and achieving social reintegration, this recommendation includes the reparation of victims. In order to achieve this end, point III urges the development of alternative measures, making particular reference to mediation and those aimed at repairing the damage caused to the victims.

ECONOMIC AND SOCIAL COUNCIL OF THE UNITED NATIONS, *Opinion of the European Economic and Social Committee on the prevention of juvenile delinquency. Ways of dealing with juvenile delinquency and the role of the*

*juvenile justice system in the European Union, 2006*. In paragraph 4 regarding new trends in juvenile justice, the concept of restorative justice that has emerged is defined as, “encompasses the victim, the perpetrator and the community in seeking solutions to the consequences of the conflict caused by the offence”. Due to the benefits that this reparation has for all parties involved, these practices “represent an ideal model for the juvenile justice system since it produces little stigmatisation, is highly educational and is less punitive”.

THE EUROPEAN PARLIAMENT, *Resolution of 21 June 2007 on juvenile delinquency “the role of women, the family and society”, 2007*. It recommends that State Members focus their national juvenile justice policies on prevention, judicial and extrajudicial measures and the social inclusion of all young people. It stresses the need for developing alternative measures to detention such as mediation and reparation to the victim.

THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Recommendation (2008)<sup>11</sup> of the Committee of Ministers of the Council of Europe on the European Rules for juvenile offenders subject to sanctions or measures, adopted in 5 November 2008*. Although, there is a specific recommendation for the implementation of custodial measures for minors, it considers the mediation and other restorative measures should be encouraged in all phases of the proceedings.

According to the above, it is noted that at both the international and European levels it has been emphasised that these practices should contemplate compensation and restitution to the victim. Among the alternative measures to custody mentioned in different recommendations were mediation and those aimed at repairing the damage

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caused including the participation of victim, offender and community as fundamental parts of the process.

Thus, taking into account the benefits that reparative justice could offer to victims of crime, *Directive 2012/29/EU of European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, contemplates these services and the conditions under which they are to be developed within the chapter devoted to the participation of victims in criminal proceedings. However, due to its recent entry into force, there is a lack of data or studies that report on compliance and implementation of this in Member States.

In this regard, through the *REVIJ project: Reparation to the victims in the European Juvenile Justice Systems*, led by Fundación Diagrama (Spain), a comparative analysis of reparation provided for victims within the European Juvenile Justice Systems has been made.

Led by Fundación Diagrama, the Project joined forces with different European organisations such as: Diagrama Foundation (United Kingdom), Association Diagrama (France), Istituto Don Calabria (Italy), Universidade Católica Portuguesa do Porto (Portugal) and the International Juvenile Justice Observatory (Belgium), which have focused on analysing the provisions contained in Directive 2012/29/EU of the European Parliament and of the Council as regards the respect for rights, support and protection of the victims of crime; the practices carried out in restorative justice services in the field of juvenile justice, and the type of guarantees they offer to victims.

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In this regard, the project is the result of the efforts of the consortium and its main objective is to present the results of national reports and facilitate different practices in the field of support to victims within the youth justice systems.

Francisco Legaz Cervantes  
*Chairman of Fundación Diagrama*





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*Fundación Diagrama Intervención Psicosocial*

# CHAPTER I:

## RESTORATIVE JUSTICE FOR VICTIMS IN THE EU

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## I. INTRODUCTION

*The International Juvenile Justice Observatory works for the defense of children's rights, focusing on the issues faced by those who are in conflict with the law, caught in cycles of violence and crime or particularly at risk of social exclusion. Involved in a wide range of activities, the Observatory has tackled the theme of restorative justice from different perspectives: promoting in depth research on the evolution of the practice at national and regional levels<sup>1</sup>, and advocating the implementation of its constitutive principles.*

In the course of the last four decades, the diffusion of restorative practices has considerably influenced the evolution of justice systems, and especially juvenile justice systems. Even more noteworthy is the transversal nature of this expansion, which has taken place, albeit with different characters, in different continents and across different justice systems. Measures such as victim-offender mediation services or conferencing have officially become an option in the course of criminal proceedings. As they acquired an increasingly important role in justice reforms, they have been increasingly regulated and gained easier access.

Such development has drawn considerable attention to restorative approaches, from academics, policy-makers and international organisations, who examined the strengths and weaknesses of the emerging services. Since some of those measures allow offenders to be diverted from the traditional criminal system, restorative practices are often analysed in terms of the benefits they could provide to young offenders, who are particularly vulnerable when they come in contact with the justice system<sup>2</sup>. Nonetheless, the consideration of **the victim's perspective** is also a crucial aspect of the research on restorative justice.

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<sup>1</sup> Dünkler, F. Horsfield, P., Parosanu, A. (2015) *Research and selection of the most effective Juvenile Restorative Justice practices in Europe: 28 National Snapshots*, International Juvenile Justice Observatory.

<sup>2</sup> Chapman, T. Aertsen, I. Anderson, M. Gellin, M. (2015) *Protecting Rights, Restoring Respect and Strengthening Relationships: A European Model for Restorative Justice with Children and Young People*, International Juvenile Justice Observatory.

If the advantages of recurring to restorative practices may be more evident from the point of view of the offender, especially when compared to a criminal trial or a custodial sentence, they are equally considerable when taking into account the position of the victim. While the criminal proceedings and trial phase in particular, are built on an opposition between the State and the offender, and therefore assume the crime as a violation of the system of law and order, restorative justice puts the personal damage suffered by the victim right back at the core of the process. The participation of the victim, his or her suffering, and his or her right to see it recognised and healed are therefore substantial components of a restorative approach.

In this light, the present article aims to determine **what beneficial elements the restorative process can provide to a victim of crime, and at what conditions they are better ensured**. In order to do so, it proposes a threefold analysis with a regional scope on the European Union. First, an overview of international and regional standards will address and define three key aspects: the rights of the victims; the minimum standards to guarantee a fair restorative process; and the particular binding framework determined by European legislation. A second part of the article will analyse the diffusion and the character of the restorative justice developments in the European Union. This section will focus on the definition and the expansion of restorative measures; their core principles and their distinctions from a punitive approach; as well as the degree and typologies of their implementation. Finally, the conclusion will outline how certain aspects of restorative processes are particularly indicated to fulfil the rights of victims.

## II. INTERNATIONAL FRAMEWORK: STANDARDS AND RECOMMENDATIONS

### A. Safeguards for Victims in Criminal Proceedings

#### A.1 Standards on Victims' Protection

The limited role of the victim in the traditional criminal justice proceedings has attracted increasing attention in the last decades. As a result, human rights' standards, conventions, and recommendations of International and Regional bodies have progressively specified the rights of victims of crime, and the safeguards that they should be guaranteed in the course of criminal investigations and trials.

The relevance of the topic is attested by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), which provides a list of fundamental rights for victims of crime, such as access to justice and fair treatment, retribution, compensation and assistance<sup>3</sup>.

Subsequent international Treaties have built on such fundamental provisions, further specifying their scope and content and reinforcing their binding character. The United Nations Convention against Transnational organized Crime and the Protocols Thereto, for instance, specify the role of victim's compensation in the disposal of confiscated

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<sup>3</sup> Annex to the General Assembly resolution 40/34 (1985) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

property<sup>4</sup>; enlarge the right to assistance to the obligation of providing appropriate **protection**<sup>5</sup>, and highlight the importance of **specific training** to provide adequate assistance and protection to victims<sup>6</sup>. The Rome Statute<sup>7</sup>, on the other hand, establishes the role and guarantees of victims and witnesses in the International Criminal Court proceedings, providing for consistent safeguards.

The 2010 Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power<sup>8</sup> further strengthens the safeguards of victims by reiterating the fundamental procedural rights, but also focusing on their actual implementation and on the effectiveness of the justice mechanisms, which shall be: *'expeditious, fair, inexpensive and accessible'*<sup>9</sup>. Moreover, Art. 4 highlights the importance of a specific preventive action to reduce victimization, and devotes particular attention to the risks of secondary victimization and to policies that tackle directly vulnerability factors that affect certain groups in particular. Another element that is progressively underlined is the notion of *meaningful access* to justice proceedings, whether criminal or administrative, and to legal aid<sup>10</sup>, described as a right of victims and witnesses as much as accused and suspects.

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<sup>8</sup> United Nations (2010) *DRAFT UN Convention on Justice and Support for Victims of Crime and Abuse of Power*.

<sup>9</sup> Art. 5.1, United Nations (2010) *DRAFT UN Convention on Justice and Support for Victims of Crime and Abuse of Power*.

<sup>10</sup> See also Principle 10, Economic and Social Council (2012) United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.



In the same direction but on a regional level, the Council of Europe adopted in 2006 the Recommendation on assistance to crime victims<sup>11</sup>, which incorporates UN and European standards and replaces the old Recommendation on the assistance to victims and the prevention of victimisation of 1987. The various safeguards established by the Recommendation emphasize, in particular, the need to **prevent repeated victimization** and the obligations of the States not only to deal with the offenders but also provide assistance to victims.

## A.2 Standards on Child Victims

An important category of international standards that protect the rights of victims concerns specifically children victims. The underlying principle of these measures is the one that establishes the **best interest of the child** as the paramount consideration of any legislation, social protection scheme and court of law that have an influence on children. Such norms have developed according to the specific needs of this group, especially in the context of criminal proceedings: ‘children who are victims and witnesses are particularly vulnerable and special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process<sup>12</sup>.

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<sup>11</sup> Council of Europe (2006) Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims

<sup>12</sup> Preamble, ECOSOC (2005) *Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime*.

The United Nations Convention on the Rights of the Child (CRC) establishes overarching rights for those children who have been victim of neglect or any form of degrading and cruel treatment. In these cases, the State has the **obligation of promoting the victims' psychological recovery and social reintegration**, in an environment that fosters their health, self-respect and dignity<sup>13</sup>.

Beyond the general right to recovery, a set of specific procedural safeguards need to be applicable in the course criminal proceedings, to counterbalance the particular situation of the child victim during the justice process. From the phase of investigation to the trial, the child or young person experiences enhanced vulnerability, which can further be aggravated by the circumstances of the crime and by the requirements of criminal proceedings. The first provision on procedural safeguards specifically addressed to children victims is Art. 12 of the CRC, providing for **the right to be heard**, which applies to both victims and offenders<sup>14</sup>, and which represents the main pillar to ensure their active participation in the proceedings. The Committee on the Rights of the Child offers helpful specifications concerning the broad implications of this right, which is not limited to the free expression of personal views by the children, but also inherently linked to the right to be adequately informed of their role within the proceeding, as well as of the availability of support services<sup>15</sup>.

The UN Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime<sup>16</sup> reaffirm the basic procedural rights of victims, with particular attention to the

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<sup>13</sup> Preamble, ECOSOC (2005) *Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime*, Res. 2005/20.

<sup>14</sup> Art. 39, United Nations (1989): *UN Convention on the Rights of the Child*.

<sup>15</sup> Art. 12, United Nations (1989): *UN Convention on the Rights of the Child*.

<sup>16</sup> Art. 62 ; 63 ; 64, UN Committee on the Rights of the Child (CRC), General Comment No. 12 (2009): *The right of the child to be heard*, 20 July 2009, CRC/C/GC/12.

specific needs of a child. Such guarantees, already outlined in the CRC<sup>17</sup>, include: **the right to be treated with dignity and compassion**, which limits interferences in the child private life to the minimum necessary, and stresses the importance of having trained professionals; **the right to be protected from discrimination**, and **the right to be informed**, together with **the right to be heard**<sup>18</sup>.

Moreover, these Guidelines recall the **right to effective assistance** (already in Article 37.d of the CRC), which entails legal assistance but also counselling and services to promote physical and psychological recovery. Such multidisciplinary assistance should be provided throughout the justice process and is instrumental to ensure effective participation.

On the other hand, participation to the judicial proceeding shall not, in any case, impact a child's **right to privacy**. All the concrete concerns over the impact of the proceeding, from its inception to its end, on the well-being of the child, are explicitly addressed by the **right to be protected from hardship during the justice process**, which covers the detection, investigation and prosecution phase and tackles three fundamental aspects: the length of the process, the attitude and preparation of the staff, the sensitivity of the environment and of the procedures<sup>19</sup>.

Finally, the **right to reparation**<sup>20</sup> aims to ensure that the interest of the victim plays a key role in determining not only the course of the proceeding, but also its outcome.

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<sup>17</sup> Art. 37, Art. 40, United Nations (1989): *UN Convention on the Rights of the Child*.

<sup>18</sup> Respectively, title V; title VI; title VII, tile VIII, Economic and Social Council (2005) *Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime*, Res. 2005/20.

<sup>19</sup> Respectively: title IX, X, XI Economic and Social Council (2005) *Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime*, Res. 2005/20.

<sup>20</sup> Title XIII, Economic and Social Council (2005) *Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime*, Res. 2005/20.

Such provision contributes to reaffirming the importance of the victim in the criminal process, and shifts the purpose of sentencing from the exclusive consideration of appropriate punishment to the offender.

Overall, in the International as well as in the EU and national legal frameworks, the safeguards for victims have multiplied in the course of the last decades, embracing the different stages of their contact with the justice system. Nonetheless their effective implementation has proved difficult, while recent research shows that victims of crime, and especially vulnerable groups, have experienced various types of difficulties in reporting a crime to the competent authorities<sup>21</sup>.

Taking into account the challenges to achieve effective access to justice, the latest international guidelines, as well the most recent EU legislation have emphasized the emergence of certain standards<sup>22</sup>, more focused on facilitating the implementation phase, specifically concerned with:

the provision of legal aid to victims of crime;

the specific role of frontline responders to duly communicate with the victim their rights in terms of procedural safeguards, legal aid, assistance and information;

ensuring that the view of the victim is taken into account in the course of the proceeding;

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<sup>21</sup> Fundamental Rights Agency (2014) *Victims of Crime in the EU: the Extent and Nature of Support for Victims*, p.28.

<sup>22</sup> For an analysis of the emerging standards see Fundamental Rights Agency (2014) *Victims of Crime in the EU: the Extent and Nature of Support for Victims*, p.26

the close coordination between the different providers of assistance to the victim (social, legal, health related).

In the same view of facilitating the referral of crimes and therefore the access of victims to justice, it is crucial to highlight the role of the State, and therefore of its agents, in fulfilling the rights of victims. Both the European Court of Human Rights, and the Court of Justice of the European Union have contributed to developing significant jurisprudence in this sense. In particular, the ECtHR underlined how competent authorities, once they have become aware of a situation of violence or crime, should not wait for the victim's referral to initiate proceeding, as the victim's access to justice shall not be conditional upon their active contribution<sup>23</sup>. The CJEU case-law also pointed to the obligation of the State to fulfil the victim's right to compensation which could otherwise not be redressed, as a last resort guarantor of that right<sup>24</sup>.

## **B. Minimum Standards on Restorative Practices' Implementation**

As was mentioned, Restorative Justice's diffusion has been particularly connected to the juvenile justice systems, since it is perceived as particularly appropriate for young people in conflict with the law and more responsive to their best interest because of its informal character<sup>25</sup>.

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<sup>23</sup> ECtHR, *Cadiroğlu v. Turkey*, No. 15762/10, 3 September 2013, para. 30: 'Whatever mode is employed to fulfil that purpose, the authorities must act of their own motion, once the matter has come to their attention, and they cannot leave it to the initiative of the victim's relative'.

<sup>24</sup> Opinion of Advocate General Carl Otto Lenz, *Cowan v. Trésor Public*, 186/87, 2 February 1989.

<sup>25</sup> See Special Representative of the Secretary-General on Violence against Children (2013) *Report: Promoting Restorative Justice for Children*

The principle of the **best interest of the child** assumes particular relevance in the context of children in conflict with the law. Proclaimed in article 3 of the UN Convention on the Rights of the Child (CRC), the concept has suffered from the inherent vagueness of its original definition. Nonetheless, the crucial work of the Committee on the Rights of the Child allows for a more operational definition of the principle, to be understood as threefold: a substantive right, whenever various interests are at stake in a decision concerning a child, his or her best interest shall prevail on other considerations; an interpretative legal principle, when a decision is taken it will be implemented and interpreted as to favour the child's best interest; a rule of procedure for any decision-making process that can affect a child<sup>26</sup>. Finally, the Economic and Social Council's Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime define the best interest of the child as comprising the **right to protection and the right to harmonious development**, therefore underlining the future dimension of the consequences not only of the crime, but also of the criminal proceeding, on the well-being of the child.

In the case of juvenile justice, the best interest principle is essential to reverse the inherently punitive approach to offenders and to substantiate the principles of **social integration and education** as being the overarching objectives of the process<sup>27</sup>.

The association of restorative practices with the principle of the best interest of the child is made very clearly by the Committee on the Rights of the Child, which states in General Comment 10 that: *'The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as*

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<sup>26</sup> Introduction, UN Committee on the Rights of the Child (CRC) *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14.

<sup>27</sup> N.. 2, Council of Europe, *Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures*.

*repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.*<sup>28</sup>

In the same light, restorative justice becomes very significant as a kind of alternative to criminal justice, which are less burdensome on a child, and as such can be preferable<sup>29</sup>. On the one hand, as all **diversion measures**, it is instrumental to prevent the hardship deriving from the context of the criminal proceedings themselves. On the other hand, even when implemented in a later phase, it will nonetheless, ensure that measures which entail **deprivation of liberty**<sup>30</sup> are only applied as last resort and for the shortest appropriate period of time. At regional level, the Recommendation of the Council of Europe on the Rules for Juvenile Offenders subject to Sanctions or Measures (ERJO) not only provides for the availability of a '*wide range of community sanctions and measures*'<sup>31</sup>, but also points out that they should be encouraged and, amongst them, priority shall be given to those that may have an educational impact as well as constituting a restorative response.<sup>32</sup>

Furthermore, International instruments and recommendations also address the practice of Restorative Justice directly, setting up minimum standards for mediation and restorative proceedings to ensure their compliance with the rights of both the

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<sup>28</sup> Introduction, Art. 10, *UN CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10.

<sup>29</sup> Art. 24, Council of Europe (2010) *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

<sup>30</sup> Art. 37, *UN Convention on the Rights of the Child (UNCRC)*

<sup>31</sup> N. 22, Council of Europe, Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the *European Rules for juvenile offenders subject to sanctions or measures*.

<sup>32</sup> Ibid.

offender and the victim. Particularly relevant are the provisions contained in the Council of Europe's Recommendation concerning Mediation in Penal Matters. First, according to the general principles, mediation can never take place without the free consent of both parties involved, and it is further specified that neither the victim, nor the offender should be induced to give their consent through unfair means.<sup>33</sup>

The importance of consent entails different elements for the offender and the victim, but it is equally important. For the former, it is linked to the acceptance of at least part of the responsibility of the crime, deemed necessary to begin a process of restoration and retribution. For the latter, it is an essential guarantee that any mediation would not impose more hardship and thus reiterate victimization. A second principle, in this COE Recommendation, provides that mediation should be **generally available**, geographically and at all stages of the criminal process. It is also clearly stated that provisions that would facilitate the use of mediation should be included directly in national legislation.

In addition, **recognised standards** should be adopted at the national level to regulate mediation, and particular emphasis shall be dedicated to the level of **training of mediators**, their **impartiality** and their complete information on all facts related to the case. Finally, it is also underlined that the outcome of mediation must be reached on a **voluntary basis**.

It is nonetheless important to recall that, if mediation is one of the core practices of restorative justice, and indeed one of the more universally diffused, it is not the only one. Other restorative approaches, such as family or community conferencing, are equally relevant to the restorative approach. All these practices are encompassed by

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<sup>33</sup> Art. 11, Council of Europe, *Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters*.



the provisions of the United Nations' Economic and Social Council in its Basic Principles on the use of Restorative Justice programmes in Criminal Matters.

These Basic Principles highlight the importance of **complete information** being provided to both parties about their rights, the nature of the process and the possible consequences, before giving their consent. Concerning the outcome of the restorative programme, it is also established that they can be incorporated in judicial decisions and, in that case, have the **same status as a judgment** and preclude further prosecution of the same crime. Finally, States are invited to further develop restorative approaches, recognizing their value *'as an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities.'*<sup>34</sup>

In conclusion, while it is undeniable that an international normative framework for restorative justice is developing, at the same time the initiative on how to regulate it, which standards to set and how to encourage the diffusion of restorative justice depends mainly on the will of the States. In this context, though, the legal framework of the European Union, which is deeply inspired and influenced by international human rights standards, represents an interesting exception to the rule.

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<sup>34</sup> Preamble, UN ECOSOC (2002) *Basic Principles on the use of Restorative Justice programmes in Criminal Matters Resol. 2002/12 ECOSOC*.

### C. Legal Framework in the EU

The relevance of the rights of children in the context of the EU is clearly outlined in the Lisbon Treaty.<sup>35</sup> The Charter of Fundamental Rights, in fact, dedicates Art. 24 to their right to protection and care, the right to be heard, and also incorporates the child's best interest principle, thus reinforcing its binding nature among European States.<sup>36</sup> Moreover, European Institutions have increased their direct involvement and concrete political action concerning juvenile justice, notably thanks to the EU Agenda on the Rights of the Child<sup>37</sup>, adopted in 2011. Following the commitments of the Stockholm programme<sup>38</sup>, the Agenda tackles directly the implementation of more child-friendly justice systems, on the basis of the principles outlined in the Council of Europe Guidelines. To fulfil this goal, the Union provides for specific actions and has tabled and adopted important directives in the course of the last five years.

Considering the huge disparities between the 28 justice systems present in EU nowadays, an aspect highlighted by the EU Commission's study on children's involvement in judicial proceedings<sup>39</sup>, the approach preferred in European legislation is harmonization through adoption and implementation of minimum standards.

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<sup>35</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

<sup>36</sup> Art. 24, *Charter of Fundamental Rights of the European Union*, 2010/C 83/02.

<sup>37</sup> European Commission (2011) *Communication from the Commission to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions. An EU Agenda for the Rights of the Child*.

<sup>38</sup> European Council (2010) *The Stockholm Programme-An open and secure Europe serving and protecting citizens*.

<sup>39</sup> EU study 'Data on Children in Judicial Proceedings in EU28', European Commission, 2015, available at: <http://www.childreninjudicialproceedings.eu/>

In this context, the most recent EU directives represent an important opportunity to ensure adequate protection of both the **right of juvenile offenders, and those of victims**. On the side of suspected and accused persons we can find: the Directives on interpretation and translation and on the right of information in criminal proceedings<sup>40</sup>, adopted respectively in 2010 and 2012, and the proposals for Directives on presumption of innocence and on the provision of legal aid, presented in November 2013<sup>41</sup> and currently undergoing the legislative process.<sup>42</sup>

In addition, in December 2015, the European Parliament agreed with the European Council on the text of a **Directive on procedural safeguards for children suspected or accused in criminal proceedings**.<sup>43</sup> The EU directive introduces measures designed to safeguard a package of rights in a manner consistent with the reasoning of the European Court of Human Rights<sup>44</sup> and the *Guidelines on Child-friendly Justice*. The Directive's purpose is "to establish procedural safeguards to ensure that children who are suspected or accused in criminal proceedings are able to understand and follow

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<sup>40</sup> Directive 2010/64/EU of the European parliament and of the Council on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

<sup>41</sup> EC Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings; EC Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.

<sup>42</sup> All of these measures are part of the *Roadmap for strengthening procedural rights of accused*, see the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceeding.

<sup>43</sup> Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings, 16 December 2015, 2013/0408 (COD).

<sup>44</sup> The ECtHR has stated that the right to a fair trial under Article 6 requires that: "a child charged with an offence is dealt with in a manner which takes full account of his age/level of maturity and intellectual and emotional capacities and that steps are taken to promote his ability to understand and participate in the proceeding" (*T v. UK*, No. 24724/94, 16 December 1999, at [84]).

those proceedings, to enable such children to exercise their right to a fair trial and to prevent re-offending by children and foster their social integration” (Recital 1).

On the side of victims, the European Union has recently provided for more protection of victims of violence through mutual recognition of **protection orders** between different Member States<sup>45</sup> and has established minimum standards for appropriate **compensation schemes** available at national level<sup>46</sup>, also providing for cross-border recognition of compensation claims. The Directive establishing minimum standards on the rights, support and protection of victims of crime, approved in 2012, has replaced the Framework Decision of 2001 and has improved the standards of protection of victims in criminal proceedings.

All EU Member states had the obligation to transpose this Directive into national legislation by the end of 2015. It establishes a set of minimum safeguards for victims involved in criminal proceedings but Art. 1 also specifies enhanced safeguards to be applied in the case of child victims.

Particularly interesting in the case of this directive, is the attention dedicated to **restorative justice processes**. It is clarified that the victim’s fundamental safeguards apply also in case of justice proceedings that do not entail a formal criminal trial, and States are encouraged to **facilitate the referral to restorative justice** when appropriate. Then, a set of tailored safeguards to the context of restorative justice is outlined.

Taking into account that Restorative Justice was not even mentioned in the Framework Decision of 2001, this Directive, which promotes its consideration as a valid alternative

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<sup>45</sup> Regulation (EU) No.606/2013 *on mutual recognition of protection measures in civil matters*.

<sup>46</sup> Council of the European Union (2001) *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceeding*.

to the traditional penal proceeding, highlights the growing relevance of restorative methods of conflict resolution.

At the same time, beyond setting out procedural safeguards to ensure the rights of victims are respected throughout the criminal proceeding, the Victims Directive sets out the minimum standards concerning the availability and delivery of support services, in articles 8 and 9. It is established that States are responsible for ensuring that victims have access to confidential support services, free of charge, throughout the criminal proceeding, as well as before and after, for the appropriate time. Article 8 further underlines that access to support services is not dependent on the victim making a formal complaint with regard to a criminal offence, and that the families of the victims shall be granted access as well.

The Directive also establishes minimum features and the scope of support services, therefore once again highlighting the aspect of effective implementation. Support shall include: information concerning victims' rights, in terms of procedural guarantees as well as compensation claims; psychological support; advice on financial and practical aspects. In particular, Article 9 specifies that specialised support for victims who have suffered considerable harm shall comprise: shelter for victims at immediate risk of secondary victimisation or retaliation; and target support for victims with specific needs *'such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling'*.

Altogether, the EU framework, and the Victims Directive in particular, have enhanced the minimum standards of victims protection, as well as enlarged their scope, by specifying States' responsibility to ensure procedural safeguards in the course of criminal trials, and also by establishing guarantees for the delivery of support services and specific safeguards to be applied in the context of Restorative Justice.

### III. RESTORATIVE JUSTICE IN THE EU: EVOLUTION OF THE PRACTICE<sup>47</sup>

#### A. Definition and diffusion trends

Restorative Justice includes a variety of approaches and practices, which all share basic principles but differ quite considerably in their procedures and execution: from the number and category of actors involved; to the methods of exchange adopted between the different parties; to the type of final outcome that can be reached.

In order to clarify which types of practices are taken into account by the present analysis, it is necessary to lay down the meaning of restorative justice and provide a framework definition. A broad definition is offered by the UN Economic and Social Council Resolution on Basic Principles in the use of restorative justice programmes, which defines a restorative process as *‘any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles’*.<sup>48</sup> By reason of its comprehensive character and of its formulation by the UN Economic and Social Council, such definition provides some form of international consensus on the nature of restorative justice.

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<sup>47</sup> This section of the article is based on the results of the study by Dünkel, F., Horsfield, P., Parosanu, A. (2015) *Research and selection of the most effective Juvenile Restorative Justice practices in Europe: 28 National Snapshots*, International Juvenile Justice Observatory.

<sup>48</sup> N. 2, United Nations ECOSOC (2002) *Basic Principles on the use of Restorative Justice programmes in criminal matters*, Res. 2002/12.

It is also interesting to examine the definition proposed by the EU Directive on Victims, enforceable in all 28 member States: *“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.”*<sup>49</sup> Despite being inspired by the previous one, this definition stresses two essential additional elements: the free consent of the parties, and the impartiality of the third party.

To analyse how Restorative Justice is diffusing across EU countries it is necessary to start from a macroscopic perspective: in the last 20 years, all EU countries have witnessed an increased recourse to restorative practices. However, the reasons behind the phenomenon vary depending on the country.

After centuries of absolute dominance by the criminal justice paradigm, the debate on the validity of restorative principles was reopened in the seventies. One of its main theoretical origins was the perception of the **failure of the traditional criminal system**, which the restorative movement aimed to replace.<sup>50</sup> Such abolitionist thinking was particularly significant to introduce restorative measures in certain countries of northern Europe, such as Finland, Norway and the Netherlands.

A similar reason for restorative reforms highlighted the **limitations of the retribution** approach, and, although it didn't aim to completely eliminate the criminal system, it pursued a shift in its underlying perspective, one that would favour reintegration and rehabilitation over mere punishment. This trend was prevalent in continental Europe, but also in Ireland; Northern Ireland; Scotland and Portugal.

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<sup>49</sup> Art. 2.d Directive 2012/9/EU of the European Parliament and of the Council Establishing minimum standards on the rights, support and protection of victims of crime.

<sup>50</sup> Gavrielides, T. (2011) *Restorative Practices: from the early societies to the Seventies*.

Moreover, in various cases, the same countries witnessed a considerable growth of **movements in defence of victims' rights**, advocating a stronger and more active role, instances that also converged on the support for restorative justice.

Finally, diversion from the criminal system through increased recourse of alternative practices was also stimulated by cost-efficient considerations. Countries such as Bulgaria, Croatia, Hungary, Greece, Portugal etc. were experiencing a considerable **over-burden** of their penal system, with subsequent backlog of cases. In these situations, a facilitated access to impartial mediation and stronger involvement of the community in the rehabilitation process, were considered instrumental to relieve the criminal systems. In certain cases, this also went hand in hand with a diffuse perception of the traditional system as inefficient and untrustworthy.

The development has been so significant that, in the last fifteen years, every juvenile justice reform in Europe has either included or somehow enhanced the use of restorative justice practices, and guaranteed that there's a possibility to access it at different stages of the criminal proceeding. In this reform process, a considerable role was also played by the **harmonisation** of legislation that is at the heart of the European Union construction and which was particularly relevant to determine the reform processes of those countries that accessed during the latest enlargements (for instance in: Bulgaria; Croatia; Czech Republic; Estonia, Hungary Poland; Romania and Slovenia).

Nonetheless, it is worth mentioning that the legislative reform and the formal introduction of restorative possibilities do not always guarantee the **availability of the service in practice**. In various countries access is limited by the financial constraints that hinder the development of restorative programmes, or at least prevent their availability on the entire national territory. Of the 28 Member States, in fact, only 13



can currently provide nationwide availability of Victim-Offender Mediation, while the rest can only guarantee regional services<sup>51</sup>:

COUNTRY	NATIONAL AVAILABILITY VOM	REGIONAL AVAILABILITY VOM
AUSTRIA	X	
BELGIUM	X	
BULGARIA		X
CROATIA		X
CZECH REPUBLIC	X	
DENMARK	X	
ENGLAND/WALES	X	
ESTONIA		X
FINLAND	X	
FRANCE		X
GERMANY	X	
GREECE		X
HUNGARY	X	
IRELAND		X
ITALY		X
LATVIA	X	
LITHUANIA		X
NETHERLANDS	X	
NORTHERN IRELAND	X	
POLAND	X	
PORTUGAL		X
ROMANIA		X
SCOTLAND		X
SLOVAKIA		X
SLOVENIA		X
SPAIN		X
SWEDEN	X	

<sup>51</sup> Professor Frieder Dunkel's presentation on Restorative Practices in Europe, during the 6th IJJ0 International Conference: *Making Deprivation of Children's Liberty a Last Resort: Towards evidence-based policies on alternatives*.

Such lack of funding can depend on various reasons, some more ideological, for instance the prevalence of a **punitive climate** in the country, and some other more structural, such as the **lack of investment** in the justice sector.

Other reasons that undermine the use of restorative practices can be identified in the scarce **knowledge** of the general public, or even among the judicial staff, about both the functioning and the benefits of restorative process, something that seems to be particularly common for those countries that introduced the measures as a result of the EU accession, and therefore are, in some cases, still quite new to the practice.

A different issue seems to be posed by the refusal of judges, prosecutors or even police officers (where they have the power to do so) to refer a case to restorative programmes, which can depend on the underlying conflict between two systems of justice perceived as opposed; or rather on **mistrust** towards mediators. On the other hand, it is also true that the fields of application of restorative methods are expanding.

If its prevalent application remains anchored to the sphere of juvenile justice, various experiences across Europe are extending the use of restorative processes to adults (with Hungary and Slovenia representing interesting exception to the general trend and referring a higher percentage of adults than of children to restorative measures), in prison setting, and in schools.

## **B. Core principles of the restorative process**

Apart from the broad definitions mentioned before, a multitude of studies of restorative justice focus on the nature of the process, rather than outlining specific aspects of the procedure. Such alternatives formulations are particularly interesting to determine the core principles that animate the use of restorative justice. In this light, the one by Gavrielides proves particularly interesting: *'Restorative Justice is an ethos*

*with practical goals, among which is to restore the harm done by including all affected parties in a process of understanding through voluntary and honest dialogue, and by adopting a fresh approach to conflicts and their control, retaining at the same time certain rehabilitative goals.*<sup>52</sup>

One of the crucial considerations of Gavrielides is that Restorative practices should not be interpreted as especially beneficial for the offender or the victim. Such exclusionary connotation, based on the opposition of the two interests, is the opposite of the restorative ideal, which concentrates on reaching a practical goal through a **mutually satisfying process**.

Another overarching principle of restorative justice, which is also the basis of its original distinction from the traditional criminal process, is to be found in its primary objective: **rehabilitation**. Again, this goal is valid for both the experience of the offender and that of the victim. If the offender will gain the possibility of rehabilitation from the crime, instead of mere punishment, on the other hand the victim will more easily attain full **recovery** from the victimization and trauma. This element is crucial to allow both parties to overcome not only the impact of the crime, but also the identification self-stigmatization in the role of the offender or victim, and its destructive potential.

Therefore, two subsequent components of the restorative practice can be identified. The first one is that **understanding of the other, awareness and assumption of responsibility** are crucial aspects of the process. In this sense, an interesting insight is offered by Gellin's<sup>53</sup> study of the skills acquired by young people involved in restorative

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<sup>52</sup> Gavrielides, T. (2007) *Restorative Justice Theory and Practice: Addressing the Discrepancy*, p.139.

<sup>53</sup> Chapman, T. (2015) *European Model for Restorative Justice with Juveniles*, International Juvenile Justice Observatory.

measures, amongst which she recognizes: understanding of the other's situation, listening and developing empathy, developing an objective point of view, patience and other conflict solving skills, which also leads to responsibility recognition. This analysis clarifies essential steps in the restorative process and at the same time, by emphasizing the aspect of skills acquisition, it highlights the long-term potential for future well-being of the child.

The second component is constituted by the crucial role of the **community and society** at large in the restorative ethos, and in certain cases in the practice as well. First of all, the concept of **collective justice** entails the shift from considering a crime as an action against the State, to its interpretation as damaging to the community. This in turn leads to the focus on the victim and on the reparation process, rather than on punishment. Moreover, in the broader restorative practices such as conferencing, it also entails direct participation of those members of the community which can be more affected, such as families, and can also play a more decisive part in rehabilitation. On the other hand, this concept is at the basis of the perceived positive connection between restorative justice and reoffending rates. Focusing on **positive re-socialisation** allows the offender to build stronger bonds to society, and moving from anti-social to pro-social relationship, which, according to Ward and Maruna's analysis, is one of the key determinants of a lower probability of reoffending<sup>54</sup>. Other perspectives emphasize, on the other hand, the understanding of the victim's experience and pain. Decreasing the distance between victim and offender, and confronting the latter with the other's suffering may in fact prove crucial to increase inhibitions and raise the threshold of offending.

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<sup>54</sup> Ward, T ; and Maruna, S. (2007) *Rehabilitation*, Routledge, p.170.

Finally, the entire process of restorative justice and its methodology revolve around the **voluntary participation** of the parties. While the traditional criminal system, especially in the course of the trial, delegates the participation of the parties to their legal representatives, who's task is to defend opposing interest as effectively as possible, restorative measures require personal participation, at every stage, to both the offender and the victim. In a context like that of justice, where participation, of young people especially, poses various specific issues, the restorative approach seems particularly effective.

### C. Typology of Measures in the frame of Restorative Justice

Restorative Justice Measures can vary under two different points of view. First of all, from a **procedural** perspective: national legislation in fact can provide for the referral to restorative practices at different stages of the criminal proceeding. Secondly, from a more **substantive** point of view: restorative practices include various services, such as victim-offender mediation, conferencing and so on, which entail different approaches, involve different actors and may reach different outcomes.

#### C.1 Procedural Categorization

The importance of the procedural aspect is essential to evaluate how the access to restorative justice is truly facilitated by national policy makers and legislators. According to the UN ECOSOC Basic Principles on the use of Restorative Justice programmes in criminal matters:

*'Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law'<sup>55</sup>. Regionally, the Recommendation of the Council of*

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<sup>55</sup> N. 6, United Nations ECOSOC (2002) *Basic Principles on the use of Restorative Justice programmes in Criminal Matters*, Resol. 2002/12.

Europe concerning mediation in penal matters states, in its General principles that: *‘Mediation in penal matters should be available at all stages of the criminal justice process.’*

The development of Restorative Justice in European countries, through the related judicial reforms, has progressed according to this principle and restorative practices are now accessible at four different stages: before trial, in the course of trial, as part of sentencing, and as an alternative measure.

In the first case, the participation to restorative programmes constitutes valid grounds for, or a condition to, **access pre-trial diversion** which allows both the offender and the victim to avoid proceedings in court entirely. Provisions in this sense are almost universally present in European legislations, with the only exceptions of Denmark and France. This element, together with the recognition of judicial validity to restorative agreements<sup>56</sup> leads to the consideration of the growing importance of restorative justice as a system that, although always dependent on criminal justice, can develop in parallel and still lead to legally meaningful outcomes.

The other two options, which provide for access to restorative programmes as part of **court diversion** or **sentencing**, also enjoy very broad application, which testifies to the large degree of legislative compliance of European countries with regional and international standards. In practice, this means that the power to refer a case to restorative programmes is conferred to different actors at different stages. Some systems provide for a direct referral from the police, for instance England and Wales; others empower the prosecutors to make this choice through the application of the

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<sup>56</sup> See Art. 12.d of the *Directive 2012/9/EU of the European Parliament and of the Council Establishing minimum standards on the rights, support and protection of victims of crime*; N. 15, *Basic Principles on the use of Restorative Justice programmes in Criminal Matters*, Resol. 2002/12 ECOSOC.

principle of opportunity of prosecution, as in the Netherlands, in France, in Estonia and in Romania since the latest penal reform; and then clearly the Courts retain such power in all jurisdictions.

## **C.2 Substantial Categorization**

To analyse the diffusion of substantially different restorative programmes, the present article will focus mainly on two types of measures: victim-offender mediation and conferencing. Community sanctions, in fact, despite their relevant restorative component, which is especially evident in the attempt of repairing and strengthening the bond of the young person with society, allow for a more limited role of the victim.

**Victim-Offender Mediation (VOM)** aims to reconciliation between the victim and the offender, and the restorative process concentrates on these two parties. Starting when the victim and the offender agree on both the fundamental circumstances of the case, including reciprocal roles, and on taking part in mediation, the process includes two different phases. During the initial period, offender and victim remain separate and a facilitator conducts with each of them pre-mediation sessions, which provide to both parties the opportunity to give their version of the events and also to assess the critical points to be addressed during mediation. Then, victim and offender meet in a safe and structured setting and engage in a dialogue that aims to attain a fruitful and mutually beneficial exchange. While the victim has the opportunity to explain how the events have affected him or her, the offender can relate his or her circumstances and can elaborate the responsibility for the events. Finally, victim and offender work to agree on a final outcome that addresses the harm done.

Victim-Offender Mediation is the most diffuse restorative practice, present in all European countries. Nonetheless, the differences in its implementation are quite

considerable. First, the aforementioned gaps in availability, which entail that the service is truly accessible on the entire national territory only in certain States. Secondly, the responsibility to provide the mediation process can be attributed to different actors, such as NGOs, probation services or social services.

Finally, the quality of the service crucially depends on factors that cannot be entirely ensured by the legislative framework, or by the regulations that determine which body will provide the service. One significant element is the level of training and professionalism of the mediators, which can be assumed to vary greatly between volunteer workers and professionals.

**Conferencing**, on the other hand, varies from mediation mainly because of the actors involved, which are not anymore limited to the victim and the offender but may include, depending on the type of process, families, members of the community, friends, even police officers. This 'enlargement' of the scope is based on the notion of collective responsibility, which stressed two aspects of the offence: its consequences on the community at large, and the role of the community in deciding how to solve a conflict. This traditional notion has also evolved to incorporate a special recognition of the specific needs and interests of the victim. Also in the case of conferencing, the victim and the offender will have the opportunity to express their views, and the final agreement will originate from the contributions of all participants.

Originally derived from traditional methods of conflict resolution in New Zealand, conferencing has seen a very broad implementation in Australia, in some Latin American countries such as Brazil and Peru, but also in South Africa, in the Philippines and, increasingly so, in Canada and the US. Nevertheless, its diffusion in Europe remains modest, and it attested by nationwide provisions only in Belgium; Ireland, Northern Ireland and Scotland. In other EU member States, for instance



Austria, Germany, Hungary, Latvia, its implementation is connected to localized projects on juvenile justice.

Yet, beyond its narrow application, the conferencing process has been associated to remarkable levels of satisfaction, both on the part of the offender and of the victim, and had a positive influence on reoffending rates. In particular, experiences seem to indicate that conferencing could be particularly effective on more serious offences<sup>57</sup>, which suggests that it could also be an interesting practice to broaden the use of restorative justice.

Finally, there are also measures that provide for **reparation** to the victim, but that do not involve a restorative process. They are present in the majority of EU countries, and can constitute ground for lighter sentencing, but because of their different nature, their deeper analysis does not fall within the scope of the present article.

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<sup>57</sup> Page 14-15 Northern Ireland Office (2005) *Evaluation of the Northern Ireland Youth Conference Service*, NIO Research and Statistical Series: Report No. 12.

#### IV. CONCLUSION: RESTORATIVE JUSTICE AND THE RIGHTS OF THE VICTIM

The present analysis has concentrated on one of the core aspects of restorative justice: the primary role conferred to the victim. This, it has been argued, is not only one of the essential aspects of the restorative process, but also a crucial innovation compared to the configuration of traditional criminal justice.

First, through an overview of existing international and regional standards, this article has provided a general framework to evaluate how a restorative approach can fit with the safeguards and rights of victims of crime. Then, an examination of the practice has highlighted in what forms and on the basis of which principles, restorative practices have gained relevance in the European context.

In this light, it is worth specifying once again that before any referral of a case to the restorative services is made, it is necessary to consider whether the format of restorative processes is appropriate to the situation of the individual victim, and it is absolutely necessary to ensure that direct confrontation with the offender does not entail a risk of secondary victimization or intimidation.

Building on this evidence-based assessment of restorative justice's prerogatives, it is now possible to conclude with an evaluation of the determinant benefits that it can entail for the victim.

Considering the rights and safeguards of victims in the context of criminal proceedings, in light of the key values which animate the restorative ethos, three fundamental rights appear to be particularly advantaged by a restorative perspective.

First, the **right to be heard**, which is presented as a crucial aspect of access to justice and fair treatment<sup>58</sup>, or, in the EU Charter of Fundamental Rights, as part of the right to good administration<sup>59</sup>, and which constitutes one of the key guarantees of a fair trial.

The definition of this specific rights, in the case of children victims, is clarified in the Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime: *‘ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process.’*<sup>60</sup> In this context, it is clear that the restorative procedure, both in the stage of preparation, and during mediation or conferencing, revolves entirely around the victim’s expression of his or her personal views. Moreover, the process is progressively built around those expectations and necessities that are expressed by the victims, therefore guaranteeing that meaningful participation that is a cross-cutting principle of child-friendly justice.

Secondly, the **right to reparation**, which is instrumental to achieve ‘full redress, reintegration and recovery’.<sup>61</sup> Thanks to this definition, it can be inferred that the right to reparation entails a more comprehensive perspective than the right to compensation. The right to compensation, in fact, emphasizes two aspects: the right of those who have suffered injuries, traumas, or loss of property, to see the

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<sup>58</sup> See principle 6.b in *Access to justice and Fair Treatment*. Annex to the General Assembly Resolution 40/34 (1985) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

<sup>59</sup> Art. 41, *Charter of Fundamental Rights of the European Union*, 2010/C 83/02.

<sup>60</sup> No.21 (b) *Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime*.

<sup>61</sup> No.35, *Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime*.

subsequent expenses reimbursed, and the responsibility of the State to cover such expenses, when compensation cannot be obtained directly from the offender. The right to reparation, on the other hand, emphasizes the negative impact of the crime on the future well-being of the victim, by stressing the aspect of recovery and reintegration. This element leads to considering not only the monetary aspect (which is nonetheless essential, and often a component of the restorative outcome) but also a psychological aspect which can be particularly favoured by a dialogue with the offender. Clearly, in order for reparation to be favoured by a restorative approach, it is necessary that the offender willingly recognises his or her responsibility of the crime. Finally, the **protection from secondary victimization**, which, according to the Council of Europe's Recommendation on assistance to crime victims 'means the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim'.<sup>62</sup>

Victims are in fact particularly vulnerable when they enter in contact with justice professionals and procedures. In this sense, special attention should be paid to the specific needs of child victims, who, when facing the criminal system, have to deal with a system that is not built around their needs. Repeated questioning, unfriendly environment and difficulties to be believed are only some of the issues experienced by child victims. Restorative processes, thanks to the informal setting and to the specialisation of facilitators, mediators, and other professionals can thus particularly indicated to avoid hardship during the justice process.

Nonetheless, evidence shows that the recourse to restorative justice still doesn't exploit the full potential of these services in most EU States, and in particular the participation of victims is still very limited. As is increasingly underlined by international standards, in order to guarantee effective reparation and appropriate protection from secondary victimization in the practice, it is necessary to strengthen

access to justice first, which proves especially complicated for victims, who often have to deal with repeated questioning and different authorities before being able to access support, and can be easily discouraged.

In this light, the IJJO underlines its support for the notion of integrated support, also highlighted in the EU Victims' Directive, Art. 9, and especially important for victims who have undergone particularly dramatic experiences. Integrated support emphasizes multi- agency coordination, and combined assistance, in order to avoid repeated hearing of a child victim, and at the same time provide from the beginning psychological or medical support that may be needed. In pursuing more effective assistance, various countries have developed practices that allow a potential child victim to refer its case to only one child-friendly structure (providing shelter and accommodation if needed), where help of different types is directly accessible<sup>63</sup>; while others have potentiated specialist training for some police-men following cases that concern children victims, which includes developing direct contact with protection services. Capacity building of all practitioners and public authorities who are directly in contact with children is another fundamental element to encourage children who have suffered harm to report it and pursue reparation. These good practices deserve particular attention, as they foster a holistic approach to the needs of victims, facilitating their recovery and opening the door to a process of reparation.

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<sup>62</sup> See Art.1.3, Definitions, Recommendation Rec(2006)8 of the Committee of Ministers to Member States on assistance to crime victims.

<sup>63</sup> See Children's House in Iceland: <http://www.coe.int/t/dghl/standardsetting/childjustice/Iceland%20good%20practices.pdf>.

## V. GLOSSARY

For the purposes of this article, the terminology that has been employed to describe Restorative Justice and its application to juveniles and victims of crime should be interpreted in accordance with the definitions provided here below, based on the Report: ‘Promoting Restorative Justice for Children’ of the Special Representative of the Secretary General on Violence Against Children.<sup>64</sup>

**Child:** article 1 of the Convention on the Rights of the Child (CRC) defines a child as “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”

**Child involved with the juvenile justice system:** a child may become involved with the juvenile justice system when he or she is a victim, witness or, as defined under article 40(1) of the CRC, when he or she is “alleged as, accused of or recognized as having infringed the penal law”.

Children may also become involved with the juvenile or criminal justice system when they are considered to be in danger by virtue of their behaviour or the environment in which they live.

**Child-friendly justice:** child-friendly justice refers to “justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level”, and that give “due consideration to the child’s level of maturity and understanding the circumstances of the case”.

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<sup>64</sup> Special Representative of the Secretary-General on Violence against Children (2013) Report: Promoting Restorative Justice for Children.

**Crime prevention:** the active creation of an environment that ensures for the child a meaningful life in the community and fosters a process of personal development and education that is as free from crime and violence as possible; an environment that deters children from committing an offence, engaging in violent acts or becoming victims of violence.

**Deprivation of liberty:** any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

**Detention:** the condition of a detained person, that is “any person deprived of personal liberty except as a result of conviction for an offence.”

**Diversion:** Diversion involves removal of a child from criminal justice processing. A child is diverted when he or she is alleged as or accused of having infringed the penal law but the case is dealt with without resorting to formal trial by the competent authority. Diversion may involve measures based on the principles of restorative justice.

**Facilitator:** a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.

**Juvenile justice system:** a system that consists of the laws, policies, guidelines, customary norms, systems, professionals, institutions and treatment specifically applicable to children involved with the justice system.

**Non-custodial measure:** a measure to which a child may be sentenced by a competent authority that does not include deprivation of liberty.

**Offence:** any behaviour (act or omission) that is punishable by law under the respective legal systems.

**Minor offence:** in many countries, minor offences, such as speeding or using public transport without a ticket, are considered as misdemeanours, with a separate code or provision devoted to these offences. Other countries consider these offences to be “administrative” in nature and they do not form part of the criminal code. Such offences are not subject to criminal investigation, nor do they fall within the competence of a prosecutor, but are dealt with in lower level administrative tribunals. The domestic legal definition of a minor offence usually represents the group of offences for which children who come into contact with the juvenile justice system can benefit from diversion.

**Mediation:** an attempt at settling the differences between two contending parties by the intervention of a third neutral party whose role has been accepted by the two opponents. There is no obligation on the part of the contending parties to accept the decision of the mediator. In mediation, the negotiations are carried on through the plenipotentiaries of the mediating power, and not directly between the contending powers.

**Parties:** the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.

**Reintegration:** the promotion of the child’s sense of dignity and worth and the child’s respect for the human rights of others, with the aim of supporting the child to assume a constructive role in society. This goes hand in hand with the development of the abilities to deal with risk factors so as to function successfully in society, thereby improving the quality of life of the person and the community.



**Restorative justice process:** any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by the crime, together participate actively in the resolution of matters arising from that crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

**Restorative justice for children:** any programme that uses restorative processes and seeks to achieve restorative outcomes that promote the child's rehabilitation and reintegration.

**Restorative justice outcome/agreement:** an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

**Sentence:** a final decision about a child's case - notwithstanding any right of appeal – made by a competent authority.

**Serious offence against a person:** homicide, non-intentional homicide, kidnapping, sexual assault or abuse, assault or an attempt to carry out any of these acts.

**Violence:** under article 19 of the CRC, all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

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## CHAPTER II:

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# NATIONAL REPORT: SPAIN

## AUTHORS

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## 1. INTRODUCTION

Restorative Justice seeks to repair the damage caused by rule breaking behaviour which damages protected legal assets by holding the offender responsible for the actions they committed, while at the same time urging the involved parties (the offender, the victim and the community) to actively participate in the process of resolving the conflict and re-establishing the affected relationships.

The restorative process has been defined in the Handbook on Restorative Justice Programmes, published by the United Nations Office on Drugs and Crime in 2006, as a process in which the victim and the offender, and where appropriate any other individual or member of the community affected by the crime, actively participate together in order to resolve the issues caused by the crime, generally with the help of a facilitator. It is in this way that restorative practices put a special emphasis on the needs of the victim and compensation for the harm caused.

However, although restorative justice is widely accepted today and is formally applied in 25 European countries (Maiers y Willemsens, 2004), the reality is that a high percentage of programmes which have been developed focus on the rehabilitation of the offender to the detriment of the involvement of the victim. Many authors have criticised the restricted participation of victims in restorative processes (Becroft, 2006; Green, 2007; Tkachuk, 2002; Wright, 2006).

With the involvement of the victims of crimes, we often find a person that, in many cases, has been randomly victimised and as a consequence, is immersed in a new and troubling emotional state which for the victim means the beginning of complaints, legal proceedings and the use of specific social resources which, initially, are completely foreign to them.

In this sense, although it is widely accepted that reparation to the victim in the penal process is an important element in serving their interests and needs and repairing the harm caused, restorative justice services must put in place guarantees to avoid secondary and repeated victimisation, which can be psychological aggression experienced by the victim while dealing with professionals in the judicial service, police or health care professionals, as well as the effects of the way in which the events are reported on by the media (Kühne, 1986).

Therefore, in order to avoid secondary victimisation, we must take into account that when referring to victims of a crime, we are referring to individual and unique profiles which depend on each individual person. Accordingly, before launching a process of restorative justice, it is necessary to take into consideration that the extent and degree to which being a victim of a crime is going to affect and harm someone will vary from person to person, and may be worsened or improved depending on different factors such as: age; gender; the relationship between the victim and the aggressor; social skills; professional, family and social support networks; environment; the gravity of the crime; etc.

On some occasions, the very dynamic of the police and judicial process can cause secondary victimisation or cause the victim to abandon proceedings. Some reasons for this behaviour may be: the victim is not sufficiently informed on the process which started with reporting the crime; a lack of knowledge of their rights; a feeling of vulnerability; feeling like a mere spectator in the process; etc. Therefore the 2012/29/EU Directive of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, which replaces the Council of the EU's Framework Decision 2001/220/JAI, was created in order to avoid said secondary victimisation and to establish minimum rules on the rights, support and protection of victims of crimes.

Article 12 of the Directive refers to the guarantees which victims involved in the restorative processes must be informed of. Also, in Article 27, Member States are urged to achieve the aims established in the Directive by the 16th of November 2015 at the latest.

In order to achieve the objectives of this directive as set out by the European Parliament and the Council, on the 28 April 2015, Spain published Law 4/2015 Law on the Status of the Victim of a Crime (Ley 4/2015 del Estatuto de la víctima del delito). It consists of a general catalogue of rights, both within and out of the courts, of all victims of crimes in Spain. Article 15 specifically makes reference to restorative justice services, observing the explicit guarantees in Article 12 of the 2012/29/EU Directive.

Throughout this report, we will analyse the Spanish juvenile justice system, later focusing on the attention received by victims in the system and the analysis of practices, in order to evaluate if victims' rights in judicial proceedings are fulfilled in Spain.

## 2. THE JUVENILE JUSTICE SYSTEM IN SPAIN

### 2.1. REFERENCE STANDARDS

The current juvenile justice system in Spain begins with the hypotheses of the model of responsibility. This model reinforces the legal position of the minor (which in Spanish law is anybody under the age of 18; this definition will apply to all following uses of the term “minor”), recognising that they have the same rights and guarantees as an adult and therefore abandoning the previous positivist and reformatory model which assumed that a minor was not responsible for their acts. In this way, the nature of the model of responsibility is formally penal, but is substantially corrective-educational in both legal proceedings and in the application of measures.

The current regulations mainly consist of Organic Law 5/2000, 12 January 2000, on the Criminal Responsibility of Minors (Ley Orgánica 5/2000 de Responsabilidad Penal de los Menores, henceforth referred to in this text as LORPM) which was developed by the Regulations passed by Royal Decree 1774/2004 on 30 July 2004 (Real Decreto 1774/2004, henceforth referred to as LORPM). The LORPM stipulates that the age of criminal responsibility is 14 years, limiting its field of application through Article 1 of the Law to acts defined as crimes in the Penal Code or in special criminal laws.

Since its implementation, the LORPM has undergone various modifications aimed at making judicial measures stricter for the most serious crimes (Organic Law 7/2000, 22 December 2000; Organic Law 9/2000, 22 December 2000; Organic Law 15/2003, 25 November 2005; Organic Law 8/2006, 4 December 2006). In addition, as the autonomous regions of Spain possess the powers for implementing these measures, they also develop regulatory functions in the areas of creation, organisation and the management of essential resources in order to carry out the measures.

## 2.2 PRINCIPLES

In order to carry out an accurate analysis of the principles which guide the Spanish juvenile justice system, we must firstly start by taking into account that the guarantees of adult proceedings are in essence transferable to proceedings involving minors, as was declared by the Spanish Constitutional Tribunal in its Judgement nº 36/1991, 14 February 1991.

Traditionally, the theory normally distinguishes between principles of the trial, principles of the proceedings and principles of the execution of the law. The distinction between the principles of the trial and the principles of proceedings is based on the fact that political principles are given priority in the principles of the trial while, in the case of the principles of proceedings, technical principles are given greater emphasis. Moreover, the principles of the trial are closely related to the essence of the trial itself, whereas the principles of proceedings refer to the external conduct of different judicial operators.

Finally, the principles of the execution of the law are those which serve as a base for the regulation of criminal sanctions, and guide the activities of professionals, organisations and institutions which intervene in the execution of measures imposed by the judge. Furthermore, the principles of the system of criminal responsibility can be derived from the LORPM.

The principles of trials involving minors as stated in the LORPM:

- The principle of the best interest of the minor
- The principle of flexibility
- The principle of specialization
- The principle of legality
- The principle of opportunity
- The principle of needs
- The accusatory principle
- The principle of the free evaluation of evidence
- The principle of *audi alteram partem* (that both parties must be heard)

The principles of criminal proceedings involving minors:

- The principle of oral hearings
- The principle of immediacy
- The principle of urgency
- The principle of concentration
- The principle of publicity of the proceedings  
if it is compatible with the interests of the minor



The general principles which govern the implementation of the juvenile justice system as stated in the LORPM can be summed up as following:

The best interest of the minor above all else

The respect for the free development of the personality of the minor

The information on the rights of the minor at any time and the necessary assistance in exercising them

The application of educational programmes which encourage a sense of responsibility and respect for rights and freedoms

The adaptation of actions to the age, personality, and personal and social circumstances of minors

The prioritisation of actions taken in the minor's family and social environment, provided this is not in conflict with the interests of the minor

The encouragement of the collaboration of the parents, tutors or legal guardians during the execution of measures

The preferably interdisciplinary manner in which decisions that affect or could affect the person are made

The confidentiality of the private lives of the minors and their family, in the actions that are carried out

The coordination of actions and the collaboration between different organisations which deal with minors

As can be deduced from the previous statements, the principles stated in the LORPM take into account international regulations regarding minors in general and particularly those who are in conflict with the law. For example, “respect for the free development of the personality of the minor” appears in Articles 18 and 19 of the Universal Declaration of Human Rights, adopted on the 10th December 1948 by the General Assembly of the United Nations, as well as “the best interest of the minor above all else” which appears in the Declaration on the Rights of a Child, adopted on the 20th November 1959 by the General Assembly of the United Nations.

As well as taking into account international regulations, the principles of the LORPM promote tailored interventions, which are multidisciplinary and systematic in nature and which prioritise the interests of the minor above all else. This will also determine the type of measure which can be most beneficial to the minor, in order to guarantee their reintegration and psychosocial recovery.

Therefore, with the ultimate aim of respecting these principles, the regulations propose a mix of novel actions, which have huge procedural benefits. Among these, is the Spanish Public Prosecution’s (Ministerio Fiscal) responsibility to lead the proceedings as well as to draft the pleadings and put forward the measure which they consider as the most appropriate for the minor’s circumstances and for the crime or offence committed (bearing in mind the principle of the best interest of the minor and tailored intervention). In order to do this, the Public Prosecution has the support of the Technical Team report, which plays a key role throughout the trial: it is a complete evaluation of both the personality of the minor as well as the circumstances surrounding their conduct. This report provides both the Juvenile Prosecution Service during the preliminary investigation, and the Judge during the trial, with the information that allows them to apply a ruling which is adapted to the individual minor and to determine the measures to be taken.

## 2.3 TYPES OF MEASURES

In order to individualise the intervention and to adapt measures to the best interests of the minor on the basis of their psychosocial characteristics, Article 7 the LORPM develops a wide range of measures that can be imposed on minors in conflict with the law. These are divided into two groups:

☉ Measures which involve the deprivation of liberty such as:

**Detention in a closed unit.** Those sentenced to this measure live in the facility and within it carry out training, educational, work and leisure activities.

**Detention in a semi-open unit.** Those sentenced to this measure live in the facility, but may carry out some training, educational, work and leisure activities outside of it, which have been established in the individual programme as part of the implementation of the sentence.

**Detention in an open unit.** Those sentenced to this measure carry out all the activities of the educational project in their normal surroundings, and live in the facility as their habitual residence, with the restraints of their personal programme and its rules.

**Remedial detention in a closed, semi-open or open unit.** Facilities of this nature provide specialised educational activities or specific treatment aimed at those who suffer from psychological disorders, a dependence on alcohol, drugs or psychotropic substances, or alterations in perception which cause serious alterations to their concept of reality.

**Weekend stays at units.** Those sentenced to this measure must stay in their place of residence or in a facility for a maximum of thirty six hours between Friday evening or night and Sunday night, excluding the time which they must dedicate to social-educational projects which must be carried out outside of these places, as assigned by the Judge.

⊙ Measures which do not involve the deprivation of liberty:

**Outpatient treatment.** Those sentenced to this measure must attend a designated centre for the period required by the medical professionals which deal with them and must follow the rules set for the appropriate treatment of the psychological disorder, addiction to alcohol, drugs or psychotropic substances, or alterations in perception from which they suffer.

**Attendance at a day centre.** Those sentenced to this measure live in their normal residence and attend a centre which is fully integrated into the community, in order to carry out support, educational, training, work or leisure activities.

**Supervised release.** This measure involves monitoring the activities of the person sentenced and supervising their attendance at school, a centre of professional training or place of work, and depending on the case, obtaining help for them so that they can overcome the factors which led them to commit the crime. Also, this measure obligates the person sentenced to follow the social-educational rules indicated by the public entity or professional charged with monitoring them, in line with the programme of action created and set by the Juvenile Judge.

**Living with another person, family or educational group.** Those sentenced to this measure must live, for a period of time established by the Judge, with another person, a different family to their own or with an educational group, which has been chosen as sufficient for guiding that person in the process of socialisation.

**Community service.** Those sentenced to this measure, which cannot be imposed without their consent, must carry out specified unpaid activities, which are of social interest or of benefit to vulnerable people.

**Fulfilment of social-educational tasks.** Those sentenced to this measure must carry out, without detention or supervised release, specific educational activities aimed at facilitating the development of their social behaviour.

**Caution.** This measure consists of the Juvenile Judge reprimanding the person in conflict with the law and is aimed at making them understand the gravity of the acts committed and the consequences that they have had or could have had, urging them to not commit such an act in the future.

**Revocation of driving or moped licence, or the right to obtain one, hunting or all types of weapons licence.** This may be imposed as a secondary measure when the crime or offence committed involved the use of a moped or motor vehicle, or a weapon, respectively.

**Total disqualification.** The measure of total disqualification is the definitive deprivation of all public honours, jobs or positions held by the person, even if they are voluntary, as well as the inability to obtain the same or other such public honours, positions or jobs.

### 3. RESTORATIVE JUSTICE IN THE JUVENILE JUSTICE SYSTEM

#### 3.1. CHARACTERISATION

As a precedent of the current Spanish regulations shaped by the LORPM which regulate the juvenile justice system in Spain, Regulatory Law 4/1992, 5 June 1992, on the Competencies and Proceedings of Juvenile Courts (la Ley 4/1992 de 5 de junio Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores) includes tools of restorative justice which can be found in Articles 15.1 6<sup>a</sup> (extrajudicial reparation during the proceedings) and 16.3 (possibility of suspension of the execution of the judgement due to the acceptance of reparation).

Point 13 of the Statement of Purpose of the LORPM refers to the importance of the institutions of restorative justice in the field of juvenile justice, as an expression of the principle of minimal intervention and of the predominance of educational and re-socialisation criteria, above criteria of defence essentially based on the general prevention of crime.

Equally, the current regulations make reference to the interests and needs of the victim, facilitating proceedings for economic compensation for the victim when crimes have been committed by minors and are included in Title VIII of the LORPM. Point 8 of the Statement of Purpose of the LORPM demonstrates the legislator's prerogative for achieving victim satisfaction, as it introduces the principle of joint and several liability for the minor responsible for the acts, their parents, tutors, carers or guardians. This facilitates the meeting of the needs of the victim, but only when the crime has been committed by a minor.

The regulations also describe the victims' right to participate in proceedings, and since the modification of Organic Law 15/2003, 25th November 2003, Article 25 of the LORPM, which regulates private prosecution, includes the victims' right to participate in the prosecution. In addition, the last reform undergone by the LORPM (Organic Law 8/2006, 4 December 2006) reinforces the attention paid to and the recognition of the rights of victims and those who have been harmed, including the right to be informed at all times, whether they have appeared in the proceedings as the prosecution or not, and establishing the trial together with civil and criminal matters, in order to achieve the satisfaction of victims' needs and interests in a fast and efficient manner. Similarly, this last reform modified Article 4 of the LORPM which refers to the "Rights of the victim and those who have been harmed", modifying how the rights of the victim must be ensured by keeping them informed at all times, and establishing the steps to follow so that actions relating to the proceedings which may affect the victim are communicated to them.

In this way, the rights relating to the victim's participation in the trial included in Article 4 of the LORPM are in line with those which were recently included in Law 4/2015, 27 April 2015, on the Statute of the victim of a crime. Article 3.1 of this law refers to the "Rights of the victims", and establishes that the victim has the right to protection, information, support, assistance and attention, as well as the right to actively participate in the criminal trial and receive respectful, professional, tailored and non discriminatory treatment from their first contact with the judicial system, during the implementation of restorative justice services, during the criminal proceedings and for an adequate time after it has ended. These aforementioned rights of the victim are elaborated on in Title I "Basic rights", in Title II "Participation of the victim in criminal proceedings" and in Title III "Protection of the victim" of Law 4/2015. This demonstrates that the positive experiences and beneficial effects of restorative justice tools in the juvenile justice system have encouraged Spanish legislators to transfer them to other areas of the legal system.

The LORPM incorporates its own mechanisms of restorative justice in the jurisdiction of minors in Articles 19 and 27.4, which highlight the effects of mediation and conciliation in the pre-trial phase, and in Article 51.3 which allows conciliation in the implementation of disciplinary measures phase. Articles 5 and 15 of the RLORPM develop the proceedings in order to implement extrajudicial solutions during the pre-trial phase and regulate the procedures for conciliation and reparation in the implementation phase as mechanisms for revising the sentence.

In addition, a clear distinction between the concepts of conciliation and reparation is established, which is as follows:

The aim of **conciliation** is that the victim receives piece of mind from the minor in conflict with the law, who must show remorse for the harm caused and be willing to apologise. Conciliation takes place when the minor shows remorse and apologises, and the person harmed accepts this and gives their forgiveness.

With **reparation**, an agreement is not reached solely through the attainment of piece of mind, but also requires something more: the minor makes an agreement with the victim or those who have suffered harm to repair the damage caused, through community service or through actions, tailored to the crime, which benefit the victim or those who have suffered harm.

As this demonstrates, with both conciliation and reparation the offender and the victim must reach an agreement, which when upheld by the minor in conflict with the law ends the legal dispute. However, section F of Article 5 of the RLORPM indicates that when conciliation or direct reparation are not possible, or when the technical team consider it more appropriate for the interests of the minor, the fulfilment of **social-educational** tasks or the completion of community service can be proposed.



Based on the above information, we can conclude that the principles which guide the extrajudicial solutions set out in the juvenile justice system are the following:

**Educational nature:** The minor in conflict with the law faces up to the crime and its consequences, and is afforded the possibility of resolving it in a positive way and in learning from the experience.

**Willingness of the parties:** If the offender does not accept reparation, it will not be possible, even in the hypothetical case where the victim expresses their prior willingness to arrive at an extrajudicial solution. If it is the victim that does not accept reparation, the result is the same, although, depending on a decision by the Public Prosecution, in some cases it may be possible to accomplish indirect reparation.

This principle has two requirements for the services of restorative justice stated in Article 15 of Law 4/2015: that the offender has given their consent, and that the victim has given their consent prior to hearing information given in the proceedings.

**Tailoring of the intervention:** Taking into account the nature of the criminal act, the situation of those involved and the resources available.

**Respect for the rights of the minor:** The young offender is afforded the same judicial guarantees as an adult, has the right to be assisted by legal counsel during proceedings, subject to the legal representatives' authorisation of the reparation agreements.

**Instilling a sense of responsibility in the minor:** This measure involves making the minor face up to their crime, with the goals that they will become aware of the consequences that their behaviour has had for the victim and for society, that they will take responsibility for the damage caused and make restitution for the harm.

### **3.2. APPLICATION OF RESTORATIVE PRACTICES IN THE JUVENILE JUSTICE SYSTEM**

As previously stated, Articles 5 and 15 of the RLORPM develop the procedure to follow in order to implement extrajudicial solutions, both in the preliminary investigation and during the execution of the imposed sentence.

- ⊙ During the preliminary investigation of the disciplinary proceedings:

Taking into account Article 16 of the LORPM, the Spanish Public Prosecution is responsible for the preliminary investigation of the disciplinary proceedings, and is therefore responsible for practicing the relevant procedures when checking the facts and the role played by the minor; they may close the file of proceedings or initiate the disciplinary proceedings and provide an account to the Juvenile Judge.

During this phase, Spanish juvenile criminal law considers the possibility of ceasing the disciplinary proceedings in favour of conciliation or reparation between the minor and the victim through Articles 19 and 27.4 of the LORPM. Judgement 4/2013 “on the criteria for soliciting the stay of the disciplinary proceedings conforming to Article 27.4 of the LORPM”, from Spain’s Public Prosecution’s Department for Juveniles, summarises and analyses the predicted aims of said stay (the suitability of the intervention due to the passing of time and/or the sufficient fulfilment of disciplinary action on the part of the minor).

The procedure to follow, taking into consideration Article 5 of the RLORPM as well as the Judgement 4/2013, is the following:

#### 1. Start of the extrajudicial solution

For the solution to begin, the requirements stated in Article 19.1 of the LORPM must be met:

- The act that the minor is responsible for constitutes a less serious crime
- A lack of serious violence or intimidation in carrying out the crime

Providing the previous conditions are met, the start of the extrajudicial solution may be implemented at the request of the Public Prosecution (on its own motion or because it is requested by the minor's lawyer) or the Technical Team of the Juvenile Court.

Nevertheless, irrespective of who formally made the request as stated in Articles 19 and 51.3 of the LORPM and in Article 5 of the RLORPM, there is nothing that prevents the initial proposal coming from the minor or the victim (Bueno, Legaz, Periago and Salinas, 2008)

Whether the process was started at the request of the Public Prosecution or the Technical Team, in both cases the Technical Team will publish a report on the benefits, or lack of, of implementing the extrajudicial solution, which must explain the nature of the solution with regards to the interests of the minor and the victim. It is important to note that this report, regulated by Article 27.3 of the LORPM, is different from the regular report on the psychosocial circumstances of the minor described in Article 27.1 of the LORPM.

## 2. Making contact with the minor, their legal guardians and their lawyer

The Technical Team will make an appointment with the minor, their legal guardians and their lawyer in order to explain to them the possibility of an extrajudicial solution as stated in Article 19 of the LORPM. The main aims of this first contact are:

To confirm that the minor is in a suitable position to complete the solution: this involves assessing their motivation towards reparation, the level of responsibility taken and remorse felt, etc.

Explain to the minor and their legal guardians, in the presence of their lawyer, the process of the solution and its implications.

Once the solution is deemed adequate for the minor, and if the minor accepts it, the approval of the minor's legal guardians is sought. In the case that the minor or their legal guardians do not agree to the implementation of the solution, the Technical Team communicates this to the Public Prosecution and initiates the drafting of the technical report as stated in Article 27.3 of the LORPM.

## 3. Making contact with the victim

Once the solution has been accepted by the minor, the Technical Team will contact the victim, either through a personal interview or another medium, with the main aims of:

Explaining how the juvenile justice system functions and the process followed with extrajudicial solutions

Assessing the level of victimisation

#### Assessing the willingness and capacity of the victim to participate in the mediation process

It is noted that, in conformity with Article 5 of the RLORPM, if the victim is a minor or unfit to do so, their consent must be confirmed by their legal guardians or representatives and be made known to the relevant Juvenile Judge.

#### 4. Extrajudicial solution

Following the meeting with the minor in which they accept to complete the extrajudicial solution and contact with the victim, the following circumstances may arise:

The victim shows their willingness to participate in the process (whether this is done in a direct or indirect manner)

The victim does not show their willingness to participate in the process or the Technical Team considers it to be more appropriate for the interests of the victim or the minor if the victim does not participate. In these cases, it will be proposed to the minor that they complete social-educational tasks or community service.

In the case that the victim shows their willingness to participate in mediation, the Technical Team will arrange to meet with both parties in order to set the conciliation and reparation agreements. The first step towards going ahead with the meeting is to set out the conditions in which it will take place, prior to the meeting, explaining that both parties will be listened to in order to analyse the different alternatives for conciliation or reparation, and to settle upon agreements reached in a clear manner.

However, conciliation and reparation also may occur in an indirect manner at the request of the victim, that is to say, without the need to hold a meeting between both parties and through some other medium which allows reflection on the agreements reached.

## 5. Evaluation and report

On finalising the process (when conciliation is achieved or when agreements made by the minor are fulfilled), the Technical Team will inform the Public Prosecution of:

The process of mediation and both parties views on its level of success, leading the Prosecution to give their recommendation as a conclusion and requesting a stay of criminal proceedings and that the file is closed by the Juvenile Judge

or

The reasons why an agreement has not been reached, handing over to the Prosecution to continue with the normal judicial process

### ⦿ During the implementation of the sentence:

The LORPM considers the possibility of carrying out conciliation or reparation during the implementation of the sentence in its Article 51.3. The procedure for carrying out this kind of conciliation or reparation is expanded upon in Article 15 of the RLORPM:

## 1. Start of mediation

Firstly, it is necessary to clarify that contrary to what happens with conciliation and reparation in the pre-trial phase; during the implementation of the disciplinary measure, requirements relative to the type of criminal act are not established.

However, considering that carrying out conciliation and reparation in this phase may mean that the disciplinary measure imposed on the minor is dismissed, the following factors are taken into consideration:

That the duration of the already completed disciplinary action equates to a sufficient punishment merited by the harmful acts committed by the minor.

That a safety period has passed (which, for those accused of extremely serious crimes as referred to in Article 9.2 of the LORPM, is at least one year into the completion of the disciplinary measure, and, for crimes stated in the Criminal Code which carry a punishment 15 or more years imprisonment, until half of the sentence has been served).

This first phase starts with the minor's willingness to carry out conciliation and repair the harm caused to the victim. Following this, the public body will inform the Juvenile Court and Prosecution, and will designate a mediation team in order to carry out the first assessment on the viability of this option, checking if the aspects relating to the time passed during the implementation of the disciplinary measure are met.

Also at this point, verification is required that the minor's lawyer is also willing to conciliate with the victim, and will advise the minor throughout the process of mediation.

## 2. Making contact with the minor and the victim

When the previous requirements are fulfilled, a first interview with the minor will be carried out in order to analyse if they assume responsibility for their actions and are willing and agree to the conciliation or reparation.

A meeting with the victim will have been previously arranged to carry out a first interview where they will be informed of the willingness of the minor and on the procedures that will be followed. At this point, the victim will form their decision on whether or not they want to participate in the process, and in the case that the victim is a minor, the agreement must be made by their legal guardian and approved by the Judge.

## 3. Conflict analysis

Once both parties have been interviewed, the mediation team will carry out an assessment on whether or not continue with the process based on the circumstances of the victim and the minor.

## 4. Meeting of the parties

The minor, victim and mediator will all attend the meetings. Both parties will be heard in order to obtain a mutual understanding, and the mediator will explain the different possibilities for conciliation or reparation. The agreement reached between the parties must be put in writing in a clear and concrete manner.

However, and identically to what would occur in the pre-trial phase of disciplinary proceedings, the conciliation or reparation can be carried out indirectly at the request



of the victim, that is to say, without the need to hold a meeting between both parties and through another medium which allows reflection on the agreements reached.

Finally, the public entity will inform the Court, Juvenile Prosecution and the minor's lawyer of the agreements reached and the level to which these were achieved during the process.

## 5. Judicial Decision

In the case where the agreements reached are fulfilled correctly, the Public Prosecution or lawyer may propose to the Juvenile Judge that the disciplinary measure that the minor is in the process of completing is dismissed. Once the proposal has been received, the Judge will hear from the party which is not involved in the petition and the public body in order to come to a decision.

In principle, Article 51.3 of the LORPM considers that the only response is to dismiss the disciplinary action. However, if the Judge considers that there are not sufficient circumstances to adopt this decision (for example, if they consider that the duration of the disciplinary action that has been fulfilled does not represent sufficient punishment for the acts committed), nothing prevents the judge from applying the measures included Articles 13 and 51.1 of the LORPM and instead reducing the duration of the disciplinary measure or substituting it for another measure stated in the law that they deem more appropriate (Bueno, Legaz, Periago, and Salinas, 2008).

### 3.3. STATISTICS CONCERNING THE IMPLEMENTATION OF RESTORATIVE PRACTICES AT A NATIONAL LEVEL

In Spain, the fact that the implementation of disciplinary measures prescribed by Juvenile Judges is under the authority of the individual Autonomous Communities, and due to the difficulty in accessing some activity reports and the delay in their publication, gaining a real knowledge of juvenile justice data is very complicated. The only quantitative data available, although delayed, comes from the Consejo General del Poder Judicial (the constitutional body that governs the Judiciary of Spain)<sup>1</sup>, the Fiscalía General del Estado (Spain's Office of the Public Prosecutor)<sup>2</sup>, the Instituto Nacional de Estadística (Spain's national statistics institute)<sup>3</sup> and the Observatorio de la Infancia dependiente del Ministerio de Sanidad, Política Social e Igualdad (the Childhood Observatory set up by Spain's Ministry for Health, Social Policy and Equality)<sup>4</sup>.

The problem is that these reports and/or statistics have serious limitations, as they use different indicators as references (arrests made, pre-trial proceedings initiated, disciplinary measures imposed, etc.).

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<sup>1</sup> Collection of activity carried out by Juvenile Judges (principally relating to resolutions and disciplinary measures imposed)

<sup>2</sup> Summary of Public Prosecution Service's activity carried out during the previous year, with a section dedicated to the juvenile chamber

<sup>3</sup> Socio-demographic and criminologist study on minors convicted of an offence.

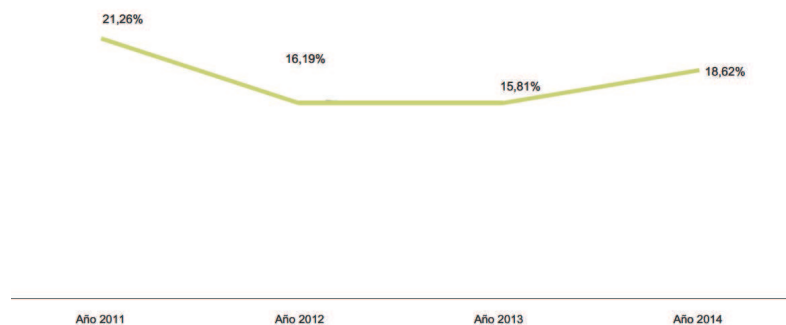
<sup>4</sup> Prepared the "*Estadística Básica de medidas impuestas a los menores infractores*," (Basic statistics on measures imposed on minors in conflict with the law), providing information on Autonomous Communities' activities when implementing disciplinary measures.

With respect to restorative practices in juvenile justice, both the Fiscalía General del Estado and the Instituto Nacional de Estadística offer data on extrajudicial solutions carried out by each Autonomous Community, although there is no distinction between conciliation, reparation and social-educational activities.

Specifically, the most recent data published in this regard by the Public Prosecutor of the State in its latest report (2015) on 2014, indicates that the dossiers filed for conciliation, repair or extrajudicial educational activity were 5,117, representing 18.62% of all cases under investigation.

This report also indicates a slight increase in the percentage of extrajudicial solutions adopted compared to the previous two years (15.81% in 2013 and 16.19% in 2012) but it is lower than those adopted in 2011 (21.26%).

Figure 1. Evolution of extrajudicial solutions



Source: Compiled from the Annual Report of the State Public Prosecutor of 2015

With respect to the disciplinary actions filed that relate to Article 27.4 of the LORPM, the number was 1,891, 6.37% of the total disciplinary actions initiated by the Public Prosecution Service, which also represents a drop compared to previous years. The report noted that the reduction could possibly be attributed to the application of cautionary guidelines in Ruling 4/2013 from the Public Prosecution Service's Coordinating Chamber for Minors, on the criteria for requesting a stay of disciplinary measures as stated by Article 27.4 of the LORPM.

#### 4. THE VICTIM IN RESTORATIVE PRACTICES

As previously stated, attention is paid to the victim's needs throughout the restorative process used in the Spanish juvenile justice system. The victim's willingness to participate in mediation after being informed in a detailed manner of the characteristics of the proceedings is essential in order to start the restorative process.

The LORPM contains the same requirements as Article 15 of Law 4/2015, 27 April 2015, on the Status of the victim of a crime, which refers to the services of restorative justice: a) the person who has committed the crime must recognise their acts; b) the victim must give their consent, after having been extensively informed about the process; c) the person who has committed the crime must give their consent; d) the process of mediation does not pose a risk to the victim's safety; and e) the restoration is not prohibited by law for the crime committed. Also, the principles of confidentiality and the ability of both parties to withdraw their consent to participate in the process at any time are stated in the Article.

To conclude, the actions stated in the LORPM aimed at meeting the needs of the victim during the process of conciliation are the following:

Recognition of their rights, whether or not the victim is present during the process

Information on the means of assistance for the victim as stated in the LORPM, especially with reference to counsel and/or legal aid, and victim assistance services

Information surrounding the restorative process, putting particular emphasis on its characteristics, implementation and implications

The need to obtain the victim's consent in order to start the restorative process

Consensus with the victim about the conditions in which the conciliation with the minor in conflict with the law will take place, paying attention to their requests or suggestions referring to the act of conciliation. One of the main aims of this point is to avoid secondary victimisation, with the ideal being that the process takes place taking the availability and circumstances of the victim into careful consideration

Assistance during the act of conciliation, always safeguarding the wellbeing and interests of the victim

The need for the victim to sign the agreements reached in order to continue with the process. Article 19.6 of the LORPM also considers that in the case where the victim is a minor or incapable of participating, the agreement for conciliation or reparation must be taken by their legal guardian and approved by the Juvenile Judge

Where conciliation is satisfactorily undertaken but agreements regarding civil responsibility are not reached, the victim is informed about the steps they must follow in order to obtain any economic compensation they seek. It is necessary to highlight in this point that in cases where a stay of criminal proceedings is granted (as occurs when an extrajudicial solution is reached), the LORPM does not consider any course for the request for civil responsibility, for which the victim must go through civil proceedings

Information surrounding the result of the reparation in cases where it is achieved

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## 6. REGULATIONS USED

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*Ley Orgánica 5/2000, de 12 de enero, Reguladora de la Responsabilidad Penal de los Menores, (BOE núm.11, de 13 de enero de 2000), modificada por Ley Orgánica 7/2000, de 22 de diciembre (BOE núm.307, de 23 de diciembre de 2000), por Ley Orgánica 15/2003, de 25 de noviembre (BOE núm.283, de 26 de noviembre de 2003) y por la Ley Orgánica 8/2006 de 4 de diciembre (BOE núm.290, de 5 de diciembre de 2006).*

*Real Decreto 1774/2004, de 30 de julio, por el que se aprueba el Reglamento de la Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores.*



# NATIONAL REPORT: UNITED KINGDOM

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## 1. JUVENILE JUSTICE SYSTEM IN ENGLAND AND WALES (GENERAL OVERVIEW)

### NATIONAL STANDARDS

The Crime and Disorder Act currently in force in England and Wales dates back to 1998. As stated in the Act (section 37): “it shall be the principal aim of the youth system to prevent offending by children and young persons”.

The National Standards for youth justice services are set by the Secretary of State for Justice on the advice from the Youth Justice Board for England and Wales (YJB), which is a non-departmental public body set up by the Crime and Disorder Act 1998 (Section 41). This body works on the prevention of offending and reoffending of children and young people under 18 years. The standards apply to those organisations providing statutory youth justice services.

For the past years, the National Standards have been updating their investigations in search of improvements, and each time these are reviewed, they go under the indications of the national consultation with Youth Justice Services and other skilled key professionals. These standards should be seen as a distillation of the range of legislation, compliance frameworks (contracts, inspection regimes, etc.), and sources of statutory and effective practice guidance which applies across the youth justice sector.

The Youth Justice Board has a responsibility to monitor adherence to National Standards on behalf of the Secretary of State. National standards in youth justice must define the minimum required level of service provision consistent with ensuring:

Delivery of effective practice in youth justice services;

Safeguarding of children and young people who come into contact with youth justice services;

Protection of the public from the harmful activities of children and young people who offend.

In defining these standards the Secretary of State also requires that (Youth Justice Board, 2013 p. 5):

Where possible and appropriate, youth justice services are afforded the maximum freedom and flexibility to adapt their practice to local context,

The public have confidence that children and young people subject to statutory supervision by youth justice services are fairly punished and are supported to reform their lives.

The youth justice system of England and Wales constitutes a structure of institutions that cooperate to give support and guidance to young offenders.

The National Offender Management Service (NOMS), through the small number of establishments holding young people, supports the youth justice system by looking after young people in custody in Young Offender Institutions (YOI) and to help prevent those young people from reoffending.

## PRINCIPLES

Although acting in the best interest of the child is an obligation under the United Nations Convention on the Rights of the Child (1989), and is a dominant principle in youth justice systems around the world, there are a number of other principles that have been adopted.

These include (Hazel, 2008, p.6):

The principle of 'preventing offending', which is influential in England and Wales.

The protectivist *parens patriae*; of treating young people who offend as children in trouble who require welfare.

Minimal intervention.

Protection of society.

Education and resocialisation.

## AGE RANGES

The age of criminal responsibility is the point where a child or young person can formally enter the criminal justice system and be legally prosecuted for a proven offence. In England and Wales the minimum age of criminal responsibility is set to 10. Children under 10 cannot be arrested or charged with a crime. Young people between

the age of 10 and 17 can be arrested and taken into court. However, they are treated differently than adult offenders as they dealt with by youth courts, they are given different sentences, and they are not sent to adult prisons but Special Secure Centres. People over 18 are treated as adults however, if an imprisonment sentence is imposed and they are sent to prison, they will be sent to a place that holds 18 to 25 years old, separated from the adults (Youth Justice Board, 2013).

## **TPOLOGY OF SENTENCES**

There are different types of sentences in England and Wales, depending on the age of the young person or the offence committed. Here, we have a brief explanation of the sentences available:

### **First tier penalties**

It has to be taken into account that: “the police have the power to issue a reprimand or final warning, where it is judged that prosecution is not in the public interest” (House of Commons, 2013, p.19).

When a young person is sentenced to a referral order, they have to attend a Youth Offender Panel, and agree to take responsibilities that the panel decides, this period could last from three months to a year. The object of this referral order is to make the young person conscious of their behaviour and take responsibilities for their actions. These sentences are usually for young offenders that have committed a first offence and plead guilty. The sentence can be a minimum of three months to a maximum of twelve months. The victim could also contribute to this sentence.



### Community penalties

The *Youth Rehabilitation Order (YRO)* was introduced at the end of November 2009. The YRO provides judges and magistrates with a choice of 18 community options from which they can create a sentence specifically designed to deal with the circumstances of the young offender before them.

The *Youth Rehabilitation Order* is a sentence applied in the community and can contain one or more of all the different requirements that the young offender must fulfil for a total period of three years. Some of the requirements mentioned before are the following, curfew, drug treatment, mental health treatment, education requirement, etc.

### Custodial sentences

Custodial sentences apply to the most severe cases, the main goal is to provide the training, education and rehabilitation to reduce the risk of reoffending. For these types of sentences specific centres are required, like, Secure Children's Homes (SCH), Secure Training Centres (STC) and Young Offender Institutions (YOI).

A *Detention and Training Order (DTO)* may be in respect of a youth aged over 15, or in respect of a youth aged 12 to 14 if he or she is a 'persistent offender'. A DTO can only be made if the court agrees that the offence is so serious that neither a fine alone nor a community sentence can be justified for the offence (Section 152 Criminal Justice Act 2003 and Section 100 powers of Criminal Courts (sentencing) Act 2000).

The *Detention and Training Orders* are sentences that can range from 4 months to 2 years. These types of sentences are split into two; the first part sends the young

offender to custody (Secure Children's Home, Secure Training Centre's or Youth Offender Institution) and the second half will be under the supervision of a Young Offender Team out in the Community.

For more serious offences in the Crown Court, longer sentences up to a maximum of 14 years can be imposed. If the Crown Court considers that there is significant risk of serious harm to members of the public or if they have been convicted of a specified offence listed in section 91 of the Powers of Criminal Courts (Sentencing) Act, 2000, a sentence of detention for life or an extended sentence of detention could also be imposed.

## 2. RESTORATIVE PRACTICES IN THE JUVENILE JUSTICE SYSTEM

Restorative Justice is not in itself a new concept. In the UK there have been several ways to use agreements between the Justice System, victims and offenders applying the same main principles to seek the best benefit for all, working to resolve issues formally.

Historically, police across England and Wales have used Restorative Justice since the 1980s. Research by the *Association for Chief Police Officers* (ACPO) found 33 of the 43 police forces in England were using some form of restorative practices (Criminal Justice Joint Inspection, 2012).

Restorative Justice has been part of the process of youth justice in England and Wales since 1998, when the system was reformed (Youth Justice Board, 2008). Marshall

(1999), noted that this was mentioned in the Crime and Disorder Act 1998, “only partially and haphazardly” (p.6), but not enough for it to be embedded in the system.

According to the Crown Prosecutor Service (2015), “RJ processes are more widely used with youth offenders. The Youth Justice Board has been promoting RJ from 2001 and includes within national standards a standard regulating RJ and work with victims of crime”. That means a focus on addressing victims needs should be central to the criminal justice system. Afterwards, in 2006, the statutory Victims Code of Practice was created “to transform the criminal justice system more responsive and easier to navigate” (Ministry of Justice, 2015, p. 1).

## FEATURES

### Definition

There are in existence a wide range of definitions about what Restorative Justice means, but one of the main definitions that we take into account is the one from the UK government which says: “RJ brings those harmed by crime, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play part in repairing the harm and finding a positive way forward” (Ministry of Justice, 2014a).

For a wide definition of the process, and according to Marshall (1999), Restorative Justice is defined as “a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implication in the future” (p.5).

### Typology of sentences in the frame of restorative practices

The intervention of Restorative Justice has some common types of practices, from indirect mediation where offenders and victims never actually meet, to face-to-face offender/victim mediation and the Restorative Justice conferences composed by offenders, victims and their supporters.

It is known that the process of Restorative Justice requires engagement with young people, involving them into the process, mainly with young people who have committed an offence. Young people who participate in the Restorative Justice process can learn about the harm caused to the victim and work to make amends in the community.

There are four main types of restorative practices, which involve victims, offenders and also the families and volunteers, as shown below (Youth Justice Board, 2008, p. 8):

**Victim-offender mediation:** communication between a victim and offender facilitated by a trained mediator,

**Restorative conferencing:** in addition to the primary victim and offender, other people connected to the victim and offender (such as family members) also participate,

**Family group conferencing:** includes members of the wider extended family, with a particular onus on the family to provide an acceptable solution,

**Youth offender panels:** trained community volunteers work alongside a member of the local YOT to talk to the young person and their parents/carer, with the participation of the victim, to agree on a tailor-made contract aimed at putting things right.

## Principles

Here we can find some general principles which can orientate, according to Marshall (1999) "the general practice of any agency or group in relation to a crime":

These principles are:

Making room for the personal involvement of those mainly concerned (particularly the offender and the victim), but also their families and communities.

Seeing crime problems in their social context.

A forward-looking (or preventive) problem-solving orientation.

Flexibility of practice (creativity).

RJ may be seen as criminal justice embedded in its social context, with the stress on its relationship to the other components, rather than closer system in isolation (Marshall, 1999, p.5).

On other hand, the Restorative Justice Council (RJC) which aims to promote quality restorative practices for everyone, defines as principles that should be held by all practitioners in the field (Restorative Justice Council, 2015, p. 1):

**Restoration:** the primary aim of restorative practice is to address and repair harm.

**Voluntarism:** participation in restorative processes is voluntary and based on informed choice.

**Neutrality:** restorative processes are fair and unbiased towards participants.

**Safety:** processes and practice aim to ensure the safety of all participants and create a safe space for the expression of feelings and views about harm that has been caused.

**Accessibility:** restorative processes are non-discriminatory and available to all those affected by conflict harm.

**Respect:** restorative processes are respectful to the dignity of all participants and those affected by harm caused.

### Age ranges

The age of criminal responsibility in England and Wales is up to 10, this excludes children under 10 years, they cannot be arrested or charged with a crime. The remit of the cases to the Youth Justice Board is 10 to 17 years old. Restorative Justice is used in the same way throughout the youth court procedure in this age range. In addition, the YOTs carry out mediation work as participation in the Restorative Justice with children and young people with an age range of 8 to 18 years old.

Through research, the RJC is developing programmes for schools with a restorative approach to resolving conflicts and preventing harm, by using a range of methods adapted to appropriate age groups.

### Statistical data about restorative practices at national level

Ministry of Justice research demonstrates that restorative justice provides an 85% victim satisfaction rate, and a 14% reduction in the frequency of reoffending (Restorative Justice Council, 2015).

Government research has shown that Restorative Justice has a positive impact on both victims and offenders. The government funded a seven year research programme into restorative justice which showed that (Restorative Justice Council, 2015, p. 10):

70% of victims chose to take part in face to face meetings which led to 85% victim satisfaction rates.

78% of victims said that they would recommend restorative justice to other victims (only 5% would not).

The research also showed that face to face meetings reduced the frequency of reoffending by 14% and that this reduction in reoffending was highly cost effective for the criminal justice system, saving an average of eight pounds for every one pound spent on delivering restorative justice.

### Implementation of restorative practices in the juvenile justice system

Restorative Justice in England and Wales is in place in all the stages of the criminal justice process, from out-of-court to post-sentence. And the activities that are included in these processes can be a victim-offender conference (face-to-face), community conference or indirect communication (Ministry of Justice, 2014a). In the cases that Restorative Justice practices cannot take place in direct form, the participants can choose another kind of communication like indirect shuttle mediation, video conferencing, telephone conferencing, the use of a two-way screen, audio or video recordings or written communication.

Restorative Justice processes are always voluntary for both victim and offender. If it is a part of a diversionary process (e.g. with a conditional caution), offenders need to have admitted responsibility for the harm they have caused. When the RJ process is part of a conditional caution, both victim and offender agree to take part. In some processes when the offences are misdemeanours, and the conditional process executes correctly, the young person could avoid a Court Attendance Notice.

In that respect, “RJ works best when the offender is committed to participating in a meaningful way, rather than simply trying to avoid being prosecuted” (The Crown Prosecution Service, 2015).

#### In pre-trial proceedings

The aim of the pre-sentence RJ is to provide victims with the opportunity to take part in a RJ activity at an early stage of the criminal justice system; offer victims greater direct involvement in the criminal justice process, give victims a voice and increase victim satisfaction; and reduce re-offending (Ministry of Justice, 2014a, p. 4).



The cases have to be identified as “suitable” for RJ practice, with some requirements: “identifiable victim or victims....the offender accepts responsibility and has made a guilty plea...and victim, offender and any other participants all consent to take part in a RJ activity” (Ministry of Justice, 2014a, p.7). RJ activities, can be suitable for any offence, however it should not normally be used in cases like domestic violence or hate crimes and sexual offences.

The identification of “suitable” can come from police, victim services, probation staff, youth offending teams and even from court, where sentence is deferred to allow for RJ activities. The early contact with the victims takes part when the suitable case is identified with victims and offenders. These cases should only be referred to a trained RJ practice, from recognised organisations like the Restorative Justice Council. Only the trained facilitator should seek the consent of both parties. The trained facilitator has to be sure that the requirements mentioned above have been fulfilled. RJ practice can only take place if victim and offender have been risk assessed by the facilitator and deemed fully able. Procedures differ depending on the area, local authority or court. The facilitator may be required to inform the court of the practice and keep them updated on progress (Ministry of Justice, 2014a).

#### During the execution phase of the sentence

According to the Crown Prosecutor Service (2015), “RJ can take place in any stage of the criminal justice process including after conviction and it can also form an integral part of any sentencing disposal, specially with youths.”

In addition, part 2 of schedule 16 to the Crime and Courts Act 2013 inserts a new section into the power of Criminal Courts (Sentencing) Act 2000, which makes it explicit that the courts can use their existing power to defer sentence post conviction

to allow for an RJ activity to take place by imposing an RJ requirement, (The Crown Prosecutor Service, 2015).

Restorative practices can be used as well as part of a sentence. The Criminal Justice and Immigration Act 2008, contains and gives the power to issue a *Youth Conditional Caution*, providing another vehicle for the RJ approach.

#### Development of restorative practices (where, when and implemented by whom?)

The Ministry of Justice has developed a “Restorative Justice Action Plan for the criminal justice system for the period to March 2018”, with the focus firmly on developing equal access for victims, awareness and understanding of RJ and benefits, the way to access RJ and how to find good quality practice, delivered by trained facilitators. This action plan is a continuation from the last one published in November 2012. The success of the last action plan is the bed-rock of the next plan, working in the areas previously mentioned.

To ensure the success of this action plan, Ministry of Justice wants to put in place some measures during the next years until March 2018.

Implementing the plan is something that has to be part of the work of all the agencies, local authorities and not only working centrally. To introduce the new system would increase administrative burdens but it is important to collect the data on the use of RJ.

The Ministry of Justice will measure success using the following range of measures (Ministry of Justice, 2014b, p.2):

- Monitoring RJ provision through on-going engagement with Police and Crime Commissioners (PCC).

- Monitoring take up of the Restorative Justice Council’s restorative services standards and restorative services quality mark.

Working with the Victims' Commissioner to monitor compliance with the relevant requirements in the Victims' Code.

Continuing to work with the Restorative Justice Council to understand the extent and nature of RJ provision and build on research which has attempted to provide a benchmark.

### 3. VICTIMS IN THE RESTORATIVE PRACTICES

#### **GUARANTEES FOR VICTIMS IN CRIMINAL PROCEEDINGS**

According to article 27 of the Directive 2012/29/EU, of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victim of crime, member states must have brought into force the laws, regulations and administrative provisions necessary to comply with the directive by November 2015.

The Victims' Code sets out the minimum level service victims should get from criminal justice agency. The Code was revised in 2013 after the Directive, to reflect the commitments in the EU Victims' Directive. The last updated version of the Code was published in October 2015, and came into effect on 16 November 2015, fulfilling the Directive 2012/29/EU. The last updated version states that "enhance entitlements are provided to victims of the most serious crime, persistently targeted victims and vulnerable or intimidated victims" (Ministry of Justice, 2015, p. 1).

The Code for Victims (2015) is a guideline, to use as information and as a guide of services that victims should receive from the criminal justice system. There are two

specific chapters for victims under 18 that set out all the steps to follow if you are a victim, from the police investigation, information about the pre-trial trial or post-trial, appeals, to the post-sentence or the way to use Restorative Justice in the process. In addition, victims have a short guide of the duties of the Service Providers for children and young people.

As listed bellow, there are some key rights under the Code (Ministry of Justice, 2015):

The right to be kept informed about case progress by the police.

The right to hear when a suspect is arrested, charged, bailed or sentenced.

The right to apply for special measures in court for vulnerable or intimidated victims.

The right to be told when an offender will be released, if the offender in question has been sentenced to a year or more in prison for a violent or sexual offence.

The right to be referred to Victims Support Services.

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# NATIONAL REPORT: PORTUGAL

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## 1. THE PORTUGUESE JUVENILE JUSTICE SYSTEM. GENERAL OVERVIEW

The Portuguese juvenile justice system is currently characterized by a legal bifurcation, between the *Protection of Children and Young People in Danger* Act (Lei de Proteção de Crianças e Jovens em Perigo)<sup>1</sup> and the Youth Justice Act (Lei Tutelar Educativa; hereafter LTE)<sup>2</sup>. This system evolved from a unified model of protection and welfare, reflected in the *Tutelary Organization for Minors* (Organização Tutelar de Menores)- wherein all youth justice measures were directed to youngsters in danger and juvenile offenders alike<sup>3</sup> -to a more differentiated system in terms of target situations and management devices employed (Castro, 2010). According to Rodrigues and Duarte-Fonseca (2003, p. 5 - 6) “(...) *the wide diversity of situations that may legitimize State intervention (minors in danger and juvenile offenders) must lead to a variety of answers. In the first case, a protective and assistentialist answer is required; in the second case, an intervention which aims minor education to society’s fundamental values and norms, namely to the juridical values and rules*”.

Thus, the two current pieces of legislation aforementioned are respectively directed to minors in danger and juvenile offenders, though articulated and with several common principles. Recently, on 15 January 2015, LTE has suffered several legal reformulations with the entry into force of Law 4/2015. Nevertheless the main principles, the structure and the philosophy of educational intervention were upheld. The new modifications are considered in this report.

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<sup>1</sup> Portuguese Law 147/99 from 1 September

<sup>2</sup> Portuguese Law 166/99 from 14 September; changed by the Portuguese Law 4/2015 from 15 January

<sup>3</sup> The protection and welfare model suffered several critics due its unified treatment for minors and the absence of procedural law guarantees. The necessity to comply with international legal standards also boosted the implementation of a more differentiated juvenile system.

### 1.1. REFERENCE STANDARDS

According to the LTE -Law 166/99- a youth justice measure is applied when a youngster aged between 12 and 16 years old has perpetrated an act legally qualified as crime and when he/she needs to be educated to law compliance (articles 1, 2, 6 and 7).

Following the legal amendment of the LTE (law 4/2015 from 15 January), any person can report an illicit fact perpetrated by a youngster aged between 12 and 16 years old, regardless of the crime nature (public, semi-public or particular crime). The complaint is mandatory both to the police and to the public officials when the facts are known in the exercise of their professional duties (article 73).

The youth justice measures selected are those that represent less intervention in the decision-making autonomy of the minor, and that are more likely to get him/her adhesion, as well as of their parents or legal representative, according to his/her best interest. When several offenses have been perpetrated, one or more measures can be applied, according to the specific need of minor's education to the right.

Youth justice system is organized around two different phases: inquiry and jurisdictional phases.

#### ☉ Inquiry phase

Inquiry phase aims to determine whether the youngster has perpetrated or not the illicit action of which he/she is suspected and whether he/she needs to be educated to law. The LTE foresees a set of “custodial measures” that can be applied in this phase when preventive and procedural concerns are present – article 57 LTE (i.e., the minor is returned to the parents, legal representatives or whoever has his guardianship or

even to a reliable person or foster family, with imposition of obligations to the minor; minor's custody is ascribed to a public or private entity; the minor is temporarily placed in an educational centre). The application of precautionary measures at this time point (art. 58 LTE) requires:

- Clear evidences regarding the perpetration of a crime;
- High predictability of application of a youth justice measure to the minor;
- High probability to escape or to perpetrate new illicit facts.

In the beginning of the inquiry phase, a youth justice case-file can be archived<sup>4</sup> both when the youngster has perpetrated a crime punishable with a sentence not exceeding one year wherein the youth justice measure reveals unnecessary due to the reduced severity of the facts<sup>5</sup> or when drug use has motivated the youth justice case-file<sup>6</sup> (article 78 LTE).

Inquiry phase comprises a 'collective audience for evidence analysis' (art. 81 and 82 LTE) where the minor, the parents (or legal representative or whoever has the minor guardianship), the lawyer and, if necessary, the victim, are present, to examine the evidences regarding the minor's personality, his/her family, educational and social background as well as evidences of the crime occurrence. As a result of the collective audience, the justice case-file can be suspended or archived as follows:

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<sup>4</sup> "Preliminarily archived "

<sup>5</sup> In this case, family, educational and social backgrounds are evaluated and as a result the measure can be considered as needless (art. 78, nr.1 LTE).

<sup>6</sup> When drug use are related to the instauration of the youth justice case-file, the Public Ministry must evaluate youngster's risk to perpetrate other kinds of crime. If the risk is inexistent, the Public Ministry can preliminarily archive the case-file. This entity is likewise able to refer the youngster to specific drug-related programs or treatments (art. 78, nr.2 LTE).

Suspension of the legal proceedings (article 84 LTE): applied when a youth justice measure is needed and the illicit crime is punishable with no more than five years of a prison sentence. The Public Ministry may indeed decide by the suspension of the process and the development of a 'conduct plan' in the following conditions: a) the minor approves the proposed plan; b) the minor has not been previously subjected to a youth justice measure; c) the minor is willing to avoid practicing facts qualified as crime by law in the future. Parents, legal representatives or whoever has the minor guardianship are heard during the conduct plan development. The Public Ministry requires help from the reintegration or mediation services to elaborate the 'conduct plan' (i.e., DGRSP teams; see *'Restorative Practices in Portuguese Juvenile Justice System'* in this paper). The Public Ministry may also suspend the process, through enacting a restorative justice measure based on victim-youngster mediation, wherein a mediation agreement should be reached and approved by the parties and the Public Ministry.

Archiving (article 87 LTE): applied when it is proved that the suspected illicit fact has not occurred; when evidences are insufficient; when the youth justice measure is needless and the illicit fact punishable with a prison sentence not exceeding three years; and when the victim, based on a relevant reason, precludes to case-file prosecution within the scope of a semi-public or particular crime.

This phase ends up with the opening of the jurisdictional phase when clear evidences of the crime perpetration are present and when the case-file's suspension or archiving was not possible due to the crime's severity and/or the clear need of education to law compliance.

## © Jurisdictional Phase

Jurisdictional phase refers to the judicial evidence of the illicit facts perpetrated by the youngster. However, in the very beginning of this phase the process can also be archived if the judge agrees with the proposal of the Public Ministry of not applying any measure, when the crime is punishable with a sentence exceeding three years. If the facts are proven and if the minor still needs to be educated to law (articles 7, 110 and 118), then youth justice measures are ordered. Within this phase, a pre-trial audience may occur (article 104 LTE), which can be defined as an informal audience towards a consensus on the most suitable measure to the youngster. As we will discuss later, during the pre-trial audience, the Public Ministry may ask for mediation services support.

## 1.2. PRINCIPLES

*The Youth Justice Act* (LTE) is governed by some main principles (Agra & Castro, 2002; Castro, 2010; Law 166/99; Rodrigues & Duarte-Fonseca, 2003):

**Education:** LTE is oriented to the youngster education for law, which means that the youngster needs to internalize legal norms. This concept embodies the purpose of youth justice measures and dictates the conditions that legitimate the judicial intervention (articles 2 and 7 LTE).

**Minor's best interest:** the legal response is chosen in accordance with the best interests of the minor as suggested by United Nations Convention on the Rights of the Child (General Assembly resolution 44/25 of 20 November 1989 article 3, nr. 1 and article 6 LTE).

**Consensus:** is both a principle and a criterion when the measure is chosen. Among all the youth justice measures, the selected one should gather the maximum consensus among the minor and the parents or legal representatives (article 6 LTE).

**Accountability:** besides the education purpose, make the youngster accountable for the crime is vital. This process entails an evaluation of offender's personality.

**Minimum Intervention Principle:** the minor has the right to freedom; self determination; and to stay, whenever possible, in his/her environment. Court must choose the measure that translates the minimum intervention in the decision-making autonomy of the minor and the maximum support for him/her. Diverse legal mechanisms –like suspension of legal proceeding- are strongly encouraged in accordance with the Portuguese constitutional and international principles (cf. Beijing Rules –article 17, nr. 1c- and Havanam Rules –article 2; article 6 LTE; and article 18, nr. 2 of Portuguese Constitution).

### 1.3. AGE RANGES

*Youth justice measures* can be applied to youngsters aged between 12 and 16 years old at the time of the crime perpetration. In Portugal, there is also 'an exceptional legal regime' (Decree-Law 401/82 from 23 September) concerning youngsters between 16 and 21 years old who perpetrated illicit facts. As an example, this exceptional regime can mitigate the applicable penalty as this brings more benefits to the youngster's rehabilitation. Under this regime, some legal perspectives claim that the youth justice measures can also be applied to youngsters between 16 and 18 years old at the

moment of crime perpetration (in the case of a prison sentence lower than two years – article 5, nr. 1). However, due to different legal readings, some legal professionals do not recognize the possibility to apply youth justice measures to youngsters who have perpetrated illicit facts between 16 and 18 years old.

The accomplishment of the youth justice measures can be extended until 21 years old, although they can only be applied to youngsters who at the time of the crime were aged 12 to 16 years old<sup>7</sup>. Overall, youth justice measures can embrace an age range between 12 and 21 years old.

#### 1.4. TYPOLOGY OF MEASURES

When a youth justice case-file is sent to the jurisdictional phase and when the youngster is considered responsible for the illicit fact and needs to be educated to the Law at the time of the decision regarding youth justice measures (article 7), different kinds of measures can be ordered by the court depending on the youngster's trajectory and criminal act. Firstly, non-custodial measures or community measures can be accomplished in the youngster's natural context of living. These measures are (cf., Law 166/99):

**Reprimand:** judge's warning about the illicit character of the conducts adopted by the youngster (articles 4 and 9).

**Suspension of driving licenses** (articles 4 and 10).

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<sup>7</sup> Exception made to the hypothesis (non-consensual), above mentioned, of extending its applicability to young people up to 18 years old (at the time of the crime practice).

**Victim reparation** (restorative-based measure): the court can select different forms of reparation to the victim (articles 4 and 11).

Apologizing for the damage caused, in the presence of the judge and the victim. The minor has to emphasize his/her clear intention to not reoffend or to express his/her regret in a symbolic way;

Economic compensation related to the property damage; the compensation can be total or partial, since it does not distort the meaning of the measure. In determining the amount of compensation or the provision, the judge must consider the financial capacities of the minor;

Developing an activity in favour of the victim and related to damage caused. This activity cannot take more than two days a week and three hours a day, and respects the need of one day per week to rest and takes into account the school hours and frequency as well as other activities that the court considers important for the formation of the child. Overall, this activity may not exceed 12 hours spread over for a maximum of 4 weeks.

**Payment of economic benefits** (restorative-based measure): paying to a non-lucrative entity a certain amount of money (articles 4 and 12).

**Activities in favour of the community** (restorative-based measure): developing an activity in favour of a non-lucrative entity (maximum of 60 hours during no more than 3 months) (articles 4 and 12).



**Imposition of conduct rules:** the youngster may be obligated to keep away from certain places, people, groups or associations, not to drink alcohol and not to bring along certain objects (articles 4 and 13).

**Obligations imposition:** the youngster may be obligated to attend certain activities (e.g., attend school subjected to control of attendance and school performance; attend activities in a club or juvenile association, etc.) or programs (e.g., outpatient or inpatient psychiatry treatments). In any case, the court should seek the minor's adherence to the treatment plan, being required the minor's consent when he/she has more than 16 years old (articles 4 and 14).

**Formative programs:** sexual education, road safety education; training of personal and social skills, sports participation or vocational training are some types of formative programs directed to offenders (articles 4 and 15).

**Educational monitoring:** personal plan which aims to train and support the youngster in some priority areas, defined by the court. Within the scope of this plan some conduct rules or obligations may be imposed as well as the frequency of training programs. Educational monitoring can last a minimum of three months and a maximum of two years (articles 4 and 16).

Secondly, custodial measures are the more restrictive measures, applied to more severe cases (articles 1, 2, 4 and 17 - LTE), which implies the placement of the youngster on an educational centre. Depending on age, number, type and severity of the crime, the minor can be placed on educational centre within an open, semi-open or closed regime:

**Open regime:** the youngster can develop scholar, educational or training, working, sport and free-time activities outside the educational centre. The minor can also spend the weekends and holidays with his/her parents or legal representatives (article 167 LTE).

**Semi-open regime:** the youngster has to develop scholar, educational or training, working, sport and free-time activities inside the educational centre. The minor may perform the previous activities outside the centre in order to accomplish certain individual educational goals (article 168).

**Closed regime:** the minor only leaves the educational centre due to judicial obligations, healthcare needs or other exceptional reasons (article 169).

Semi-open and closed regimes can only be applied to the most severe cases. For instance, the closed regime is applied when the minor has perpetrated a crime punishable with a prison sentence greater than five years or when the minor has perpetrated two or more crimes against the person punishable with a prison sentence greater than three years and cumulatively the youngster is 14 years or older at the time of the measure enactment (article 17).

Regarding custodial measures, the legal amendment of LTE (law 4/2015 from 15 January) has introduced two new practices:

**Intensive supervision period** (article 158-A LTE): in regard to institutionalized youngsters, when imposed by the court, the youngster's social rehabilitation may comprise a supervision period. Intensive supervision period starts in the final period of the custodial measure and it can be accomplished outside the educational centre, during at least 3 months and no more than 1 one year.

This process aims to evaluate the skills developed inside the educational centre, as well as institutionalization's impact on personal and social behaviour. Intensive supervision occurs on youngster's natural context of living or alternatively in "autonomy houses" and, in any case, cannot exceed a period greater than half of the duration of the enacted measure. During this period, the judge may enforce certain conduct rules (e.g., obligation to attend school, obligation of attendance in the workplace, obligation to live in a specific place or to appear regularly to the court). During the intensive supervision period the minor is accompanied by the social reintegration team, which is responsible for producing quarterly reports to inform the court. Intensive supervision measure is extinguished whenever it is shown that the youngster accomplished the obligations imposed by the court.

**Post-custodial monitoring** (article 158-B - LTE): if an intensive supervision period is not determined, once the custodial measure is ceased, the social reintegration services must monitor the minor's return to liberty and community life. If necessary, a promotion and protection case-file can be elicited to promote the reintegration of the youngster (ruled by Law 166/99 from 14 September). The *Youth Justice Act* revisited (Law 4/2015 from 15 January 2015) foresees the construction of 'residential units of transition' directed to youngsters who have recently left from educational centres, to facilitate their reintegration into society when they cannot count on the necessary support in their natural context of life.

Noteworthy, all the youth justice measures that are ordered can be reviewed. The measures revision can be asked by Public Ministry, by the minor, by the minor's parents or legal representatives (or whoever has his/her guardianship), by the lawyer and also by the entity that monitors the measure's execution. The revision can occur at any time (except on custodial measures) and in some cases is mandatory (see below).

Some specific circumstances may motivate the measure's revision (articles 136 et seq. LTE), specifically:

- Measure's execution is not possible due to a fact not imputable to the minor;
- Measure's execution has become too onerous for the minor;
- Youth justice measure has become inadequate to the minor;
- Youth justice measure has become needless due to the educational improvement of the minor;
- The minor has intentionally put himself/herself in a situation that precludes measure implementation;
- The minor has violated the duties associated with the measure's execution;
- The minor over 16 years old has perpetrated a new criminal offense.

In addition, measure's revision is mandatory in some concrete situations to reassess the need for its implementation (article 136, nr.2 LTE) and one year after the beginning of the measure's execution or the last revision or, when the youngster is institutionalized under a semi-open or closed regime, six months after the beginning of the measure's execution or the last revision (article 137, nr.4 LTE).

The revision of a non-custodial or community measure serves the following purposes (article 138):

- To preserve the current measure;
- To change the conditions surrounding the measure's application;
- To replace the current measure by another more suitable non-custodial measure;
- To reduce the duration of the measure;
- To cease the measure's execution, declaring its extinction;
- To warn/advertise the youngster to the severity of his conduct and for any consequences thereof;
- To order a custodial measure under semi-open regime, when the illicit fact perpetrated allows the application of a custodial measure under the semi-open or closed regimes. This measure is applied, as a last resort, when the youngster has incurred in non-compliance or has grossly violated the duties of the former measure.

The revision of the custodial measures (article 139) also have other purposes, besides those above mentioned, such as to extend the applied measure without any change in their regime, to exchange the execution's regime -establishing a more open or restrictive regime- or even to suspend the measure.

## 2. RESTORATIVE PRACTICES IN THE PORTUGUESE JUVENILE JUSTICE SYSTEM

Conceptually, restorative justice is a broad notion which incorporates several strategies and instruments (Costa, 2012). In the Portuguese juvenile justice system, penal mediation is the main restorative practice along with the above mentioned restorative-based youth justice measures. In the following sections, we present the features, proceedings and statistics regarding restorative practices in Portugal.

### 2.1. FEATURES

Mediation was first framed on the juvenile justice or *Youth Justice System* based on the argument that young offenders' accountability is essentially allocated on external factors. Though penal mediation turned out to be conceptualized as an important educational resource (Costa, 2012), it is rarely used in juvenile justice (Portuguese Permanent Observatory of Justice (OPJP), 2010). The important role given to mediation on LTE diverges from the current real scenario. In fact, we have witnessed a scarce presence of the victims in reparation measures and the almost inexistence of truly restorative or reparative aims (Castro, 2010).

Mediation can be understood as *"an informal and flexible process carried out by another impartial person, the mediator, which promotes an approximation between the offender and the victim, actively supporting them in the formulation of an agreement, which in turn should repair the damages caused by the illicit fact and contribute to peace restoration"* (Law 21/2007, Article 4, nr.1). The mediator is someone who helps to promote the communication between the victim and the offender and to find an appropriate solution to both (DGRSP, s/d). When applied to the judicial system, penal mediation aims a 'decriminalization' process, promoting at the same time the victim's role and the offenders' social rehabilitation (Costa, 2012).

Mediation and youth justice restorative-based measures may be applied to young offenders aged between 12 and 16 years old (Law 166/99), with an 'exceptional legal regime' that may extend these measures to offenders aged up to 18 years old. In addition, measures can be fulfilled until 21 years old. So, we are referring to an age range between 12 and 21 years old.

The principles guiding the implementation of victim-youngster mediation and restorative-based youth justice measures are (DGRSP, s/d):

**Accountability:** in contact with the victim, the youngster can easily become aware of their actions and consequences;

**Compensation of the victim:** compensatory features can be integrated on juvenile justice. Above all, this principle reflects an educational concern, in which the victim is seen as an instrument for achieving educational goals and making youngsters aware of their responsibility (Castro, 2010);

**Active participation:** the youngster and the victim can actively participate on the legal proceedings;

**Reducing bureaucratic and legal formal procedures:** mediation and restorative-based measures can engender participative and quickly forms of conflict resolution, avoiding youngster's later stigmatization.

## 2.2. THE IMPLEMENTATION OF RESTORATIVE PRACTICES IN THE JUVENILE JUSTICE SYSTEM

From the inquiry phase to the jurisdictional phase, several restorative practices, mainly mediation practices, can take place: elaboration of a conduct plan (which may integrate several restorative commitments); victim-youngster mediation; and restorative-based measures. Figure 1 illustrates the development of these practices taking into account the legal phases on the youth justice system.

We also may note that in the youth justice field, the elaboration of a conduct plan and the victim-youngster mediation together constitute the Portuguese Mediation and Reparation Program (MRP) monitored by the DGRSP -Directorate-General of Reinsertion and Prison Services (cf., Law 166/99 articles 42, 84 and 104; DGRSP, s/d; Silva, 2013). DGRPS is an administrative organism from the Justice Ministry intended to reintegrate the young offenders. In 2002, the DGRSP founded the MRP which intends to foster and build best technical and logistical conditions for the mediation case-files ordered by judicial authorities. Despite several efforts to the development of the Mediation and Reparation Program, it has been poorly implemented until now, but is in the process of being reactivated.

### © Elaboration of Conduct Plan embedded in the Suspension of Legal Proceedings

During the inquiry phase, a youngster who has perpetrated a crime punishable with a sentence not exceeding five years and if youth justice intervention is still needed, the Public Ministry may introduce a conduct plan. The preparation of this conduct plan can be requested by the Public Ministry to the social reintegration/probation services or mediation services and may include several social engagements and reparation activities to be developed by the minor (some of them representing restorative-based commitments), such as:



Apologizing to the victim (restorative-based commitment);

Compensation (effective or symbolic) regarding the whole or partial damage by paying with pocket money or by providing an activity in favour of the victim (restorative-based commitment);

Achievement of certain goals at personal, educational and professional domains or at his/her free-time occupation;

Implementation of economic benefits or activities in favour of the community (restorative-based commitment);

Exclusion from certain places or peer networks.

DGRSP' mediation services can also be enacted in order to support the development of the conduct plan. If the conduct plan is agreed, the youngster must accomplish it and the youth justice case-file is then suspended.

#### ☉ Victim-Youngster Mediation

Victim-Youngster Mediation is legally foreseen in the LTE (art. 42, art. 84 e 104). In the inquiry phase, the mediation is the closer procedure to the mediation done with adults and it depends on the decision of the Prosecutor's office, even if the mediation has been required by the youngster, their parents or legal representatives.

In a first moment, both the youngster and the victim are interviewed in order to evaluate the conditions surrounding the mediation. Parents or legal representatives of the young offender are also interviewed. During these interviews, certain conditions are assessed and mediation only occurs when these are totally satisfied and addressed. In regard to the young offender, he/she needs to:

Recognize the responsibility and damages associated to the perpetration of the illicit fact;

Display the ability or willingness to find solutions with the purpose of repair the caused damage;

Display willingness to participate on the mediation and to achieve the future agreement.

Taking into account the victim, the assessment must similarly evaluate:

Victimization experience and type of harm suffered;

Interest in being repaired and ending the conflict;

Interest in participating on mediation.

In case these conditions are guaranteed, a direct mediation starts. Each person has the opportunity to express how the illicit fact has affected her/his life. The mediator helps throughout the identification of unsolved problems and tensions. In the last phase, a mediation agreement is defined and written, being signed by the youngster, the victim, the parents or legal representatives and the mediator.

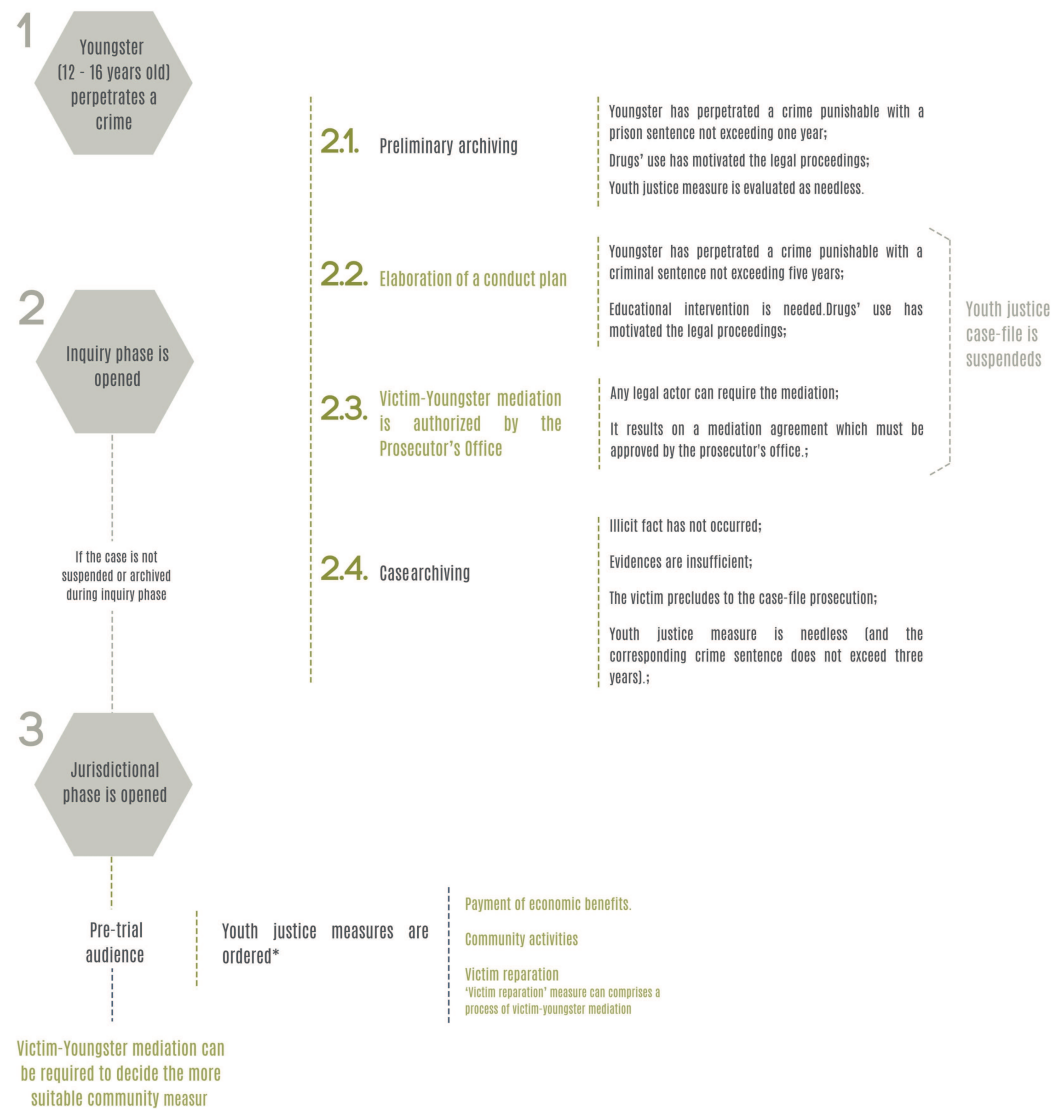
Following MRP program, DGRSP services are responsible for the practical implementation of victim-youngster mediation on juvenile justice field supporting the development of the mediation agreement. If this is approved by the Public Ministry, the youth justice case-file is suspended.

In the jurisdictional phase, victim-youngster mediation can also be required by the judge or prosecutor in order to obtain a consensus on the application of a non-custodial measure or to discuss how the 'victim reparation measure' should be implemented. In the cases where the Public Ministry proposes, in the request for opening the jurisdictional phase, the application of a non-custodial measure and is justifiable an abbreviated handling of the case, the judge may appoint a pre-trial audience (article 93, nr. 1c). This pre-trial audience is an informal audience that aims at a consensus. If the judge, during this audience, considers that the non-custodial measure proposed by the Public Ministry is appropriate seeks a consensus in applying it, listening to the youngster, his/her parents or legal representative, the advocate and the victim. If there is no consensus, the judge may refer the youngster to mediation services to seek an agreement to another non-custodial measure and suspend the audience for a period not exceeding 30 days (article 104, nr. 2 and 3 LTE). If an agreement is obtained the judge approves the proposal of the Public Ministry or apply the youth justice measure proposed within the scope of the intervention of the mediation services. In short, the use of mediation is only made if, at the outset, a consensus was not obtained.

#### ☉ Restorative-based Measures

Some youth justice measures embrace restorative principles and practices, namely victim reparation, payment of economic benefits and activities in favour of the community. The 'restorative' youth justice measures are also monitored by DGRSP, whose teams supervise its implementation, ensuring its execution and drawing up the necessary legal reports.

Figure 1. Restorative Practices in Portuguese Juvenile Legal Proceedings



All boxes filled in green represent restorative practices.

\* Other measures are foreseen on LTE (see Juvenile Justice System in Portugal | General Overview on this paper).

Figure 1 only comprises restorative-based measures

### 2.3. STATISTICAL DATA ABOUT RESTORATIVE PRACTICES AT NATIONAL LEVEL

The last available statistics concerning victim-youngster mediation refer to 2008 and 2009. The number of mediation case-files accomplished by DGRSP was 44 in 2008 and 49 in 2009. In regard to suspension of legal proceedings with mediation, on 2008 and 2009, 92 and 93 case-files in respect were conducted by DGRSP.

At last, in respect to restorative-based measures, Table 1 shows the quantitative evolution between 2008 and 2013. On December 2013, no victim reparation measure neither payment of economic benefits was ongoing. Activities in favour of community represent 183 measures, less than on the same period of 2012 when this represented 217 applied measures. Altogether, victim reparation measure and payment of economic benefits are seldom applied to the young offenders under youth justice system.

Table 1. Restorative-based measures between 2008 and 2013

Year	2008	2009	2010	2012	2013 <sup>9</sup>
<b>Measure</b>					
Victim Reparation	7	6	4	1	0
Payment of economic benefits	2	2	3	3	0
Activities in favour of community	186	189	118	217	183
<b>Total</b>	<b>1196</b>	<b>1188</b>	<b>1116</b>	<b>1703</b>	<b>1639</b>

Source: DGRSP (2013; 2012; 2010; 2009; 2008)

<sup>9</sup> Data refers to the number of ongoing case-files in the last month of each year.

### 3. VICTIMS IN RESTORATIVE PRACTICES

The “Victim Status” (Law 130/2015) was recently created and introduced in the Portuguese justice system, based on the Directive 2012/29/EU of the European Parliament and of the Council that sets standards on the rights, support and protection of victims of crime. This law establishes a series of principles and rights, such as: Equality principle; Confidentiality principle; Principle of consent; Right to information and Right to protection, to name a few. It contains a set of measures aimed at ensuring the protection and promotion of the rights of victims of crime (art. 1) articulated with other legislation – Law 93/99 modified by the Law 29/2008 and Law 42/2010 - and not impairing the procedural rights and duties of the victim contained therein (art. 2).

In this section we focus mainly on the rights of victims in practices of restorative justice. Accordingly, we start this section by explaining how penal mediation is generally understood and implemented in adult criminal matters (Law 21/2007 from 12 June). After this contextualization, we introduce and discuss the guarantees enjoyed by victims in Portuguese restorative criminal proceedings.

In the adult justice system, penal mediation can only occur at ‘inquiry phase’ (i.e., investigation phase) at the initiative of the offender, the victim, or the Public Ministry (article 3, nr.2) who is also responsible for the validation of the agreement and for ending up the process (article 5, nr.7; article 3, nr.6) (Costa, 2012). According to the typology of Groenhuijsen (2000) penal mediation is integrated in the Portuguese traditional justice system in that the process cannot be delivered to the mediation system without a formal complaint and sufficient crime evidences to accuse the offender. In regard to its scope, penal mediation and restorative strategies are further

legally foreseen in the following cases:

Criminal proceedings depend on the victim's complaint or private prosecution  
– Law 21/2007 from 12 June (article 2, nr.1);

If the crime depends only on the victim's complaint then mediation can only occur if the crime is against persons or property - Law 21/2007 from 12 June (article 2, nr.2);

According to the point nr.3 of this regulation mediation cannot take place in the following cases:

- If the crime is punishable with a prison sentence exceeding five years
- If the crime is against sexual freedom and self-determination
- If the crime is of embezzlement, corruption and influence peddling
- If the victim is less than 16 years old
- If a speedy trial is applicable

Thus, concerning public crimes (e.g., human trafficking, white-collar criminality) and crimes against sexual liberty or sexual self-determination, restorative strategies cannot be applied (Carmo, 2010).

After the decision to proceed with the mediation, the mediator has three months to finish the mediation agreement, signed by the offender and the victim. This period can be extended to more two months since a high agreement probability is presented (article 5). The mediation agreement cannot express custodial sanctions and other duties that may harm offender's dignity. Besides, sanctions or duties cannot exceed a period of 6 months implementation (article 6).

### 3.1 . GUARANTEES ENJOYED BY VICTIMS IN CRIMINAL PROCEEDINGS

In terms of the rights and guarantees which are legally foreseen to the victims of a crime, hereafter we emphasize those which are related to penal mediation and other restorative practices (cf., Carmo, 2010; Law 21/2007; Law 112/2009; Law 29/2013), both on juvenile and adult justice systems:

Mediation requires always the victim's consent: mediation practices can be elicited by a court order and also by a mutual decision taken by the offender and the victim. In both cases, the victim has to consent the penal mediation and he/she can leave the mediation at any time. Mediation is then a voluntary process (article 3, nr.5, nr.6, nr.7 – Law 21/2007);

Mediation is a confidential process: the mediator must keep all the information discussed at mediation sessions under secrecy. Information cannot be used in court (article 4, nr.5 – Law 21/2007);

Victim is an active agent of the penal mediation: the victim is an active agent, whose opinion is on the basis of the mediation agreement. Even so, the ultimate decision is given by the Public Ministry, who must approve or disapprove the mediation agreement (article 5 – Law 21/2007);

Victim has the right to a representative: if the victim cannot understand the right to complaint, mediation can be developed with a representative (i.e., a complainant) (article 2, nr.4 – Law 21/2007);

In face with offender non-compliance to the mediation agreement, the victim can restart the penal case-file: if a mediation agreement is not, partially or



fully, accomplished by the offender or offenders, the victim can renew the complaint and the penal case-file is then reopened in regard to the non-compliant offenders (article 5, nr.4 – Law 21/2007);

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# NATIONAL REPORT: FRANCE

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## 1. THE FRENCH JUVENILE JUSTICE SYSTEM

This first section is dedicated to providing an overview of how juvenile justice works in France, of how relevant legislation has evolved, of the institutions which oversee socio-judicial monitoring and of the overall in which way juvenile justice rulings are made and enforced. A quantitative approach provides an insight into the number of minors affected and the number of rulings passed, showing which are the most frequent, as well as how they are enforced.

### 1.1. LEGISLATION AND HISTORICAL REFERENCES

The founding text for juvenile justice in France is the Decree of 2 February 1945<sup>1</sup>. It was one of the first legal texts to be promulgated after the end of the Second World War, and as such is heavily symbolic.

General de Gaulle included the following in the preamble to the 1945 decree, justifying the requirements of the decree: “France does not have so many children that it can afford to neglect its duties towards the healthy ones”<sup>2</sup>. This preamble thus affirmed that the 1945 decree should contain educational provisions in its scope.

The 1945 decree has been reformed a number of times (34 times from the moment it was passed until 10 August 2007), to adapt to societal changes, technical changes in educational sciences, or even in response to new international laws.

Initially, the decree of 2 February 1945 contained the following provisions:

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<sup>1</sup> Ordonnance du 2 Février 45, Préambule, Available at : [http://www.textes.justice.gouv.fr/art\\_pix/exposemotifsordonnance.pdf](http://www.textes.justice.gouv.fr/art_pix/exposemotifsordonnance.pdf)

<sup>2</sup> Ordonnance du 2 Février 45 relative à l'enfance délinquante, Available at : [http://www.textes.justice.gouv.fr/art\\_pix/ordonnance.pdf](http://www.textes.justice.gouv.fr/art_pix/ordonnance.pdf)

The creation of a specialised body of magistrates, youth judges, totalling one per court.

The creation of the criminal status and rights of minors, reducing their responsibility by half, a status which may only be derogated from in exceptional circumstances and by reasoned decision. The notion of discernment was removed.

The creation of posts for civil servants who specialise in matters of minor rehabilitation such as educators, doctors and psychologists.

The implementation of various educational measures and their monitoring. These measures may be delegated by the judge either to a service, a public institution or to a structure within the charity sector: observation and education in open facilities; placement with a host family, confinement, semi-confinement, or placement with a “trustworthy individual”; or placement with one of the youth welfare (ASE - Aide Sociale à l'Enfance) services.

The notion as to what constitutes a minor was modified: the distinction between minors aged 13 years and those aged 18 years was removed as well as the requirement for a different approach for minors aged between 13 and 18 years. From now on, whatever the age of the minor, cases are examined and ruled upon according to the same procedure.

Reforms to the decree included the listing of minors on the criminal records register: the criminal records register is based on reports issued for the exclusive use of magistrates, and therefore all other authorities and public administrations are excluded. It is possible to remove any mention of the



sentence passed after 5 years have gone by, so as not to jeopardise the minor's chances of reintegration.

The decree includes significant amendments to procedure for minors. A youth judge must –except in exceptional circumstances, justified by reasoned decision– carry out an in-depth inquiry into the minor's behaviour and living conditions, especially in terms of the material and moral circumstances of their family, their personality and previous convictions. This is because it is more important to understand as much as possible about the minor's personality and their behaviour, which is what will decide which measures should be taken in their best interests, than to look at the accusations made against them. To achieve this, each time the case is submitted to a youth judge or to an investigating magistrate, they should in turn preferably refer to specialised social services attached to the youth courts.

The law which brought the most amendments to the 1945 decree was that of 9 September 2002<sup>3</sup>. It is known as the "PERBEN 1" law, made up of 21 amendments, including 9 newly-created articles, which feature, among others, the following provisions:

An obligation for the parents of a guilty minor to attend all hearings (article 10-1, reinforced by the law of 10 August 2011).

The possibility of placing a minor in pre-trial detention if they do not comply with the rules of judicial supervision (article 11-2).

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<sup>3</sup> LOI n° 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice, dite « PERBEN 1 », Available at : <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000775140&dateTexte=&categorieLien=id>

The possibility of trying and imposing educational sanctions on a minor aged 10 years (article 15-1).

The creation of “Closed Educational Centres” (Centres Educatifs Fermés).

The creation of prisons for minors.

The law of 5 March 2007 regarding crime prevention and the care of minors also amended certain provisions of the 1945 decree. Three main areas were developed:

Reinforcing prevention, by trying to detect risk situations as early as possible through regular evaluations at "key moments in child development": systematic interviews from the 4th month of pregnancy, home visits during the first days following discharge from hospital, systematic assessments at nursery and primary school...

Reorganising procedures for communication and information sharing with professionals overseeing the situation: the creation in every department of a specialised task force allowing professionals, united in professional secrecy, and intervening to boost child protection in social, medical-social, and educational spheres, to share information and thus harmonise practices. Outside these specialised structures, information is protected by professional secrecy. Diversifying and improving the ways in which children and their families are cared for and supported.

In 2009, then Justice Minister, Michèle Alliot-Marie talked<sup>4</sup> of the need to “improve the legality and effectiveness of procedures” and to find the right responses to the reality of youth crime.

*“The 1945 decree has become unworkable due to the successive reforms. A criminal justice code for minors will replace it.*

*The processing times for case files are often too long. As a result, charges are often dropped, the severity of penalties may be reduced, or there may be instances of repeat offending before the case is heard.*

*New measures are foreseen to expedite the procedures: direct referrals to courts, limitations to the duration of certain investigations, youth courts presided over by a single judge for less serious offences.”*

*“A single file will bring together all information collected during the various judicial stages. Imprisonment of minors in a closed facility should remain exceptional. For first-time offenders, priority should be given to alternatives to imprisonment.*

*If the judge passes a prison sentence, the time in prison should be used to help the offender rehabilitate. To achieve this, education should play a key role (...) When it comes to repeat offenders, we cannot afford to show weakness. Sanctions, although on a sliding scale, should be dissuasive. The specific nature of youth justice should nonetheless not offer impunity to repeat offenders.”*

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<sup>4</sup> Available at : <http://www.presse.justice.gouv.fr/garde-des-sceaux-communiques-discours-agenda-10227/archives-deplacements-du-garde-des-sceaux-11613/michele-alliot-marie-en-visite-a-lecole-nationale-de-protection-17944.html>

As regards the need to bring together all the relevant stakeholders, she adds:

*“I’m thinking about the parents. As the natural guardians of minors and their education, they should be fully involved in educational actions.*

*I’m also thinking about the victims. Youth justice should better recognise their right to reparation and compensation.”*

In the report “Between changes and fundamental innovations: 70 proposals for adapting the criminal justice system for minors” (*Parmi les changements et les innovations fondamentales: 70 propositions pour adapter le système de justice pénale pour mineurs*) dated 14 April 2008<sup>5</sup>, for the Justice minister, professor André Varinard highlighted the main points of reflection:

Ensure that the provisions which apply to minors are easier to interpret.

Reinforce the responsibility of minors.

Revise the criminal procedure and the regime which applies to minors.

The role of this commission was to suggest ideas to reform the criminal procedure which applies to minors so as to improve the response to youth crime, in order to reconsider and clarify the role of different youth justice stakeholders.

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<sup>5</sup> Available at : [http://www.presse.justice.gouv.fr/art\\_pix/1\\_RapportVarinard.pdf](http://www.presse.justice.gouv.fr/art_pix/1_RapportVarinard.pdf).

## 1.2. PRINCIPLES

The guiding principles governing criminal legislation for minors are as follows:

**The primacy of education** over deprivation of liberty: Imprisonment should remain exceptional. The deprivation of liberty is a last resort, only to be used in cases where all other attempts have failed.

**The excuse of being underage** as regards criminal responsibility: Child protection should lessen the sentence. Children can only receive half the sentence initially foreseen for adults for the same crimes, except for some specific cases.

The 1945 decree also foresees the following enforcement principles:

A specialist judge is in charge of these procedures, the youth judge.

A lawyer is appointed to defend the minor.

To preserve children's anonymity, the trial is held behind closed doors.

The minor is arraigned if the courts decide that they acted with discernment, that is to say that they are capable of understanding the consequences of their actions.

Rulings are relative to the age and specific situation of the young person.

A minor can go to prison from the age of 13, but only as a last resort, in

criminal matters. Conviction is based on the sentence foreseen for an adult under similar circumstances, but halved.

The enforcement of court rulings is overseen by specialised individuals: educators from the Legal Protection for youth and minors service (Protection Judiciaire de la Jeunesse) or those from the charity sector authorised by the Justice ministry.

In France, there are today just over 150 youth courts, in ordinary lower courts, throughout the entire country.

Youth judges preside over matters of child protection, civil matters and also criminal matters.

The judges pass their rulings in different contexts:

Either following a closed hearing.

Or following a youth court trial. The judge will then be assisted by two individuals from the field of child protection who help reach a decision.

Or following a trial in the court of assizes for minors, in criminal matters. The court of assizes for minors is made up of 3 professional judges and a jury of 9 people.

The sentencing age is that of the minor on the date they offended.

Once the elements of the inquiry have come together, the prosecutor will decide which direction the procedure should take, whether the minor should be brought before the courts, to call them at a later date, to proceed to a simple reminder of the law or to decide to implement alternative measures on their behalf.

If they are to be prosecuted, the public prosecutor for minors will represent society's interests. They may request pre-sentencing reparation measures.

The main stakeholders in judicial procedure for minors are as follows:

1. The youth judge
2. The investigating magistrate
3. Youth courts
4. Court educational services (*Les services éducatifs auprès des Tribunaux*)
5. The liberty and custody judge (*Le juge des libertés et de la détention*)
6. The Public Prosecutor or the Assistant Public Prosecutor for minors
7. The Legal Protection for youth and minors service (PJJ)
8. Authorised charity Sector (*Secteur Associatif Habilité - SAH*) services
9. Lawyers

The Legal Protection for youth and minors (PJJ) service is one of the administrations under the auspices of the Justice ministry. It implements the enforcement of judicial rulings and coordinates "cooperation between institutions which intervene to this end". () The scope of the PJJ includes in particular the definition of standards and organisational frameworks for the quality control of the implementation of these elements.

It is organised in a decentralised way via Inter-regional Directorates and Territorial Directorates, which oversee monitoring and support centres and services for minors subject to judicial measures. Part of these actions is carried out via the Authorised Charity Sector which also deploys services and centres which monitor and house young offenders.

**Court educational services** also rely on the PJJ. Through this service educators carry out social inquiries and make educational suggestions to magistrates overseeing youth cases.

### **1.3. AGE GROUPS**

#### **Children under 10:**

Children under 10 are generally considered as incapable of discernment, which means they cannot be held responsible for their actions, and this is also how they are viewed in criminal justice matters.

#### **10 to 13 year-olds:**

Children of this age cannot be held liable but they are legally responsible (in criminal justice matters) for their actions. Here a number of justice measures exist which offer an alternative to liberty deprivation. Article 122-8 of the French Criminal Code states that “Minors who are deemed capable of discernment are criminally responsible for their offences, or for crimes of which they have been found guilty”.

As such, certain educational sanctions and measures can be enforced. No sentence can be passed under the age of 13.



### **13 to 16 year-olds:**

Diminished criminal responsibility, however the minor may be deemed liable and sentenced as a maximum to the equivalent of half the sentence foreseen under the law for an adult who has committed the same crime. Here priority is given to educational measures.

**Educational measures:** reparation, preventive detention, community service, citizenship courses, educational centres.

**Criminal sanctions:** Fine, community service work.

**Sentences:** Up to imprisonment.

### **16 to 18 year-olds:**

The criminal responsibility of minors is here lessened according to the same principle as before. The minor can be deemed liable and sentenced to half of that which an adult is subject to for a similar crime.

Exceptionally, in some extreme cases or where dealing with repeat offenders, a minor's underage status may be ignored. The sentence may as a result become life imprisonment, the same as an adult would receive.

**Educational measures:** reparation, preventive detention, community service, citizenship courses, educational centres (reinforced or closed).

**Criminal sanctions:** diminished criminal responsibility, but with the possibility of ignoring underage status

Age and gender of minors subject to civil or criminal judicial procedure: change from  
2006 to 2013

	2006	2007	2008	2009	2010	2011	2012	2013
Total measures followed during the year	234.607	234.220	233.568	229.501	226.011	218.011	211.953	205.021
Number of young people followed during the year	170.609	166.837	163.763	158.058	154.359	148.181	142.552	143.068
<b>GENDER</b>								
Man	122.191	121.613	121.141	119.120	117.468	112.521	108.499	108.085
Women	48.418	45.224	42.622	38.938	36.891	35.660	34.053	34.983
<b>AGE</b>								
0-6	19.241	18.075	17.220	16.034	15.880	15.809	15.584	16.543
7-12	24.089	22.786	21.577	20.173	19.676	18.892	18.240	18.573
13-15	35.190	35.160	34.286	33.302	32.564	30.516	28.595	28.737
16-17	51.973	52.019	52.082	50.665	49.150	47.427	45.041	43.829
18 and +	40.067	38.754	38.566	37.854	37.035	35.521	35.066	35.351
Total not processed (age not given)	49	43	32	30	54	16	26	35

The table above<sup>6</sup> shows the entire population of young people under criminal justice control, in terms of child protection and of youth offending, in the care of the Justice ministry and authorised associations. It does not take into account children or young people in the care of French departments as part of child protection measures.

<sup>6</sup> Statistical Yearbook 2014. Ministry of Justice.

## 1.4. CLASSIFICATION OF MEASURES

### 1.4.1. Criminal responses to youth crime

Criminal responses must meet a number of requirements:

Firstly, the response should be proportional to the act committed.

Next, the response must include both an educational and pedagogical dimension and also a penalising or mandatory dimension.

Finally, the criminal response must take into account the minor's personality, their potential and their family and social background.

Thus, the possible responses are by their very nature diverse so as to respond as effectively as possible to these requirements, at different stages of the criminal procedure.

#### Investigative measures:

Investigative measures are used to obtain further information to assist the magistrate in reaching their decision. Educational services carry out the various investigations.

There are different types of investigation:

Social investigations

Educational Orientation Investigations (Investigations d'Orientation Educative [IOE])

Judicial Measures of Educational Investigation (Mesures Judiciaire d'Investigation Educative [MJIE])

Collection of Socio-Educational Information (Recueil de Renseignement Socio Educatifs [RRSE])

### Educational measures and sanctions:

Educational measures are the only judicial measures specifically designed for minors. They offer a contextual response to the need for a specific approach, and place education at the heart of judicial responses to youth crimes, offences or misdemeanours.

The various educational measures include:

reprimand, which is a warning issued to the minor by the youth judge,

handover to parents, to their guardian, to the person caring for them or to a trustworthy individual,

solemn warning,

supervised release, which is one of the measures which involve monitoring by the Legal Protection for youth and minors educational service,

placement in one of various types of establishments (CEF, CER, EPE see 1.4.4.),

placement under judicial protection,  
  
support or reparation measure,  
  
daytime activity measure,  
  
waiving of measures,  
  
postponement of educational measures.

The various educational sanctions include:

confiscation,  
  
entry ban,  
  
restraining order from victim,  
  
ban on meeting with co-conspirators or accomplices,  
  
support or reparation measure,  
  
citizenship training course,  
  
placement,  
  
carrying out studies,  
  
solemn warning.

These measures and sanctions make up an educational dimension and are part of a body of measures serving to protect the perpetrator and/or the victim.

The reparation measure, enshrined in the 1945 decree in 1993, includes an additional dimension which complements the other measures: following their model, it pursues an educational goal but also a restorative one. The idea is to offer compensation, to the victim or to society, for any damage caused, whilst fostering awareness of one's actions and their repercussions. This reparation measure therefore takes into account the victim, the relationship between the perpetrator and their victim, and more generally the young person's social background.

An analysis of the restorative dimension of the reparation measure can be found in chapter 2.

#### Probation measures and sentences:

Probation, surveillance measures and sentences applicable to minors are taken from the adult criminal law in force. The main objectives of these measures are determined by the obligations and/or bans imposed by the judge's ruling. Failure to comply shall be subject to judicial sanctions (and may lead to imprisonment).

**Judicial supervision** is a presentencing measure, prior to criminal conviction. Judicial supervision generally includes obligations or bans to be respected, especially educational sanctions and measures. Failure to comply may lead to revocation of the judicial supervision and to pre-trial detention.

**Prison sentence with suspended sentence and probation** is also subject to bans and/or obligations which the person convicted must follow for the duration of their probation, or they will face a revocation of the suspended sentence and subsequent imprisonment.

**Prison sentences** are carried out in specialised facilities for minors or in specific wings of penitentiary centres for adults.

**Community service work** consists of unpaid work carried out for a legal person under public law or for an association authorised to such ends by the courts. It may be applied to minors aged 16 to 18 years, who have committed crimes punishable by a prison sentence. They must, in this case, be formative by nature or contribute to fostering social reintegration. The duration is fixed by the jurisdiction and may last between 40 and 210 hours. The end date set by the authorities for the sentence may not exceed one year.

**Citizenship courses** are a new type of criminal sanction (dating from October 2004). Citizenship courses constitute a sentence which may be adopted as an alternative measure to criminal prosecution, or an alternative sentence to imprisonment or probation required by the court of assizes for minors or by the youth court.

#### Change in PJJ activity over the past decade:

Legal Protection for youth and minors work has significantly changed over the past decade.

General overview of measures implemented and monitored by the Directorate for the Legal Protection for youth and minors service DPJJ (public and charity sector) from 2006 to 2013

	2006	2007	2008	2009	2010	2011	2012	2013
Total measures followed during the year	234.607	234.220	233.568	229.501	226.011	218.011	211.953	205.021
<b>INVESTIGATION</b>	106.898	104.317	100.272	99.385	99.883	96.731	87.828	86.099
In-depth inquiries	53.325	51.457	51.098	51.988	53.207	52.717	42.489	38.283
Collection of Socio-Educational Information (SEAT and UEAT)	53.573	52.860	49.174	47.937	46.676	44.014	45.339	47.816
<b>COURT-ORDERED PLACEMENT</b>	16.872	15.333	15.000	13.368	12.007	11.364	10.309	9.470
Collective accommodation	11.908	10.996	11.048	10.568	9.939	9.681	8.879	8.080
Independent accommodation	2.732	2.365	2.131	1.435	959	662	474	452
Host families and trustworthy third parties	2.232	1.972	1.821	1.365	1.109	1.021	956	938
<b>OPEN SETTING</b>	110.837	114.570	118.296	116.748	114.121	109.916	113.816	109.452
Educational measures and sanctions	83.933	86.928	89.279	86.719	83.152	79.170	79.314	78.353
Probation and sentencing measures	26.904	27.642	29.017	30.029	30.9690	30.746	34.502	31.099



From this table<sup>7</sup>, we can see a drop in the number of measures implemented by PJJ establishments and services. This decrease is mainly a result of the fact that measures implemented with a view to child protection are now increasingly carried out by French departmental advisory services, with PJJ establishments and services refocusing on criminal measures.

We can see confirmation of this by reading the following data<sup>8</sup>:

#### General Change in legal basis of measures implemented from de years 2006 to 2013

	2006	2007	2008	2009	2010	2011	2012	2013
Total measures followed during the year	234.607	234.220	233.568	229.501	226.011	218.011	211.953	205.021
<b>LEGAL BASIS OF MEASURES</b>								
Criminal (Decree of 02.02.1945)	135.8585	143.351	153.146	164.144	170.102	167.771	173.855	170.991
Civil (Article 375 of Civil Code)	90.532	84.584	74.943	61.969	54.197	49.538	37.904	33.897
Protection of young adults	8.217	6.285	5.479	3.388	1.712	702	194	133

<sup>7</sup> Statistical Yearbook 2014. Ministry of Justice.

<sup>8</sup> Statistical Yearbook 2014. Ministry of Justice.

The number of measures implemented with a view to child protection by the Legal Protection for youth and minors service has decreased considerably from 90,000 measures in 2006 to 34,000 in 2013 whilst over the same period the number of criminal measures adopted reached 170,000 in 2013 compared to only 135,000 in 2006.

Thus, the number of measures implemented in a year has reduced significantly over the period; however this reduction can be explained by the PJJ services' specialisation in criminal actions, following the transfer of responsibility for child protection to French departmental level.

#### **1.4.2. Alternative measures to criminal prosecution**

The implementation of alternative measures to criminal prosecution is decided upon by the office of public prosecutions, when they decide whether or not to initiate prosecution. Alternatives to convictions may be decided upon later in the procedure by the youth judge. Here are the alternative measures:

A reminder of the law

Referral to a healthcare facility

Criminal mediation

An alternative arrangement

Citizenship courses

Parental responsibility classes

### 1.4.3. Judicial measures and liberty deprivation sentences

Liberty deprivation sentences do not only include prison sentences. Some placement measures (in a closed educational centre, in a psychiatric facility, in custody...) also constitute liberty deprivation. Similarly, individuals required to wear an electronic bracelet are issued a prison number for the duration of the measure.

### 1.4.4. Young offender facilities

Legislators have created various educational facilities which each have their own specificities in terms of the support provided:

Educational placement centres (*Centres de placement éducatif*). These house young offenders, at-risk minors and under 18s providing medium and long-term care.

Immediate placement centres (*Centres de placement immédiat*). These house young offenders and, where necessary, at-risk minors, without advance warning or admission procedure. Admission periods last 3 months, which may exceptionally be renewed once.

Reinforced educational centres (*Centres éducatifs renforcés*). These house small groups of minors (a maximum of 8), who generally tend to be young offenders. The specific idea of their placement here is to temporarily cut the minor off from their family environment and also from their normal habits by putting some distance between them and their background.

Closed educational centres (*Centres éducatifs fermés*). These apply only to young offenders aged between 13 and 18 years, or repeat offenders who are placed there within the context of judicial supervision, or following a conviction with suspended sentence, conditional release on parole, or even as a condition for the implementation of a conditional release measure. They are closed legally-speaking: if the minor refuses the placement and the conditions, they risk prison to serve their sentence.

Youth prisons (EPMs). There are not many (7), but the government has built some for young offenders. Created within the scope of the Law of 9 September 2002 “act for justice” (Perben I law), the first of these facilities opened in 2007-2008. These youth prisons (7 facilities currently) constituted a first in France. They will probably replace the specific wings of temporary detention centres where minors had been imprisoned beforehand.

Change in the number of PJJ facilities (public and charity sector) between 2006 and 2013

	2006	2007	2008	2009	2010	2011	2012	2013
<b>Total</b>		1.527	1.539	1.633	1.571	1.484	1.338	1.327
<b>ALL PUBLIC SECTOR FACILITIES</b>	304	308	309	340	275	231	220	220
Educational and rehabilitation placement centres (EPEs and EPEIs)	76	72	72	99	89	78	69	65
Including "Reinforced educational centre" units (UE-CERS)	5	5	5	5	5	5	5	5
Territorial open setting and rehabilitation educational services (STEMOs and STEMs)	190	197	198	197	150	123	117	118
Territorial educational and rehabilitation services (STEI)	22	22	22	21	15	11	11	11
Closed educational centres (CEFs)	6	8	8	8	10	9	13	16
Educational services attached to the High Court (SEATs)	10	9	9	9	5	3	3	3
Educational services within penitentiary facilities for minors (SEEPMs)				6	6	7	6	6
Fleury-Mérogis centre for young detainess educational service (SECJD)							1	1
<b>ALL AUTHORISED CHARITY SECTOR SERVICES AND ESTABLISHMENTS</b>	ND	1.219	1.230	1.293	1.296	1.253	1.118	1.107

Reading this table<sup>9</sup>, we can see that the national tool for the rollout of educational services and facilities for minors under criminal justice control fell significantly between 2006 and 2013. This marked drop followed a budgetary control policy implemented by the government over this period, more specifically in 2010, 2011 and 2012.

## 2. THE INCLUSION OF RESTORATIVE JUSTICE IN THE FRENCH JJS

The concept of restorative justice was incorporated into French legislation by the *law relating to the individualisation of sentences and to the effectiveness of criminal sanctions (loi relative à l'individualisation des peines et à l'efficacité de la sanction pénale)*, of 15 August 2014. However, amongst the various different educational measures provided by the legal arsenal of the 1945 decree, some are close, in terms of their objectives and methods, to the philosophy and methodological goals of Restorative Justice.

With a view to offering clarity, in the near absence of restorative justice practices *in the strict* sense of the term, we shall make a distinction between current and historical French practices which resemble restorative justice and examples where restorative justice in the strict sense of the term has been implemented.

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<sup>9</sup> Annuaire statistique de la justice 2014. Ministère de la justice. Direction de la Protection Judiciaire de la Jeunesse (système GAME).

Initially, we shall take stock of the French legislative provisions which exist in matters of restorative justice, as well as of the institutional network which underpins the development of RJ, and also offer an overview of the operational framework of RJ.

Then, we shall look at current practices which are close to RJ, legislative provisions which led to the creation of these educational measures, and their theoretical and practical specificities. We shall therefore offer an overview of the measures which, in the legislative framework and within its more or less recent provisions, pave the way for practices close to the objectives of restorative justice. Mediation or reparation measures, for example, display a number of shared characteristics with restorative justice. So we shall move onto looking at the role of these educational measures in youth justice provisions and their use by the courts.

Finally, we shall take stock of the implementation of restorative justice measures *stricto sensu*, which is often experimental and has been possible since 2014, as well as defining them and the methods for their implementation and experiments carried out in this area.

## **2.1. DEFINITION AND LEGAL FRAMEWORK OF RJ IN FRANCE**

### **2.1.1. Change in the institutional and legislative context**

The *law relating to the individualisation of sentences* and to the effectiveness of criminal sanctions of August 2014<sup>10</sup> introduced new measures, including a reference to a restorative justice system. Article 10 reads as follows: *During any criminal procedure and at every stage of the procedure, including whilst serving the sentence,*

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<sup>10</sup> Law 2014-896.

*the victim and perpetrator of an offence, **provided that commission of the crime has been recognised**, may decide to adopt a restorative justice measure.*

Whether it be for the victims, their loved ones or for the perpetrators, such practices allow for words to be put to the criminal act, the harm it has caused and its consequences. The text aims, amongst other measures, to create a restorative justice provision to help some of those involved to “repair themselves” and others to “gain awareness”.

In France, as of 2016, experience of this is rare or little understood, in spite of the efforts and approaches of justice sector professionals, charities, researchers and more recently of the Restorative Justice Platform, created at the end of 2013, in order to promote a different vision of justice in the public sphere.

The law of August 2014 introduces Restorative Justice in the following terms:

*“A restorative justice measure is any measure which allows a victim as well as the perpetrator of an offence to **actively participate** in the resolution of any difficulties which have arisen as a result of the offence, and particularly in reparation for damages of any kind resulting from its commission. This measure can only be implemented once the victim and the perpetrator of the offence have received the **full information about it and have consented** explicitly to partaking in the measure. It is implemented by a **specially-trained independent third party**, under the auspices of the judicial authorities or, at the request of the latter, under the penitentiary administration. It is **confidential**, unless agreed otherwise by the parties and except in cases where a greater interest linked to the need to prevent repeat offending justifies information relating to the measure’s implementation being brought to the attention of the French Public Prosecutor.”*



In the legal sense, restorative justice measures mean provisions whereby perpetrators and victims are active participants in the measure, with a view to “resolving the difficulties arising from the offence, including compensation for damages of any nature resulting from its commission”.

Reading this definition, we can see that the victim is no longer merely referred to as the beneficiary of the measure but now deemed a full stakeholder in the criminal procedure.

The attention is no longer principally focused on the act committed under criminal law, but rather on the act and its repercussions, with a possibility of reparation, or reducing any damage caused by the commission of the act, in order to thus restore in totality or in part a sense of social harmony.

According to Robert Cario<sup>11</sup>, “*Restorative justice, during its implementation, triggers real epistemic breaks which undeniably bring benefits to the criminal justice system and are relevantly complementary*”. The legislative provisions of the Law of August 2014 were along these lines. The idea was to pave the way to implementing a restorative justice measure, with the agreement of the victim and perpetrator, at some stage during the criminal procedure, or as an alternative to it. The Restorative Justice measure serves to complement classic criminal justice methods.

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<sup>11</sup> Cario R, Justice Restaurative : *Principles and promises*, In Dynamic notebooks, n°59, p26.

### 2.1.2. Promoting Restorative Justice

In parallel with the legislative work which led to the August 2014 law and since then, restorative justice has taken centre stage as one of the foremost youth justice issues. Since 2006, the National Victim Support Council (*Conseil national d'Aide aux Victimes*) had been running, under the presidency of Robert Cario, a taskforce with a view to “researching the channels which would help develop restorative justice”<sup>12</sup> in our country. This taskforce then drafted a certain number of recommendations in this area.

Next, around 2012/2013, under the initiative of the Justice minister, a consensus conference was convened on the prevention of reoffending. Adopting a scientific approach, made up of a group of around twenty experts, this consensus conference helped establish the state-of-play and proposed 12 recommendations to the government, in preparation for a reform to the criminal system.

Charity networks were developed in order to promote restorative justice and its practices. These networks offer important support to experiments, to building information and to training professionals in the field of justice, to victim support and to directing them, where necessary, towards a restorative justice service.

The main advocates of restorative justice are victim support associations such as the National Victim Support Council (*Conseil national d'Aide aux Victimes - CNAV*), the National Federation for Victim Support and Mediation (*Fédération Nationale d'aide au Victimes et de Médiation - INAVEM*), the Association of Applied Criminal Policy and Social Reintegration (*Association de Politique Criminelle Appliquée et de Réinsertion Sociale - APCARS*) as well as the French Restorative Justice Institute (*Institut Français*

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<sup>12</sup> CNAV, restorative justice, taskforce report, May 2007.

*de Justice Restaurative - IFJR*) presided over by Robert Cario, an emeritus professor of criminology and a pioneer in the areas of victimology and restorative justice.

The IFJR promotes RJ, supporting its development via the technical support of experiments, training professionals, informing all stakeholders, and providing a scientific and experimental database which is accessible to professionals. The IFJR also participates in bringing together two institutional environments which have little to do with one another: institutions and charities which support perpetrators and victim support charities. The inter-individuality that exists between perpetrator and victim also calls for the coming together of different institutions.

The authorities advocate the implementation of restorative justice via events (conferences and seminars) and grassroots experiments. This drive is something which is still in its infancy today, and is mainly aimed at adult perpetrators of crimes. However, the law in itself makes no provisions which would make it impossible to implement RJ measures for minors experimentally and PJJ employees are starting to receive training as of 2016 in restorative methodology.

### **2.1.3. Restorative Justice: Operational Framework**

The French Restorative Justice Institute is one of the main stakeholders in the promotion of, training in and development of restorative justice.

The ethics code<sup>13</sup> issued by this institute clearly establishes a support framework for the successful implementation of a measure. Article 3 covers the implementation of a Restorative justice measure:

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<sup>13</sup> IFJR, Code de déontologie de l'IFJR pour la mise en oeuvre de mesures de Justice restaurative en matière pénale, juillet 2014. Available at: [justicerestaurative.org/actualites\\_2014-07-22.html](http://justicerestaurative.org/actualites_2014-07-22.html).

*Restorative measures are understood to form part of a dynamic process and involve the following:*

*voluntary participation*

*applicable to all those who feel they have been implicated*

*acting on conflicts related to criminal activity with serious consequences and repercussions,*

*aimed at negotiation*

*also aimed at co-elaboration and joint mediation*

*entails active participation of all parties*

*provides for the presence and monitoring of a “third party from the justice sector”*

*also provides for potential support from a “psychological and/or social third party”*

*aimed at developing and forming the best solutions for either side*

*aimed at increasing the parties’ accountability*

*aimed at all parties*

*more generally aimed at restoring a level of Social Harmony*

This operational framework incorporates the expectations of the law of August 2014 which outlines the following principles:

The RJ measure can be proposed at any stage in the procedure.

Free consent.

Recognition of the crime by the perpetrator.

Trained and independent facilitators.

A preparation stage for both perpetrators and victims.

The absence of any counterparty for the perpetrator of the offence.

Guaranteed confidentiality.

Appropriate monitoring throughout the process.

A restorative justice measure is a dynamic process which is constantly readapting. The protagonists, perpetrators, victims or those close to them are best placed to devise, create, and build solutions which foster reparation. The perpetrator and the victim are active participants in the measure, unlike in the criminal procedure where they are more objects and bystanders watching the process unfold.

The skills required for the supervision and facilitation of restorative justice measures are fairly specific and hard to find amongst French educational skillsets. Socio-educational care focuses on either the victims or the perpetrators at one time, and practices bringing all protagonists together remain little known about. The preparation and facilitation of restorative justice meetings requires specific training.

## 2.2. EXISTING MEASURES IN LINE WITH RJ

From the series of measures, sanctions and sentences applicable in the French juvenile justice system, we can pinpoint two in particular which contain the seeds for a restorative justice measure:

Support or reparation measures in line with article 12-1 of the February 1945 decree.

Criminal mediation.

However other current measures also show points in common with or room for manoeuvre towards RJ.

### 2.2.1. The reparation measure and article 12-1 of the 1945 decree:

The 1945 decree alludes to restorative justice practices. Thus, article 12-1 provides for the implementation of criminal reparation at every stage of the procedure. This reparation measure is defined as being a *judicial response encouraging a minor involved in a criminal procedure to commit to a restorative approach by carrying out an action or activity which benefits the victim or which is in the interests of the community*.

#### Origins of the reparation measure

The reparation measure was incorporated into the 1945 decree by the law of 4 January 1993<sup>14</sup>. It thus found a specific legal framework within the implementation methods.

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<sup>14</sup> Loi n° 93-2 du 4 janvier 1993 portant réforme de la procédure pénale .

According to the implementing circular of 11 March 1993<sup>15</sup>, the reparation measure is “first and foremost intended to foster a process making the minor accountable for the act committed by ensuring that they are aware of criminal law, its content and the consequences, should they violate it, for themselves, for the victim and for society as a whole”.

We can see that the notions of the perpetrator’s awareness, accountability towards the victims and the social environment clearly feature.

This legislative shift was partly triggered by international regulations on the subject. In particular Recommendation R87-20 of the Council of Europe (1987)<sup>16</sup> and article 40 of the International Convention on the Rights of the Child (1989).

### Implementation methods

The reparation measure can be passed whatever the perpetrator’s age provided that the judge decides that the minor is sufficiently capable of discernment for their criminal responsibility to be upheld.

It may be passed at any stage of the judicial procedure or even as an alternative to the judicial procedure.

As an alternative, a referral must be made to the public prosecutor to summon the minor and their parents before a criminal reparation service.

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<sup>15</sup> Circular of 11 March 1993.

<sup>16</sup> Recommendation R87-20 of the Council of Europe.

The youth judge may pass this measure, either within a **prejudicial context**, or at the **moment when the ruling is made**. Where passed at the prejudicial stage, the way in which the measure is rolled out can have an impact on the outcome of the trial.

Just like a classic RJ measure, the reparation measure requires a **preparatory phase**. The idea is to assess the relevance of the measure, to ensure that the young person and their family are fully invested in the measure, and finally to prepare the reparation project.

The minor, to subscribe to the measure, must recognise its relevance to the crime in question. They must therefore **recognise the reality of the crime, of the facts**.

Finally, where dealing with minors, **parental support** is both a regulatory requirement and an important educational prerequisite which allows them to be fully involved in the approach.

The reparation measure can be direct, carried out for the good of the victim, or indirect, for the good of the community. In reality, a very large proportion of reparation measures are indirect. The actual victims have little involvement in reparation measures.

In spite of this, indirect reparations help to build a reparation project geared towards the young person's needs. It may involve working based on the report to the institution or public authority (police or fire services), for the community (public services), for charity (charitable associations) or for the care of vulnerable members of society (social institutions). Even if they do not include the actual victim, these reparation activities foster the young person's relationship with their environment and more generally their ability to feel empathy.



### Educational / restorative dimension of the measure

The spirit which precludes the implementation of the reparation measure requires that it be focused on the young person before targeting the victims. This can be seen in the mass recourse to indirect reparations, as compared to direct reparation measures, involving the victim of the criminal act. The victim is, within the very design of this measure, relegated to second place in the intended outcomes of its implementation. Because of this, this measure cannot be viewed as being a restorative justice measure *stricto sensu*.

However, the educational objective of the reparation measure leaves plenty of room for a restorative “mindset”:

Fostering the perpetrator’s awareness as regards the impact of their actions on victims and on society.

Being aware that the objective of reparation is for the minor to engage with their environment.

Socially re-evaluating the minor, restoring the social value of their relationship with their environment.

In addition to the notion of “criminal responsibility”, view the minor’s “accountability” as a process underway, which requires educational support and mediation with a view to ensuring “social accountability”.

Thus, even if the reparation measure includes an element of restorative justice, it is useful to note that it cannot be viewed as such for the main reason that it is first and

foremost aimed at the perpetrator, with the “direct” victim very rarely involved, and never seen as a participant in the process.

### **2.2.2. Criminal mediation**

The law of 4 January 1993 the aforementioned reformed Criminal Procedure Code (*Code de procédure Pénale*), in the last indent of Article 41-6, making recourse to criminal mediation possible as an alternative to prosecution.

According to the application circular of 11 March 1993, the idea of criminal mediation is to “ensure reparation for any damage caused to the victim, put an end to difficulties resulting from the offence and contribute to rehabilitating the perpetrator of the offence.” This practice leans towards a “quick resolution and victim satisfaction” and “differs from the reparation measure which is centred on the educational support of the minor”.

Thus, whilst criminal mediation takes account of the victims, the way in which it is implemented and the dispute is settled are the aspects missing from the restorative dimension.

Essentially, criminal mediation is first and foremost designed as a way to quickly settle disputes in a way which is satisfactory to the crime’s victims. No reference is made to the educational and restorative scope which criminal reparation can offer.

Furthermore, the fact that it can only be deployed as an alternative to prosecution limits its implementation to less serious offences and involves admitting some level of guilt, which limits the restorative scope of the criminal reparation measure.

### 2.2.3. Other educational measures and/or sanctions

Other measures, sanctions and sentences are somewhat in line, or could be brought in line with restorative justice.

This is true of **Community Service Work** which constitutes, as modelled on the reparation measure, the placing of a young offender in a community or a charity to carry out work that will benefit it. However, community service work is a sentence and failure to comply can lead to the imprisonment of the offender. Furthermore, the idea is to carry out “work” and not an “activity”...These two subtleties are enough to confirm that community service work does not and cannot count as a RJ measure.

Citizenship courses were created by the law 2004-204 of 9 March 2004<sup>17</sup> which introduced article 131-5-1 to the criminal procedure code worded as follows:

*“Where a crime is punished with imprisonment, the courts may, in the place of a prison sentence, prescribe that the guilty party undertake a citizenship course...the idea of which is to remind him or her of the French values of tolerance and respect for human dignity upon which society is built.”*

The decree 2004-1021 of 27 September 2004<sup>18</sup> makes citizenship courses applicable to minors via article 20-4-1 of the 1945 decree worded as follows:

*“The citizenship course serves to remind the guilty party of the French values of tolerance and respect for human dignity and ensure that they are aware of*

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<sup>17</sup> Law 2004-204 of March 2004.

<sup>18</sup> Decree 2004-1021 of September 2004.

their criminal and civil responsibility, as well as the duties that living in society entails. It also aims at fostering their social reintegration.”

On reading these two extracts, we can see that a citizenship course responds to some prerequisites to restorative justice, in particular as regards social reintegration, in the context of social ties between the minor and their environment. Awareness of the impacts which criminal acts can have on victims and their environment is an important part of the citizenship course.

However, much like other measures, this does not, either in its objectives or its implementation methods, actively include the victim in a process which they should be party to.

#### **2.2.4. Conclusion**

Despite the assets and educational richness of measures currently implemented in France, none can be deemed *stricto sensu*, as of yet, restorative. The main difference with restorative justice lies in the part the victim is allowed to play in the criminal procedure.

Where the victim is taken into consideration is first and foremost in the educational approach towards supporting the minor and preventing reoffending.

At no time do the texts which provide for these measures make reference to the systemic dimension of bringing perpetrators and victims together, with the victim symbolically remaining the person to be protected and the perpetrator to be condemned and/or educated.

There is quite a lively debate going on in France about this concept. Some institutional stakeholders feel that a victim being confronted with the perpetrator of the crime goes against the duty of care towards victims, whilst others clearly advocate restorative justice as a method of victim rehabilitation.

### **2.3. QUANTITATIVE DATA ON PRACTICES IN LINE WITH RJ**

As mentioned before, restorative justice has not strictly speaking been implemented in the context of youth criminal justice. The odd experiment is in progress but these remain thus far confidential and localised.

Thus, we have sought to analyse which of the measures currently in force and their implementation methods are the most closely in line with restorative justice measures.

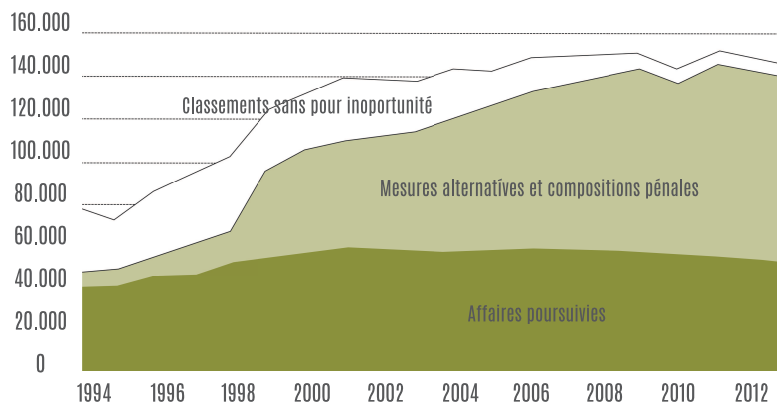
As we have previously explained, the current justice system offers numerous opportunities for the development of Restorative justice. Throughout the procedure, measures are currently implemented which have an educational focus often very closely aligned with the restorative approach.

We shall therefore analyse the prevalence of these measures, implemented either as an alternative to or implemented during the judicial procedure, amongst the entirety of measures prescribed by the youth judges and prosecution service.

We could surmise that these alternative measures, reserved for less serious crimes, are aimed at expediting and simplifying the judicial processing of cases.

The majority of declared criminal acts do not therefore lead to prosecution. Only a third of prosecutable minors are truly subject to prosecution.

Graph : Change in the proportion of alternative measures since 1994<sup>19</sup>



This table shows that the high rate of alternatives to prosecution has considerably increased over the past 20 years, to become a deciding factor in the directions taken by prosecution services.

<sup>19</sup> INFOSTAT JUSTICE 133.

### 2.3.1. The use of reparation and mediation measures by magistrates

Activity of minors prosecution services from 2005 to 2010

	2005	2006	2007	2008	2009*	2010*
<b>REFERRALS</b>						
Records, complaints, accusations	194.521	201.451	200.608	203.491	206.157	193.604
<b>DIRECTIONS TAKEN</b>						
Cases processed	168.174	174.592	178.812	181.449	182.530	173.000
Non-prosecutable cases	25.323	25.941	28.961	31.116	31.870	29.079
Prosecutable cases	142.851	148.651	149.851	150.333	150.660	143.921
Proportion of prosecutable cases (in %)	84,9	85,16	83,8	82,9	82,5	83,2
Cases where prosecution occurred	58.738	60.367	59.936	58.550	57.974	56.707
Alternative measures to prosecution	63.408	69.301	73.883	77.795	80.884	77.140
Mediation	2.636	1.645	1.552	1.238	1.294	nd
Therapeutic order	780	678	709	626	647	nd
Minor reparation	7.159	7.830	7.786	8.994	9.383	nd
Desinterested plaintiff, regularisations	4.404	5.424	6.448	7.218	7.523	nd
Reminder of law, warning	43.797	48.505	51.144	52.314	54.354	51.838
Other non-criminal proceedings	4.632	5.219	6.244	7.405	7.683	nd
<b>CASES CLOSED</b>	<b>20.705</b>	<b>18.983</b>	<b>15.781</b>	<b>13.430</b>	<b>10.754</b>	<b>8.790</b>

Within the significant changes in alternatives to prosecution<sup>20</sup>, we should however underscore that the **criminal mediation tool is little used**. In the years between 2005 and 2010, we can see that mediation measures went from 2,636 to 1,294, a fifty percent drop in 5 years. For their part, **reparations as an alternative to prosecution** have increased on the other hand, rising to 9,400 in 2009 whilst there were only 7,000 in 2005.

If we look more specifically at the change in open facility measures exercised by the PJJ (in the public and charity sectors), the following table<sup>21</sup> highlights a number of trends:

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<sup>20</sup> Source: Annuaire statistique de la Justice – Édition 2011-2012. Ministère de la Justice et des Libertés / SG / SDSE

<sup>21</sup> Annuaire statistique de la justice 2014. Ministère de la justice. Direction de la Protection Judiciaire de la Jeunesse (système GAME).



Legal protection for youth and minors service measures exercised between 2006 and 2013

	2006	2007	2008	2009	2010	2011	2012	2013
Total measures followed during the year	234.607	234.220	233.568	229.501	226.011	218.011	211.953	205.021
<b>INVESTIGATION</b>	106.989	104.317	100.272	99.385	99.883	96.731	87.828	86.099
<b>COURT-ORDERED PLACEMENT</b>	16.872	15.333	15.000	13.368	12.007	11.364	10.309	9.470
<b>OPEN SETTING</b>	110.837	114.570	118.296	116.748	114.212	109.916	113.816	109.452
<b>EDUCATIONAL MEASURES AND SANCTIONS</b>	81.116	84.284	86.678	84.692	81.897	78.612	79.156	78.210
Placement under judicial protection	3.646	4.274	5.165	6.545	7.905	8.566	9.585	9.838
Community educational aid (AEMO)+monitoring of young adults	21.911	20.423	16.688	9.612	3.984	1.439	491	260
Supervised release	8.328	7.885	8.060	8.354	8.045	7.294	6.482	5.703
Pre-trial supervised release	17.189	18.265	19.047	19.760	19.923	19.933	20.796	19.797
Reparation	29.308	32.505	36.218	38.213	39.446	38.096	36.434	36.092
Educational sanctions	734	930	1.254	1.576	1.753	2.411	3.456	3.537
Daytime work measure	0	2	246	632	841	873	1.004	1.208
Awareness course on the dangers of substance abuse								
<b>PROBATION MEASURES AND SENTENCES</b>	26.904	27.642	29.017	30.029	30.969	30.746	34.502	31.099
Judicial supervision	8.232	9.316	10.348	10.940	11.828	12.604	14.802	14.588
Parole	26	25	10	1	0	0	0	0
Suspended sentence with probation	13.057	12.632	12.560	12.218	11.687	10.918	11.738	9.248
Socio-judicial monitoring	75	95	106	111	81	81	90	72
Community service work	5.386	4.937	4.503	4.266	4.233	3.986	4.633	4.345
Community service work	97	554	1.291	2.247	2.948	2.972	2.990	2.636
Reduced sentence	31	83	199	246	192	185	249	210

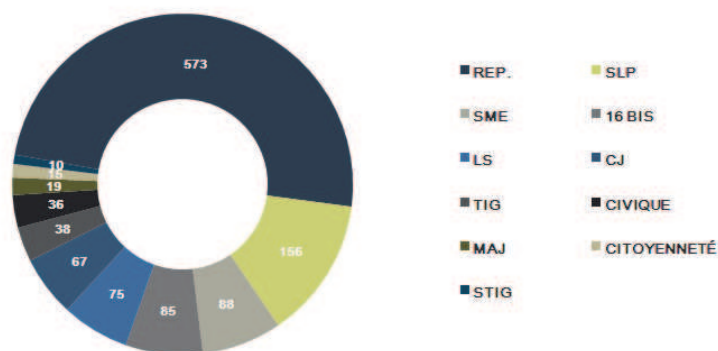
The first observation is that reparation measures, during the criminal procedure, have increased significantly during the period, going from 29,000 passed in 2006 to 36,000 in 2013. We should note that reparation measures, incorporated into the 1945 decree in 1993, have been constantly on the rise over the years. 10,485 were passed in 1999. It is therefore a tool which plays a key part now in the French juvenile justice system, increasingly used since its creation.

The second is the more significant use of judicial supervision measures, which rose from 8,200 to 14,500, with judicial supervision used as a legal framework for the implementation of educational measures.

Finally, the last observation relates to the powerful upswing in citizenship courses which rose to 2,636 in 2013 from just 87 in 2006.

To go a step further as regards reparation measures, the diagram below shows, in both absolute and proportional terms, how much reparation measures have been used over other measures (in the territory of the Brittany region):

Graph<sup>22</sup>: breakdown by type of measure in rulings implemented/ Brittany region



<sup>22</sup> Source : Direction Interregionale de la Protection Judiciaire de la Jeunesse, activity report 2014

We can see that **reparation measures** (“Rép”, in blue) make up half of all measures ruled upon and that it is therefore a particularly well-used measure by magistrates in the Brittany region.

None of the current measures or sanctions are, strictly speaking, restorative justice provisions but some of them may satisfy criteria defining restorative justice if changes are made to their implementation. This is the case for the reparation measure.

As regards the widespread use of the reparation measure by magistrates, we can conclude that it has responded to a significant need for a response of this kind and that French juvenile justice is “preformatted” based on a resolutely educational and, to a certain extent, restorative philosophy.

#### 2.4. RJ PRACTICES IN FRENCH JJS IMPLEMENTATION

Within the strict operational framework of RJ, different types of restorative measures can be implemented. They can be differentiated between according to the following criteria:

A direct or indirect measure, involving the actual victim of the crime or a victim of the same kind of crime.

From the moment the judicial procedure starts: some are more appropriate for the presentencing stage, others post-sentencing.

Some can be carried out in open facilities, others in closed facilities.

In France, the main experiments in using such measures are quite recent and isolated examples, although they have been increasing in number and diversity since 2014. The different juvenile justice stakeholders have progressively adopted the concept of restorative justice and some professionals are experimenting with its implementation within their services or establishments.

Generally-speaking, these experiments bring about partnerships between state-run services and victim support associations. The IFJR is very often involved in such experiments, providing precious technical and methodological support.

The implementation of restorative justice measures relies on a number of public (mainly justice ministry administrations) and charity (IFJR, Victim support associations, authorised justice associations) stakeholders. The development of this implementation has been in progress since June 2014, with increasing numbers of field experiments.

The measures outlined below are, in some cases, subject to pilot programmes with a view to studying the implementation of restorative justice within the French judicial system for adults or for minors.

As a general rule, the restorative process follows 4 successive stages:

Assessment of the measure's eligibility as regards the aforementioned criteria.

Meeting with third party mediators with the victim on the one side and the perpetrator on the other, with a view to preparing meetings. Mediators will then check that there is the necessary consent, psychological aptitude and motivation on either side.

Holding of the meeting(s).

Signing of a memorandum of understanding.

These 4 stages can be broken down differently during the different measures deemed to make up the body of restorative justice practice.

#### **2.4.1. Restorative mediation**

Restorative mediation consists of face-to-face meetings between the perpetrator and the victim of a crime to talk about the consequences of the crime. Criminal mediation has been in use in France since 1999. It is rarely implemented for minors, with a significant drop noted over the past decade.

Although they are similar from a formal standpoint, restorative mediation is very different to criminal mediation:

Restorative mediation is aimed at both minor and serious offences, whilst criminal mediation is aimed at only minor offences.

Restorative mediation is mainly aimed at kickstarting dialogue, whilst the primary goal of criminal mediation is to implement a deal between the victim and perpetrator of a criminal offence.

Restorative mediation requires more time than criminal mediation, especially as regards preparing the two parties (around two to three times as much time for the average serious offence).

Finally, restorative mediation can be implemented at every stage of the criminal justice process, including whilst a sentence is being served, whilst criminal mediation is only used as an alternative to prosecution.

#### Spotlight on Experiments: post-sentencing and direct mediation

**Citoyens & Justice** carried out an experiment on criminal mediation in the post-sentencing stage of a trial, following a European call for projects launched in 2008. This experiment, supported by the district courts (*tribunaux de grande instance* - TGIs) of Marseilles, Pau and Nantes, and carried out in cooperation with the charity sector (ASMAJ, ABCJ and AAE 44), lasted 22 months.

In Indre-et-Loire, within the scope of a **university psychology doctorate project, a direct mediation experiment** between perpetrators and victims was carried out between 2012 and 2013 (the post-sentencing stage of aggravated thefts) and in 2013-2014 (inclusion of the presentencing period and extension to all types of offence). It shows collaboration between the sentence enforcement services of the Tours TGI, the Indre-et-Loire SPIP, the judicial supervision and inquiry association of the TGI (*association de contrôle judiciaire et d'enquête du TGI*), the applied criminology service, (*service de criminologie appliquée* - ARCA) and the support association for the victims of criminal offences (*association d'aide aux victimes d'infractions pénales* - ADAVIP 37)

#### **2.4.2. Restorative conferences**

Restorative conferences work according to the same face-to-face principle as mediation. In addition, there is participation from loved ones of both parties, who have been impacted to a lesser or greater extent by the crime. The presence of these relatives helps highlight the direct consequences of the crime but also of its repercussions on the family and/or social environments of the two parties. This extended group also allows for the consideration of support and solidarity methods within the groups, to help foster the perpetrators' reintegration, the victims' rehabilitation and to prevent reoffending.

The restorative conference group requires a significant preparation stage, given the large number of participants.

Their loved ones come from the family and sometimes social environments of the perpetrator and the victim, and are therefore affected and have a stake in resolving the case, both for the perpetrator and/or victim and for themselves.

The restorative agreement, following the process, is particularly important because it engages the participants, with both sides interacting within their natural surroundings (family members of the victim or of the perpetrator, perpetrators and victims belonging to the same family or social group).

Thus, the restorative conference is very specifically targeted towards seeking the restoration of a level of social and/or familial harmony following the crime, by involving the main stakeholders from these two environments.

### **2.4.3. Detainee/Victim Meetings (DVMs) or Victim/Offender Encounters (VOEs)**

Detainee/Victim Meetings (DVMs) bring together 3 to 5 detainees, convicted of the same kind of crime and 3 to 5 victims of the same kind of crime.

This meeting is led by a duo of mediators, accompanied by two individuals from civil society. The two facilitators/mediators are specially trained in mediation and in facilitating group dynamics. The community members offer their support and recognition to the various participants and thus facilitate the smooth running of the process.

The preparation stage is significant and cumbersome to implement given the number of participants involved and the different personal challenges faced by each individual. VDM has the same objectives as mediation or restorative conferences, that is, putting the act committed into the context of its consequences and repercussions, other than the criminal aspects. However, it is subtly different in terms of the way in which it is implemented.

It occurs essentially at the post-sentencing stage and cannot therefore have any repercussions on the course of criminal justice. Its reach is therefore largely symbolic and heavily restorative, with participants looking for an emotional and human approach not provided by the criminal trial.

The fact that these are not the direct victims and perpetrators of the same crime allows a restorative measure to be proposed to a victim where the perpetrator would not want to be involved in the restorative approach and, conversely, offers the same to perpetrators whose victims would be unable to partake in this kind of measure. It is therefore mainly aimed at individuals who do not want to meet face-to-face but who would like to be able to understand their attacker's mentality.



This indirect confrontation may also prevent, in more sensitive cases, a re-emergence of trauma. The victim faces up to the crime, represented by a number of other perpetrators, which allows them to “depersonalise” the situation and to grasp it in a more general and comprehensive manner, which could be helpful for a number of victims intimidated by the idea of direct confrontation.

Finally, the group dynamic and interactions between subgroups foster comparisons and positioning, yield mutually supportive attitudes and can prove very constructive and conducive to establishing a positive outcome to the restorative process.

The same tool can be implemented with a group of convicted people, monitored on probation, instead of detainees. These are called Victim/Offender Encounters (VOEs).

### Spotlight on Experiment Implementation : Detainee/Victim Meetings

Following a **partnership project supported by the Yvelines SPIP**, the National victim support and mediation institute (*Institut national d'aide aux victimes et de médiation* - INAVEM), the head of the penitentiary establishment and the national penitentiary administration school, detainee/victim meetings (DVMs) took place from 2010 in the visiting rooms at the Poissy National Penitentiary. The review carried out highlighted the benefits experienced by the victims and perpetrators through this experiment.

**The Val d'Oise SPIP and the Val-de-Marne Victim support service** (SAJIR/APCARS7) devised and implemented in early 2015 meetings between probationers monitored in an open facility setting and victims. An assessment carried out by the French Restorative Justice Institute (*Institut français de justice restaurative*-IFJR) is planned. This experiment focused on two courts of appeal and four Ile-de-France departments (Paris, Val-de-Marne, Val-d'Oise, Hauts-de-Seine). Other local initiatives are being progressively developed. For example, the Seine-et-Marne Victim support and judicial mediation association (*Association d'aide aux victimes et médiation judiciaire*-AVIMEJ) and the SPIP in the same department drew up a project to implement, during the year 2016, victim/offender encounters in an open facility setting months.

François Goetz, the Poissy prison governor in Yvelines, shared his feedback on the experiment carried out in his establishment<sup>23</sup>:

*“The meetings help both the perpetrators and victims to make progress, leading them to feel relieved, healed and at peace with themselves. More specifically, victims feel that they can start living again and make plans. For the perpetrators, the chance to feel human again is the outcome with the most resonance, as well as truly becoming aware of the suffering inflicted upon their victim and gaining a clearer understanding of their personal background and the factors which contributed to them offending. This rediscovered humanity helps, without question, to ease victims’ suffering and to prevent perpetrators from reoffending, with awareness serving as the key component in its prevention”.*

#### **2.4.4. Circles of support and accountability**

The circle of support and accountability is aimed at an individual who requires specific support when they are released to reduce the risk of reoffending. This tool, implemented in the 1980s in North America, was initially aimed at persons convicted of sex offences. This tool fosters the resocialisation of the released person, whilst significantly minimising risk of reoffending.

These circles are made up of 3 to 5 individuals, volunteers from the community and trained individuals, and the main aim is to provide regular support for the reintegration of and efforts undertaken by the released individual.

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<sup>23</sup> Source : La justice Restaurative, présentation de l'APCARS. Available at : <http://www.apcars.fr/projets/la-justice-restaurative>

The circle of support is implemented prior to the prisoner's release. Volunteers meet with them upon their release, on a usually weekly basis or more frequently in the first weeks. These meetings can be underpinned by a circle of resources, which is external and made up of professionals who can offer methodological and technical assistance to the circle of support.

**Spotlight on Experiments and Implementation: Circles of support and accountability**

The Yvelines SPIP has been trialling this tool since the beginning of the year 2014, aimed at individuals monitored in an open facility setting who are significantly cut off from society. Each COSA focuses on a group of volunteers from civil society who have received training and form a circle around the person under the control of the justice system, via weekly meetings which last 1h30 organised in a neutral place. This initial circle is complimented by a second, made up of two CPIPs who coordinate the tool. Monitoring by a psychologist is foreseen.

#### **2.4.5. The importance of the notion of “community members”**

The community etymologically-speaking defines a group of people who share something. This notion is used in different areas: in law, in sociology, in political sciences, in science and in religion...

This notion therefore carries different connotations for everyone depending on the way they approach the notion. For some, it harks back to the communalisms which created “sub-communities” to the national community; for others it evokes a more institutional or ideological dimension...

It is therefore useful to note that this notion of community members only refers here to people likely to feel affected by the resolution of difficulties and problems following the commission of a crime. “Community members” may be directly affected because they know the perpetrator/victim well or a little and they live in the same “social environment” (municipality, company...), they can also consider themselves indirectly affected, even without knowing either the perpetrator or the victim.

The presence and involvement of “community members” is therefore a core element of the restorative measure. It allows for the involvement of people who are trained, neutral, or volunteers in the resolution of the fallout of a crime. Their role is to provide support and confidence to the participants. They may also share their point of view on situations, whilst retaining a benevolently neutral attitude.

This voluntary participation, in addition to the intervention of professionals overseeing the measure, is symbolically important, as it demonstrates community support for the victims so that they can cease to be victims, and to perpetrators to foster their social reintegration.

The historical and sociological design of the French criminal justice system inherently leaves little room for “community members”. Furthermore, the continuing trend of social change which yields ever more individualism and consumerism is not conducive to the involvement of “community members” in this kind of procedure.

One of the current obstacles to the development of certain RJ measures lies in the difficulty of mobilising “community members”. On an experimental level, volunteers can be found, but for these tools to become widely implemented a large-scale awareness and information campaign is required.

### 3. RESTORATIVE JUSTICE AND VICTIMS' RIGHTS

The role of the victim in the prosecution process is clearly a controversial issue from a practical and/or ethical standpoint in France. Some specialists insist that confrontation can bring back any psychological trauma for the victim, whilst the judicial measure is implemented with the intention of recognising the victim, allowing them to “separate themselves” symbolically from their attacker. Those who advocate this view implicitly understand that through restorative justice the opposite could be achieved. The idea, to a certain extent, would be to ask the victims to care for their torturers.

This ethical standpoint is understandable, and is also a concern of the restorative process which, in its methodologies, should offer guarantees allowing any potentially harmful and undesirable effects to be limited. Furthermore, as outlined previously, Restorative justice does not seek to overturn criminal logic, but complements it by including the victim in the process, for the benefit of everyone cooperating in the measure.

Restorative justice practices should therefore uphold the rights as well as the physical and psychological integrity of victims:

Restorative justice is aimed as much at reparation for victims as at prevention of repeat offending for the crime/offence's perpetrator.

Victims and perpetrators are informed, subscribe to the measure freely, make a more or less explicit request...the law of August 2014 provides that "victims and perpetrators may propose" a restorative justice measure. In no way does it foresee that such a measure may be imposed, either on the perpetrator or even less so on the victim.

The diverse nature of restorative justice measures allows for the measure to be adapted to the victim's needs. Indirect confrontation is given priority for victims who cannot directly face the perpetrator of the crime. Restorative conferences, VDMs or VOEs, since they bring together several victims, can prove reassuring for some. In these cases, restorative effects are encouraged by the implementation of a "peer group".

The preparation stage allows the benefits for the victim to be assessed, but also for any difficulties to be foreseen, in particular trauma reactivation.

The possibility of external support by a psychologist is ensured throughout the measure.

Therefore, whilst the concerns raised by some child and victimology specialists are well-founded, it is clear that restorative justice, in its substance and implementation methods, takes great care to prevent any negative effects on victims.

### 3.1. INSTITUTIONS ENSURING VICTIMS' INFORMATION AND RIGHTS:

The National Victim Support Council (Conseil national d'Aide aux Victimes - CNAV) is a consultative body whose role is to make proposals, including on the reception, information, support and compensation of victims of criminal acts. Presided over by the Justice minister and representatives of associations, the CNAV reflects the fact that consideration of the status of victims is, and must remain, a major concern in criminal policy.

The specificity of the justice system for French minors, and by extension the entire justice system which applies to victims, is that the justice system is not directly in charge of the psychological aspect of a trial. A summary of the support offered to victims is passed on to associations who complete the action triggered by the justice system. Thus, a number of victim support associations have been created with a view to assisting victims from a restorative point of view. They represent the victims' interests through the CNAV (through victim support associations which have representation). This is largely managed on a national level by INAVEM (a victim support association) and by local-level member associations.

The CNAV (National Victim Support Council) was created by a decree passed on 3 August 1999. Since 2010, the CNAV has been made up of 22 members, broken down as follows:

the Justice minister, the minister of the Interior, the Social Affairs minister and the Health minister;

four elected representatives (an MP, a senator, a CEO and a mayor);



six representatives of associations working in the field of victim support;  
  
seven qualified individuals;  
  
the Director General of the Guarantee fund for victims of acts of terrorism or other crimes.

Associations represented on the CNAV:

*The INAVEM (National Federation for Victim Support and Mediation)*  
  
*the “Citoyens et justice” federation*  
  
*the national federation of victims of collective accidents*  
  
*the CNIDFF (National information centre on the rights of women and families)*  
  
*the Support for Parents of Child Victims association*  
  
*the Marilou association, for life choices*

The CNAV has already contributed to the creation or improvement of a number of victim support tools, such as:

strengthening and structure of the charity association network;  
  
the development of statistical tools dedicated to victims of criminal acts;

the status of victims of human trafficking;

Information and support for victims of collective accidents; CNAV's work has in particular led to the creation of a central coordination unit within the Justice ministry and a methodological guide for use by grassroots workers;

Support for victims in an emergency.

INAVEM is a federation which brings together victim support associations in France. It provides information and advice to victims whilst serving as a major stakeholder in supporting the development and networking of victim support associations.

This federation manages the National Victim Support Number, organises training for professionals in charge of victims and moderates the network of member associations.

As well as its commitment to victims, INAVEM is also a major promoter of restorative justice in the country.

### 3.2. THE LAW OF 17 AUGUST 2015, “ON VICTIMS’ RIGHTS”

The LAW n° 2015-993 of 17 August 2015<sup>24</sup> was aimed at adapting the criminal procedure code to the provisions of European directive 2012/29 UE<sup>25</sup>.

Through this law, a new subtitle, “*on victims’ rights*”, is included in the preliminary title of the Criminal Procedure Code (*Code de Procédure Pénale* - CPP).

Thus, a year after restorative justice was included in its preliminary title, the criminal procedure code was complemented with specific provisions for the inclusion of victims, with regard to their rights and to the attention paid to their fate. There is also a specific mention made to restorative justice, within article 10-2: “*Right to reparation, including through a restorative justice measure*”.

Article 10-2 of the CPP more generally establishes the minimum level of information to be guaranteed to the victim about their rights and how to exercise them:

- Obtain reparation and/or compensation for harm suffered – including through a restorative justice measure.
- Act as a civil party in the procedure.
- Be represented during the procedure.
- Call upon victim support associations.

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<sup>24</sup> Law n° 2015-993.

<sup>25</sup> Directive 2012/29 EU.

Refer to the victim compensation commission (*commission d'indemnisation des victimes*).

Be able, where necessary, to benefit from appropriate protection.

Be able, where necessary, to benefit from translation.

For minors, the right to be accompanied by their legal representative and by an adult of their choice.

Be able to declare as residence that of a third party, with their agreement.

Article 10-3 provides for and details the resolution of problems arising from language as well as for translation where the victim does not speak French.

Article 10-4 provides for and details possible victim support by a third party of their choice.

Article 10-5 covers the protection where necessary of victims depending on their state, and lists the institutions in charge of assessing the danger perceived by the victim and the objective dangerousness of the situation.

These legal provisions therefore establish the rights of victims as a prior notion to the criminal procedure, outlining the role of victim support associations as well as the role of victim compensation commissions.

### 3.3. NEW MEASURES FOR VICTIMS' RIGHTS

The Justice ministry's 2015 budget<sup>26</sup> had shown "an unprecedented effort to develop victim support". Two major actions benefited from additional measures:

Direct victim support tools: The funding budget for victim reception was **16.9 million euros in 2015**, compared to 13.9 in 2014 (+22%) and 10.9 million in 2012 (+65%). The idea of this additional funding was to provide all district courts with a victim support bureau for the reception, support and guidance of all victims. This funding should also allow for the development of restorative justice practices on a large scale.

Legal aid to ensure access to victims' rights. The 2015 budget led to an increase of **43 million additional euros** to ensure that legal aid continues and improves for litigants whose income is under 936 € a month.

We can see that victims' rights have been established as a governmental priority over the past few years. Budgetary efforts have been consequential although they do not appear to be enough to ensure the development of RJ measures nationwide.

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<sup>26</sup> Budget justice 2015. Available at : [http://www.justice.gouv.fr/publication/budget\\_justice\\_2015.pdf](http://www.justice.gouv.fr/publication/budget_justice_2015.pdf)

## 4. CONCLUSIONS AND OUTLOOKS

During the years 2013, 2014 and 2015, current legislation in criminal matters became very rich. It has taken on fresh legislative provisions which very significantly place victims back at the heart of the criminal process and its repercussions. The possibility of having recourse to a restorative justice measure must now be considered as a requirement at every stage of the criminal procedure.

The criminal code saw additional provisions largely added to its preliminary and introductory section, which meant a more ambitious scope from the legislator.

Restorative measures are currently being tested in France. This on the one hand is intended to foster change in already existing French law and on the other hand to implement new measures from the traditional practical body of restorative justice measures.

There are various different outlooks, they will require time, institutional support, specific resources and finally a demanding and exhaustive assessment of the effects and results compared to the initial objectives.

Firstly, and this is underway, it will be useful to inform and raise the awareness of professionals from justice administrations, associations offering support and monitoring to perpetrators and victim support associations so that each considers the challenges rolling out these measures presents.

Secondly, restorative practices require specific training as a necessity, with a view to developing an option of certified training which allows these measures to be implemented in the country.

It would also be useful to foster communication beyond socio-judicial specialists and partners. As we have seen, civil society should also play a role in this tool, since the support of community members is a prerequisite if VDMs, VOEs or CSRs are to be rolled out. This point clearly shows that the advent of restorative justice also constitutes an opportunity to mobilise society in the resolution of problems and conflicts, including in the context of a criminal procedure.

Change to reparation and mediation measures is still a work in progress, but the outlook is positive, with very advanced practical and methodological provisions already in place. If the role of the direct victim of a crime can be redefined as well as ensuring a restorative approach to interactions between perpetrators and victims, these measures will evolve to become true restorative justice measures.





# NATIONAL REPORT: ITALY

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## 1. INTRODUCTION

Mediation, according to the restorative justice approach, balances the victims' needs against holding offenders responsible for the harm caused and requiring them to make reparation for it. Victim—offender mediation in the Italian juvenile justice system is not, as yet, widely implemented. Social workers, employed by the Juvenile Criminal Justice Department, are the only professionals involved in mediation.

Victim-offender mediation (VOM) was introduced in Italy in the mid 90s. The present study was aimed at providing a first overview of the characteristics and functioning of the VOM services throughout the country. Specifically, the investigation focused on the organization of VOM services, and resources available, as well as on the characteristics of the profession of the mediator (i.e., training, motivations). It should be noted that VOM practice in Italy is currently limited to the juvenile criminal justice system (Baldry, 1998).

Recently in Italy some important steps have been done to protect victims' rights, thus demonstrating the attention politicians and the legal system dedicate to such an issue. This is particularly true with regards to so called 'special groups' of victims being entitled to benefit from a sort of special legislation for crimes of great social concern: i.e. victims of domestic violence, sexual assault, terrorism, mafia and organised crime, exploitation and racket. In some cases procedures to guarantee victims' participation in criminal proceedings have been reinforced, and sometimes partially extended, obviously without implying an authentic, deep hypothesis of "rethinking" victims' roles and their expectations in the criminal justice system. The Italian Juvenile Criminal Code assures the protection and safeguard of underage offenders in the penal process through peculiar legal guarantees: 1) the right to be processed and judged before special courts, by specialised judges and prosecutors, where "specialised" means

specially qualified and trained to work inside the juvenile (criminal and civil) justice system; 2) the right to a fair trial 3) the right to a special hearing; 4) the right to privacy; 5) the right to be psychologically and emotionally supported by relatives, experts in pedagogic disciplines or by the legal ward during all the steps in the criminal proceeding (“14. Competent authority to adjudicate: (...) 14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding which shall allow the juvenile to participate therein and to express herself or himself freely” – see again ‘The Beijing Rules’). Things are definitely different for victims, especially for underage victims. An attempt to explain such a paradox could be found looking at the legal definition for “victims”, being first and foremost considered the direct witnesses of the crime. If the offence is seen primarily as a violation against the state and only marginally against individual human rights, it is easier to understand why there are so few provisions on supporting and protecting victims inside criminal proceedings. According to the law (see art. 31 DPR 448/88, and art. 90 of the Italian Procedural Penal Code 10), victims are allowed to present written memories and indicate probationary elements. They also shall receive formal communication of the primary judicial hearing. Other than that, there is not much one can do – irrespective of whether one is being legally assisted (or not) by a lawyer. On the contrary, it is rather interesting to note that victims are not allowed to enter into a civil lawsuit - while it is allowed for adults on trial – which can be considered contrary to the pedagogic principles inspiring the juvenile criminal justice system (art. 10 DPR 448/1988). So, even if the victim and the offender are both minors, their situation before the law is completely different. According to the Chart of Noto, what is positive concerning young victims of sexual abuse, rape and exploitation, is the implementation of particular legal measures which explicitly require the protection, cover and safeguarding of more fragile victims. For example, protected hearings before the judge and supported by experts in pedagogic and psychological matters are clearly required by law. Again, when possible, participation of victims’

relatives is considered to be very important in order to ensure emotional support. All these issues seem to have something important in common: the complete absence of a wide, deep and rooted victim culture in Italy. This observation could probably also help to explain several paradoxes occurring when talking about victims of crime: they have no place in criminal courts and no legal opportunities to express their needs but, at the same time, their sad stories of pain and suffering are on the front page of local and national newspapers (Vezzadini 2013).

In this work we tried to evaluate the state-of-the-art of victim protection and support in Italy, by defining the Italian juvenile justice architecture and restorative justice practices in order also to discuss the role of victim reparation inside the legal system.

## 2. THE JUVENILE JUSTICE SYSTEM IN ITALY

### 2.1. BACKGROUND

In Italy, towards the mid-1800's a penal and sociological movement it was born whose idea was to differentiate juvenile penal sanctions arguing that juvenile offenders must be subject to less severe sentencing.

The *Rocco* Penal Code of 1930, which raised the age of criminal responsibility from 9 to 14 years and lowered the age of full responsibility from 21 to 18, makes explicit reference to the concept of *the capacity of will and thought* as a new parameter for replacing the previously used parameter of ‘discernment’<sup>1</sup>. If the offender had reached the age of eighteen when the offence was committed, and is therefore considered an adult, it is presumed that he/she is capable of understanding and acting intentionally and is therefore criminally liable. This presumption may not be considered valid, however, if it is proved that the offender was unable to understand and act intentionally at the moment of the offence, due to *insanity* (Article 88 of the Criminal Code) or other causes. If this is proved, the offender cannot be considered liable for the offence and therefore no penalty can be imposed on him/her, with the exception of those security measures that may be applied if the offender is recognised to be *socially dangerous*.

The minimum age of criminal responsibility is set at 14 years (Article 97 of the Criminal Code). Any minor who has not reached that age can not be indicted for any type of illegal activity whatsoever, since it is presumed that the minor is incapable of

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<sup>1</sup> In the *Rocco* Penal Code criminal offences are divided into two main categories: crimes and misdemeanours. The discretionary criteria used in the Criminal Code to discern between these two types of criminal acts are of an exclusively formal character and depend on the different types of penalties.

understanding and intent. In certain circumstances, persons aged under 14 can be recognised as being *socially dangerous* and can therefore be subjected to *security measures*. In order to establish whether a minor aged between 14 and 18 years should be subjected to a penalty, the Court must, for each case and on the basis of the concrete evidence put before the Court, ascertain whether the perpetrator of the crime had reached an adequate level of maturity and psychological development at the moment of the offence to understand the seriousness of the act (Article 98 of the Criminal Code<sup>2</sup>).

The Italian Criminal Code that is currently in force (the so-called ‘Rocco Code’, named after the fascist Minister of Justice) dates back to 1930. Like all the Codes of European Countries approved since then, it was inspired by the Napoleonic Code of 1810 on the one hand, and by the 1870 Code of William, on the other hand. Although it was modelled on the liberally inspired Codes of the nineteenth century, the fact that it was approved when Fascism was at its height (1942-1943) meant that, in compliance with the ideological dictates of an authoritarian State, the Code was originally very severe

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<sup>2</sup> Art. 97 of the Italian Penal Code states that a person who has not reached the age of 14 at the moment when he or she commits a crime must not be punished. Art. 98 states that a person who has reached the age of 14 but not 18 at the time of committing a crime and ‘who is capable of understanding and willing’ must be punished, but the punishment may be reduced. At the age of majority, 18 years old, the person becomes fully responsible for his/her crimes. Between the ages of 14 and 18 the ability to understand and willing must be ascertained in each case. The system recognizes that the cognitive ability of a juvenile to understand is not necessarily the same as that of an adult. In this respect the Courts have established the concept of immaturity: a condition of inadequate physical, psychological or even social development. Since minors under the age of 14 are not responsible, they are automatically acquitted. Minors between the ages of 14 and 18 may be given a custodial sentence, which is usually reduced to two-thirds of the sentence that would have been imposed on an adult offender for the same crime.

and gave a highly repressive role to the State powers<sup>3</sup>. Until 1934 a special Juvenile jurisdiction did not exist in Italy. The Juvenile Court, which was born in 1934, is composed of four persons and includes a professional Appeal Judge who presides over the Court proceedings, a Court Magistrate and two citizens, one man and a woman, whom act as assistants and consultants in the case. The citizens are chosen from among experts in the fields of biology, psychiatry, criminal anthropology, education and psychology. So finally in 1934, with serious delay in respect to the other European nations, the Juvenile Court was finally instituted in Italy. Three competences were attributed to the Court:

the Penal Competence which guarantees that juvenile offenders be judged by a specialised judge;

the Administrative Competence addressing juveniles under 18 years of age, who, for repeated behaviour, demonstrate proof of deviance and the need for moral correction;

the Civil Competence which regards the area of provisions limiting the parental authority.

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<sup>3</sup> Alongside the incriminating provisions contained in the Criminal Code, Italy has also always had special laws. The complementary legislation has always been an important source of criminalisation. The use of this legislation has increased over the years, so much so as to induce some legal scholars to affirm that the Rocco Code is no longer the main source of the Italian Criminal Justice System, but a secondary and supplementary one. Among the numerous special criminal laws, it is necessary to mention at least those related to secret associations (Law 17 of 1982), the credit market (Legislative Decree 58 of 1998), the banking market (Legislative Decree 385 of 1993), building, urbanisation and the environment (Law 1150 of 1942, Law 1086 of 1971, Law 62 of 1974, Law 10 of 1977, Law 457 of 1978, Law 47 of 1985, Law 431 of 1985, Legislative Decree 22 of 1997), bankruptcy (Royal Decree 267 of 1942), paedophilia (Law 75 of 1958), prostitution (Law 75 of 1958), migration (Legislative Decree 286 of 1998), drugs (Presidential Decree No. 309 of 1990), and taxation (Law 516 of 1982).



Originally, the Italian Juvenile Court was composed of two magistrates and one honorable citizen competent in social service and dedicated to biology, psychiatry, criminology or pedagogy. This composition was modified by law n.1441 of 1956 that raised the number of lay judges to two: one man and one woman. The Constitutional Law (December 22, 1947) marked an important evolution in juvenile rights and formed a base for a wider and more complete consideration and protection of the minor. In 1956, after the Constitution came into force, law no. 888/1956 changed the perspective of looking at juvenile offenders with greater attention being paid to their needs and their deficiencies. Rehabilitative intervention was, in this way, aimed at individualised treatment to cope with deficiencies and personal motivation, whereas in the years before the defence of the society was considered the priority.

## 2.2. PRINCIPLES

In contemporary laws juvenile offenders are seen as individuals in need of protection and re-socialisation. The juvenile trial is guided by the principle of minimal *intervention* referring to the risk that intervention becomes superfluous or harmful, compromising the harmonious development of the juvenile's personality.

The aforementioned modification of the Juvenile Justice System in 1956 was oriented towards a rehabilitative approach and in 1962 a whole range of welfare services were established (Gatti and Verde, 1988). These included a specialised social service for minors which was designed to work in close cooperation with the Juvenile Court and whose task it was to carry out a range of interventions to help and support juveniles in civil, penal and administrative fields. Before 1956 magistrates imposed mainly penal measures on juvenile offenders, though these were complimented with rehabilitative elements. Since 1956 the juvenile justice system has become more and more rehabilitative in nature, by means of a strong and structural relationship between Courts and Social Services. The overall aim was to create a welfare system inspired by

the need for social control, whether or not the minor had committed any crime. At the same time, sudden criticism arose regarding the backwardness of the structures and institutions for the rehabilitation and social care for minors. Many institutions were seen as being unsatisfactory due to poor sanitary arrangements (such as old convents and schools).

In 1977 a specific law (Presidential Decree D.P.R. n.616) on administrative centralisation caused a deep transformation in the practical work in the Juvenile Justice System. The legislation transferred executive authority over decisions taken in the civil and administrative fields from the Ministerial's Social Services to the Local Social Services. Local Social Services fostered the development of alternative social policies, putting juvenile offenders into the general social welfare system for minors and their families. This represented a strong shift towards community intervention and went hand in hand with the development of small residential initiatives, aimed at facilitating compliance with the law and avoiding the stigmatisation and social exclusion associated with closed Institutions. According to the new law, the measures for juvenile offenders had to be imposed by the Juvenile Court, but the penal, civil or administrative provisions had to be implemented by Local Authorities. This separation led to a hidden struggle between Juvenile Court Magistrates and Local Social Services (Gatti and Verde, 2002). In fact the implementation of Court-based penal measures depended on the structures that the Local Authorities had provided.

From the middle of the 70s, also on the basis of experiments of *diversion*, carried out in other European Countries and on the basis of national and international research activities on the potential negative effects of interventions by the criminal justice bodies, a principle has progressively gained ground: the principle of the "minimum prejudice of the trial", that is to say reducing judicial interventions to a minimum, in particular those of coercive and restrictive nature. So, the judge takes into account the

*"prejudice"* the trial can cause to the minor and, case by case, considers if it is appropriate to go ahead with the proceedings or if it is better to interrupt them, with a view to educational purposes.

In Italy, this principle is embodied in D.P.R. [Decree of the President of the Republic] no. 448 of Sept. 1988 "Approval of the provisions concerning criminal proceedings involving juvenile defendants", which builds on the results of national and international observations and experiences, in some cases anticipating the development of principles included in some important international Charters, such as the UN Convention on the Rights of the Child, signed in New York in 1989.

The approval of D.P.R. n.488 introduced a new juvenile penal procedure for young offenders within the broader context of a more general procedural law reform<sup>4</sup>: DPR n.488 resulting in a shift away from an inquisitorial to an accusatory model.

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<sup>4</sup> The most significant legislation that has affected the criminal justice system was the 1988 promulgation of a new Code of Penal Procedure. The new Code represented a substantial shifting from the old inquisitorial system to a modern adversarial system. The most important innovation of this new legislation concerns the admission of evidence that, as a rule, can be obtained only during the course of an oral and public trial, in front of the judge (acting as a third party) on the basis of witnesses' cross-examination and other kinds of proof legally presented in the Court. The trial is conducted by the prosecution and defence on a parity basis. Although the new Italian Code of Penal Procedure is similar to the adversarial English and American Systems, its System of written laws still retains important differences when compared with the Anglo-American system, such as the mandatory penal action. (*obbligatorietà dell'azione penale*). The obligatoriness of penal action is sanctioned by the Constitution (Art.112). According to this provision, the Public Prosecutor (PM), when becoming acquainted with the commission of a crime (*notizia criminis*), is legally bound to start the investigation and, if there is enough circumstantial evidence, to take penal action against the alleged culprit of that particular crime. The Italian Prosecutor is therefore without discretionary power to withhold prosecution. Prosecution is not simply a right, but a duty of the PM.

### 2.3. TYPES OF MEASURES

Victim protection depends basically on juridical measures. Let's take a look at the main legal measures.

First of all, the new process is divided into different phases. The first one, the so-called preliminary investigation, conducted by the Public Prosecutor through the criminal investigation Department of the Police (under the supervision of the Judge of the preliminary investigations - GIP) is followed by a preliminary hearing, during which the Judge assesses the investigations carried out and decides whether to dismiss the case or to order a trial. The preliminary hearing is carried out by one professional magistrate and two honorary judges. The Court can decide to commit the minor for trial, find 'no grounds for prosecution', place the youth on probation, or may apply an alternative sanction to detention. In order to avoid any trauma the young offender is not cross examined. Furthermore, it is not possible to institute a civil action to claim compensation for damage during juvenile trials. In order to protect the minors involved, the parents or those who have legal authority over them are allowed to attend the trial. Given the young age of the defendants, and in order to assist in their social rehabilitation, as well as for purposes of prevention, the law provides for two decisions that might be issued: a decision dismissing the case because the fact is of minor importance and a decision suspending the trial and putting the defendant on probation. The decisions are of great significance. In the first case, the Judge can decide not to proceed when, given the non-serious and occasional nature of the offence committed, he/she decides that a continuation of the trial would harm the development of the minor. In the second case, the Judge can suspend the penal proceedings entrusting the minor to the Social Service Office for Minors (USSM), which draws up an Individualized/Tailored Educative Project (PEI), for a period that cannot exceed a maximum of three years for the most serious cases. At the end of the period of suspension, if a positive evaluation of the minor's behaviour during the

probation period is given, the charge is dropped; so the Judge declares the crime as extinguished. In case of a negative outcome the prosecution will be continued.

D.P.R. n.448 combined with general procedural provisions is one of the fundamental laws regulating formal and informal interventions for young offenders. Generally D.P.R. n.448 aims to limit as far as possible the use of preventive detention for minors (which may be imposed mainly in cases of robbery, rape and homicide).

Concerning the decisions that Courts can impose, the Penal Code states that the orders and sentences applicable to adults may also be applied to minors. The Italian Criminal Code makes a fundamental differentiation between criminal sanctions, on the one hand, and between penalties and security measures (*Misura di sicurezza*), on the other. The former, which have a set maximum duration, are applied to people recognised as being guilty of an offence. The latter, which do not have a fixed duration, are applied to socially dangerous people, i.e. people who, on the basis of a prognosis, are considered likely to commit other crimes in the future. In this case, the security measure applied can only be removed when they are no longer considered socially dangerous<sup>5</sup>.

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<sup>5</sup> The Italian Criminal Code provides certain minimum and maximum time limits for sentences. This means that a Judge is not free to decide on the length of the sentence but is bound by the Law. Article 133 establishes parameters and classifies them into two categories according to the seriousness of the offence (taking into consideration the type of offence committed, the seriousness of the damage caused or of the threat posed and the level of guilt) and the capacity of the offender to commit an offence - including the offender's reasons for committing the offence, his/her precedents and life conditions and his/her behaviour before committing the offence). This was the result of an attempt to reach a compromise between the classical and the positivist school in 1930. In fact, the criteria used for deciding on the length of the sentence, (i.e. the type of offence committed, its seriousness and the level of guilt) fully comply with the classical school's concept of criminal law. At the same time, the criteria relating to the offender's capacity to commit an offence and above all, his/her social dangerousness, clearly respond to those advocated by the positivist school.

In 1981, Law n.689 introduced community sanctions to replace short custodial sentences. These were aimed at preventing a person sentenced to a short term of imprisonment from actually passing time in a Penal Institution for Minors, thus protecting him/her from its criminogenic influence. The community sanctions can be applied under certain conditions: the custodial sentence to be served does not exceed one year (i.e. reference is made to the actual sentence imposed by the Judge and not to the maximum penalty prescribed by the law for a given offence). One alternative sanction is community work which has rarely been applied, this is, probably because the *conditional suspension of the sentence* is preferred which, as opposed to the other alternative sanctions, has an almost non-existent sanctioning element, at least as far as first time offenders are concerned. On the contrary, the application of other alternative measures to imprisonment (“probation”, “house arrest”, “semicustody” (*semilibertà*) and “early release”) is widely used.

*Probation* can be applied to an offender who has received a prison sentence of less than three years or who still has three years to serve in prison. The period of probation must correspond to the sentence to be served, or remaining to be served. On the basis of personality tests (following the amendments introduced by Law 165 of 1998, it is no longer necessary for the tests to be conducted in a prison - thus avoiding the need to stay in prison), and when there is reason to believe that the measure will contribute towards rehabilitating the offender, the latter has to carry out activities under the control of the Social Services. Social services control the behaviour of the person and assist in his/her reintegration into society. If this alternative measure proves positive, the rest of the penalty is cancelled. If it fails, the measure is revoked and the offender must serve the rest of his/her sentence in prison.

Special mention should be made of a specific alternative measure, *Probation, which is used for drug addicts and alcoholics*. This measure differs from the basic form of

probation in various respects. First of all, it can substitute a prison sentence or the remainder of a prison sentence of four and not three years, as is normally the case. Second, this measure can only be applied to drug addicts or alcoholics who are taking part or have requested to take part in therapeutic treatment. In this way, the offender is allowed to choose between serving the prison sentence or undergoing treatment.

*House arrest* can be applied to persons who have to serve a prison sentence not exceeding three years (which is increased to four years for some categories such as pregnant women, people aged over sixty, minors aged under twenty), even if it constitutes the remainder of a longer sentence. This measure is applied whenever it is not possible to assign the person to the social services.

*Semicustody* consists in giving the offender the possibility to spend a part of the day outside prison in order to participate in educational, work or other activities that are useful for his/her social rehabilitation. Only those offenders who have already served at least half of the sentence are granted this alternative measure.

*Early release* is granted to those offenders that have participated in a re-educational course, and consists of a reduction of 45 days for every six months of detention. This reduction can also be applied to prisoners serving life sentences although, taking into account the twenty-year time limit needed in order to be able to be granted conditional release, they can only be released after twenty-one years of imprisonment.

A measure of last resort is the detention of juveniles. Differently from adult offenders, Italian penal and procedural law for juveniles is inspired by a general criterion of *ultima ratio* (i.e. *last chance*). In this sense detention is seen as a residual possibility for a juvenile offender. Particular emphasis is given to forms of sentencing (such as probation for example) where Social services (at local and governmental level) and families play an essential role<sup>6</sup>. The specificity of juveniles in conflict with the law was expressed in a decision of the Constitutional Court no. 168 of 1994, which excluded, without conditions, the constitutional legitimacy of life sentences for juveniles. The Court, in fact, has confirmed that Art. 31 of the Constitution (which provides special protection for children and juveniles and favors the Institutions necessary for this aim) renders illegal a life prison sentences for juveniles, because a life prison sentence would treat all offenders with a punitive approach, without taking into account the particular conditions of juveniles. It is precisely art. 31 of the Constitution, together with international petitions, that enforces a rehabilitative and educative approach for juvenile offenders.

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<sup>6</sup> The Criminal procedure can be described as adversarial in nature. No informal justice system exists. The Italian Legal System is based on written laws. Penal Law defines what specific behaviour is criminal and what specific minimum and maximum penalties are provided. The basic principles of no penalty without a law (*nulla poena sine lege*) and no crime without a law (*nullum crimen sine lege*) are stated in the Penal Code (Article 1) and in the Italian Constitution (Article 25). Other basic Constitutional Principles follow as well: a) legal responsibility rests solely on the acting individual; b) rules of penal law are not retroactive; c) no one can be sentenced without a fair trial (*nulla poena sine iudicio*); d) no one can be considered guilty until a final sentence has been pronounced; e) penalties cannot consist in treatment contrary to the sense of humanity and must tend to the rehabilitation of the offender; f) personal freedom is inviolable and no one shall be deprived of it except under specific provisions of the law. These Principles include clarity of the law, no punishment without trial, proportionality between crime and punishment, definitions of crime and punishment based on a system of written laws and fixed penalties, and the elimination of secret accusations. The dissemination of these Principles is commonly ascribed to the influence of Cesare Beccaria's Treatise 'On Crimes and Punishments' (*Dei delitti e delle Pene*). For example, the accused does not have the right to plead guilty to a lesser offence (plea bargain). The inadmissibility of a plea bargain in the system is based on the principle of the "Obligatoriness of criminal procedure" (*Obbligatorietà dell'azione penale*), which allows no discretion in prosecution. Once acquainted with the commission of a crime, the Judicial Authority is legally bound to take action against that particular crime and cannot choose to seek prosecution to a lesser charge in exchange for a plea of guilt. In other words, discretionary or selective enforcement does not exist in the System. The Public Prosecutor has no discretionary power to engage in plea bargaining.



Article 27 D.P.R. n.448/88 introduced the possibility of “extinction of sentence for irrelevance of the offence” as a diversionary sentence (c.f. chapter 5 and 6) as well as various possibilities of victim-offender-mediation (c.f. chapter 5). Additionally there is the possibility of a “judicial pardon”.

The New Juvenile Penal Trial moved from a pure rehabilitative and punitive perspective to a new conception of the penal procedure: *restorative justice*. The attention to the victim is a recent conquest of the Italian law. The idea of restorative justice, through the use of the instruments of mediation, is based on growing interest in the victims of crimes, giving them the same level of consideration. In Italy, like in many European Countries as well as countries outside Europe, Victim Offender Mediation (VOM) has become an object of reflection, studied and applied only in the last decade. In practice, VOM is restricted mainly to juvenile offenders. VOM experiences have been carried out in Turin, Bari, Catanzaro, Milan, Palermo, Rome, Trento and Venice. Within the Italian Juvenile criminal law, VOM can be activated in every moment of the penal procedure:

<sup>1</sup> During the preliminary investigations - Article 9 of the D.P.R. no. 448/88 “Investigations/assessment on the personality of the minor” (*Accertamenti sulla personalità del minorenne*). Art. 9 provides that the PM and the Judge acquire facts and information about the minor’s personal, family, social conditions and resources, to assess criminal responsibility and to estimate the social importance of the act. In this phase, VOM has a character of an immediate “answer” to the crime. Before the victim and offender become labelled by their roles in the process they can have a meeting with a third non-institutional body, the mediator. VOM requires: the admission of responsibility; the consent of the minor; the consent of the victim.

**2** During the preliminary hearing - According to the D.P.R there are two possibilities for introducing VOM:

a) Article 27 D.P.R. n.448/88 “Extinction of sentence for irrelevance of the offence” (diversionary sentence), offers a place in which VOM can be activated. The non-severity of the fact and the occasionality of the criminal behaviour represent two elements which make mediation the most appropriate instrument for solving the conflict between the offender and victim;

b) Article 28 D.P.R n.448/88 “Probation” (*Sospensione del processo e messa alla prova*). In this case, the law recognizes a specific effect on a possible reconciliation during the probation procedure. Therefore, VOM becomes an instrument through which young offenders and victims, adequately supported, take part in the management of the conflict caused by the crime. Article 28 represents an instrument for juvenile offenders and it offers a response which is adapted to suit the personality of the minor, through the proposal and the construction of an Individualized/Tailored Educative Project (PEI) offered by the Social Service Office for Minors (USSM). This is an example of the implementation of the ‘principle of residuality’ (*principle of ultima ratio*) and the ‘principle of minimal offensiveness’ (or *destigmatization principle* or *minimum intervention principle*) which makes reference to the risk that the process results superfluous or harmful, compromising the harmonious development of a juvenile’s personality. The project must provide for flexibility during the probation, that is, the elements of the plan must be open to modification, or the probation can be shortened or substantially lengthened in relation to the objective conditions of the probation. The flexibility therefore allows the modification of the project in progress should unexpected events occur, should the specific needs of the minor change, should some resources

become scarce. USSMs firstly try to provide information and in particular to encourage the family to cooperate through meetings that should help them to accept and understand the event. They attempt to promote the immense opportunity that probation presents, from the perspective of further and positive growth of the minor rather than the stigmatising expiation of the sentence.

Each PEI must consider certain areas of intervention, that are: *family*, the unit where the minor has significant relationships; *school*; *work*; *leisure time*, an educative-experimental space where the minor's capacity for autonomy and self-realisation are played out; peer group, considered, from a pedagogical and educational point of view, a resource and a risk for the development of the minor; *Associations and voluntary services*, considered as an alternative proposal to the needs of self-realisation, responsibility, identification and socialisation of the minor. The influences to which the minor is subject, therefore, have to be stringently respected, so that the minor's conduct is carefully observed, so that they comprehend the importance of the probation. Judges can also order special *prescriptions* relative to study activities, jobs, work experience, vocational training or other activities useful for the minor's growth. The Judge can also impose particular obligations of a positive nature such as voluntary social service, environmental protection or sports activities, always considering the specific qualities of minors in order to prevent them from being reduced to simple instruments of social and penal control. Negative prescriptions exist as well: timetables, prohibition to attend places and/or have contacts with specific people. In the case of serious and repeated violations of the prescription the Judge can arrange for the measure of home confinement.

To understand the cost structure of the Italian Juvenile Justice System (IJJS) we summarise here the main features of the operational and organisational architecture of

the services for the minors in conflict with the law. When a child is arrested, he/she enters the penal structure formed by the First Reception Shelters (Centri di Prima Accoglienza-CPA), the Juvenile Social Service Offices (Ufficio di Servizio Sociale per i Minorenni-USSM), the Juvenile Penal Institute (Istituto Penale per i Minorenni-IPM) and the Community regulated by the instituting legislative decree on the 28th of July 1989, No. 272 (Bargagli, Colombo and Savona 2003).

All services offered by the juvenile justice system are coordinated by the Department for Youth Justice that is one of the four departments of the Justice Ministry. The Department is organised into 12 territorial centers (Bari, Bologna, Cagliari, Catanzaro, Firenze, L'Aquila, Milano, Napoli, Palermo, Roma, Torino, Venezia), 27 First Reception Shelters, 19 Juvenile Penal Institutes, 29 Juvenile Social Service Offices located in the Court of Appeal districts, 11 Ministerial Communities and a range of privately owned social organisations that collaborate with the different territorial Center of Juvenile Justice (CGM).

#### First Reception Shelter (CPA)

The CPA is the service in charge of hosting minors that have been arrested or taken into custody offering hospitality until the validation hearing from the pretrial investigation judge (GIP), that must take place within 96 hours from arrest. The CPA, while ensuring the custody of the child, is not characterized as a service detention. Not all young offenders under custody pass through the CPA. Offenders who are convicted with or without pretrial are traditionally received in CPAs.

### Juvenile Social Service Offices (USSM)

These structures have been initially established in 1934 by Royal Decree (R.D.) No. 1404 with the mission of rehabilitating minors with an antisocial behavior, curing and preventing juvenile delinquency. The Legislative Decree 1985 of 1962 institutes that the Social Service Offices be located in each Court of Appeal district and assign them also the task of undertaking studies and sociological surveys pertaining the prevention of juvenile delinquency. In the 1988 reform (D.P.R. 448/1988) of the code of criminal procedure, the office duties are further qualified to include formal collaboration with the social and health services of municipalities and provinces in order to jointly implement rehabilitation programs that effectively account for the personality traits of young offenders and the specific circumstances of their family and community background. Officers are also expected to report to the Judicial Authority about personal conditions and circumstances, to propose a tailored intervention plan for the assumption of responsibility of the young offender and reintegration, to assist them during the criminal proceedings and to verify the outcomes of the intervention plan until the young person in conflict with the law becomes 21 years old.

### Juvenile Penal Institutes (IPM)

The IPM implements the measures involving liberty deprivation ordered by the judge in the form of arrest warrants or orders of execution of sentence in respect of the condition of children. Those who enter IPM are between 14 and 21 years old. The specificity of each treatment can be traced to the need for protection of the personality of the child, as guaranteed by the Italian Constitution inspiring our juvenile justice system. The IPM executes the more afflictive criminal measures and implements rehabilitation plans in respect of the rights of the child in custody. The 19 Italian Penal Institutions receive an average of 500 children per year. This figure was fairly stable in the decade 2001-2012 (Source: Department of Juvenile Justice).

### Community Service

Communities are structures organised around a family model that host minors under community custody as established in the art.22 DPR n.448/88. These structures also organise educational and work activities to facilitate the social re-inclusion of the young offender, in line with the institutional mandate aimed at social reintegration of the child. The Italian context offers 11 Ministerial Communities and a wide range of affiliated privately owned social organisations. The majority of children in conflict with the law is entrusted to Juvenile Social Service Offices and submitted to alternative measures. Detention, indeed, is seen as last resort and emphasise is placed on alternative pathways while at the same time maintaining a criminal character. In previous years, the use of placement in a community has increased a lot both as a custodial measure and as a judicial measure due to its ability to match educative and control needs. Children entrusted to Juvenile Justice Services are mainly males; girls are in fact principally foreigners and come from Ex-Yugoslavia and Romania. The presence of foreign children is particularly prominent within the residential services, with children from Morocco, Romania, Albania and Ex-Yugoslavia as well as other nationalities not relevant at a statistical level but nevertheless contributing to create a multiethnic context. As for the type of offence committed, Juvenile delinquency is characterized by the prevalence of crimes against property (around 46%), more specifically thefts and robbery. Crimes related to violation of drug provisions are also frequent (around 10%) while in terms of against the person, the most common voluntary personal injury(around 25%). With regards probation, it is being increasingly implemented. In 2012 n.3.368 subjects were submitted to probation, in the 80% of cases this had a positive result.

Tab. 1 - Minors entrusted to Social Service Offices. Years 2007-2013 per sex and nationality

	2007	2008	2009	2010	2011	2012	2013
<b>ITALIANS</b>							
M	10.689	13.015	14.023	14.335	15.260	14.885	14.800
F	1.083	1.382	1.457	1.337	1.624	1.745	1.752
MF	11.772	14.397	15.480	15.672	16.884	16.630	16.552
<b>FOREIGNERS</b>							
M	2.516	2.944	2.981	2.387	2.870	3.322	3.599
F	456	473	424	304	403	455	534
MF	2.972	3.417	3.405	2.691	3.273	3.777	4.133
<b>TOTAL</b>							
M	13.205	15.959	17.004	16.722	18.130	18.207	18.399
F	1.539	1.855	1.881	1.641	2.027	2.200	2.286
MF	14.744	17.814	18.885	18.363	20.157	20.407	20.685

Data related to the year 2013 report the informatic system context related to Juvenile Services (SISM) updated at 16th May.

Tab. 2 - Placement in Community. Years 2006-2013 per sex and nationality

	2006	2007	2008	2009	2010	2011	2012	2013
<b>ITALIANS</b>								
M	924	1.056	1.130	1.160	1.189	1.222	1.225	1.119
F	44	46	65	52	59	75	60	70
MF	968	1.102	1.195	1.212	1.248	1.297	1.285	1.189
<b>FOREIGNERS</b>								
M	681	667	651	542	490	540	631	594
F	123	127	119	71	83	89	122	111
MF	804	794	770	613	573	629	753	705
<b>TOTAL</b>								
M	1.605	1.723	1.781	1.702	1.679	1.762	1.856	1.713
F	167	173	184	123	142	164	182	181
MF	1.772	1.896	1.965	1.825	1.821	1.926	2.038	1.894

Available data about the daily average presence in community furthermore highlights an even wider use of placement in community as alternative measure to detention in Italy. The quantitative research on the average presence from 2006 to 2013 passed from 463 to 925. The trend shows hence a strong increasing of this measure both for Italians and foreigners proof that such instrument has been considered ongoing as highly educative and re-including in the full respect of the principles of minor offensiveness and de-stigmatization.



Tab. 3 - Minors entrusted to Social Service Offices submitted to alternative measures. Years 2010-2013 per sex and nationality

	2010	2011	2012	2013*
<b>ITALIANS</b>				
M	193	259	293	206
F	12	8	10	303
MF	205	267	303	211
<b>FOREIGNERS</b>				
M	78	88	85	49
F	17	23	20	15
MF	95	111	105	63
<b>TOTAL</b>	<b>300</b>	<b>378</b>	<b>408</b>	<b>274</b>

\* Data related to the 1st semester year 2013.

### 3. RESTORATIVE JUSTICE IN THE JUVENILE JUSTICE SYSTEM

#### 3.1. FEATURES

Restorative justice is nowadays one of the most important tools in managing justice. Let's have a look from a broader point of view at what's going on in the field of crime prevention.

Different policy models have in recent history competed within the juvenile justice system. These dominant juvenile justice models have tended to view the problem of youth crime and deviance through distinctive “policy lenses”. The most applied familiar juvenile justice policy perspective is the traditional mission of the juvenile court to act as substitute parent in the “best interests” of the delinquent and troublesome youth. This paradigm of intervention could be defined as interventionist. Following this tradition, those who view youth crime and problems of socialisation through the interventionist lens tend to assume that deviant and delinquent behavior are symptoms of underlying psychological disturbance or deficits (Platt, 1977). Accordingly, such a ‘clinical’ approach implies that these causes can be effectively diagnosed through clinical assessment, and then treated through various forms of therapeutic intervention. This treatment or clinical model of juvenile justice’s policy remains the dominant pattern of intervention. On the other hand, especially during the 1980s, advocates of a new “get tough” focus challenged what they saw as leniency. Problems of delinquency and deviance were just a consequence of general permissiveness and the absence of a sufficiently punitive response (Ciappi, 2007). This ‘crime control’ approach gained dominance in the 1990s especially in the US and UK. Crime control model refers to a theory of criminal justice which places emphasis

on reducing crime in society through increased police and prosecutorial powers. In contrast, the “due process model” focuses on individual liberties and rights and is concerned with limiting the powers of government. Crime control prioritises the power of the government to protect society, with less emphasis on individual liberties.

Nevertheless in the mid-1990’s emerged the ‘restorative justice’ paradigm, programs like victim offender mediation, as well as reparative sanction programs such as restitution and community service were piloted in juvenile justice systems. In many countries restorative principles became a more common feature of policy discussion and began to be applied not just in criminal justice jurisdictions but also in schools, the workplace and in neighborhood settings. Furthermore, during these years a new mentality began to take shape in many countries that looked into the effectiveness of criminal justice agencies: the ‘what work’ philosophy (Sherman, 2001). This approach looks at the effectiveness of criminal justice practices, trying to measure some indicators considered crucial in evaluating criminal justices effectiveness. This approach could be interpreted like a variation of the economic approach to law and crime. The economic analysis of criminal law became very popular only from 1968 with the important scientific contribution of Gary Becker on the importance of the economic evaluation in the field of crime and criminal justice. The theoretical framework was the Rational Choice model, where an individual’s decision to commit a crime is based on the subjective evaluation of costs and benefits. The theoretical assumption is that all potential criminals could benefit (financially, psychologically and so forth) of crime: criminals are rational, self-interested agents. In so doing a potential criminal faces costs from law-enforcement activities, i.e. the severity of the punishment and the probability of getting caught. The individual decision to commit crime is just a conditional evaluation of costs and benefits. Criminal justice policies should be addressed in reducing the benefits of crime, raising the probability of being caught, or increasing the costs of punishment. Furthermore Isaac Ehrlich (1973)

analysed the effects of income levels and distribution on crime considering also the effect of unemployment on crime rates. Important for Ehrlich (1973) was the level of education of the population in reducing the individual likelihood to commit crime. Both Becker (1968) and Ehrlich (1973) considered and evaluated the effects of general deterrence through policing and convictions, and of individual incapacitation on individual disposition to crime (Deterrence essentially aims at modifying the price of crime for all offenders while incapacitation acts through the removal of a subset of convicted offenders from the market for offenses either by relocating them in legitimate labor markets, or by excluding them from the social scene for prescribed periods of time).

Many studies try to evaluate also the effectiveness in terms of crime reduction or recidivism rates the effectiveness of alternative measures (probation, diversion and restorative measures). Great importance is given to the so called 'variables of stake in conformity' in influencing the individual likelihood to commit crime (Blumstein 1995). Traditionally international criminological literature (for all this indicators see Ciappi, 1997) indicates among the main variables are, school, social inclusion and work, non-conflictual family relationships (Sampson and Laub 1990), the social cost relating to committing an offense (Thoumi 1995), the degree of social capital (Glaeser). In contrast, the impact assessment of programs inspired by crime control or the pure deterrence model has shown that, if it is true that increased police attention or the increased use of detention may have the effect of reducing serious and predatory crime in the short term, they are nevertheless likely to increase criminality in the long run (Donohue 1998). Criminological research showed how selective incapacitation or prolonged detention for petty crimes produce the following counter effects: 1. reduce the chances of employment and therefore the social integration of youth at risk (Allan and Steffensmeier 1987).

## 3.2. IMPLEMENTATION OF RESTORATIVE PRACTICE

### 3.2.1. Victim Offender Mediation

Penal mediation can be defined as modality of management of conflicts connected to a crime; it forecasts the comparison between the victim and the offender, through the support of a mediator. It is therefore a connection between a relational process and an institutional pathway aiming to favour the acceptance of single responsibilities from the involved parties promoting, at the same time, the voluntary resolution of the conflict and stimulating the spirit of cooperation in the community. The aims of penal mediation are hence, as follows:

to promote a dialogical communication model involving directly all the actors of the criminal act. The fundamental objective of mediation is not in fact to assess the crime, but to analyse the concrete reasons for the committing of a crime and to find an adequate answer through the direct participation of involved parties for their mutual satisfaction;

to promote the expression of feelings and the exchange on the conflict's reasons;

to provide the information needed to arrive to a concrete solution, promoting if possible the compensation or reparation of damage or, in any case, the mutual satisfaction of parties;

to promote the expression of parties' points of view, states of mind, difficulties and needs linked to the criminal event and eventually to ask for the reparation of the sustained damage;

to promote the maturation of the youth and the comprehension of the consequences of the crime and, when possible, to repair the damage.

to provide to parties an adequate space and the time necessary to analyse the criminal event and its consequences, beyond the search for individual responsibilities.

Given this, it can be synthetically argued that the main aim of mediation is restitution to the involved parties by granting the power to negotiate the solution of the conflict and, consequently, to sensitise and make young offender aware through ad hoc tools and strategies. Another important aim is to give voice to the victim and manage the emotional and social consequences of the crime event.

Mediation, in fact, represents an “additional” possibility, it respects the traditional mechanisms of conflict resolution parallel to the ordinary judicial pathway. The heterogeneities of the recalled dispositions demonstrate once again the wide range of potential applications of mediation and its impact on the trial and its outcomes. Nevertheless, it arises from the trial; it is applied during the trial and has a direct impact on the judicial pathway’s exit.

Last but not the least, it is necessary to highlight how art. 9 D.P.R. 448/1988, states that the adoption of mediation is up to the judge and it can be applied at each stage of the penal pathway after opportune analysis of the child’s personality. When the case is sent to mediators, the judge remains involved in particular during the phase of assessment of the child’s personality. In fact, the Public Prosecutor and the Judge gather information on the individual, family and social situation of the minor in order to assess the level of responsibility (art. 9 D.P.R. 448/88, coma 2).

The need for greater regulation gave rise to ad hoc Guidelines drafted in 2008 by the Juvenile Justice Department. They intend to complement and amend the provisions contained in the Circular Letter of Service II - Studies, Legislation and Documentation dated 9 April 1996 (no. 40494) taking into account the already existing practices and the unquestionably fast evolution of mediation in our country at both the theoretical and practical level. Such guideline aims to systematise the practices related to mediation service and processes (i.e. documentation and co-ordination and management of the same). Specifically, they suggest that Mediation Services to equip themselves with an ad hoc assessment and follow up tool able to support the monitoring of the work done. Furthermore, they clarify the role and tasks of the Juvenile Justice Department, currently in charge of carrying out studies and monitoring. Among its tasks, the Juvenile Justice Department analyses the already existing practices in order to monitor their impact in terms of reduction of the recidivism rate. The aim is to make mediation a standard practice and not a pilot or experimental one and to guarantee adequate training standard for mediators.

The guidelines hence consider mediation as ‘an innovative method to handle conflicts’, they emphasise and clarify a significant issue related to juvenile criminal mediation - namely, the ‘educational’ value inherent in mediation, i.e. it is applicable on a voluntary basis whenever one of the involved parties is a child or young person, regardless of whether the conflict is related to the commission of an offence or has arisen in one of the many areas of social interaction (family, school, friends). This is an important item of clarification, whereby mediation is included among the educational opportunities available in the context of juvenile criminal justice. The feasibility of mediation is not linked to the seriousness of the specific offence and/or the extent of the damage caused to individuals and/or society. In fact, the key factor consists in the sustainability of the mediation process by involved parties i.e., in the extent to which they accept to participate and invest in the same. Therefore guidelines stress the need

to implement mediation within non-judicial settings. Specifically, a model envisaging a full-fledged Mediation Service covering several areas (family, school, neighbourhood, ethnic relationships, criminal matters, juvenile matters, etc.) is considered as particularly interesting. The underlying assumption is that mediation should be a widespread, non-sectorial practice that is not explicitly related to the criminal justice system; at the same time, a such position is related to the lack of a specific legislation and the resulting development of feasibility-oriented experiences. Considering the already implemented experiences in the field, the guidelines support the organisational mix that is currently a feature of mediation.

Accordingly, Mediation Services can be either public or private bodies working on the basis of ad-hoc agreements. Their staff may include - also on a part-time basis - staff from the Juvenile Welfare Office that will have to be adequately trained. The guidelines ratify the existing practices and outline the procedural steps in the mediation process i.e. start, preliminary phase, meeting, restorative measures, outcome. Waiting for ad-hoc legislation, the referral to mediation takes place mainly in the context of assessment of youth's personality (art. 9 of Presidential decree no. 448/1998). Accordingly, referral is permitted at any phase of the judicial proceeding. Referral to mediation may also take place within the framework of probation (art. 28 of Presidential decree no. 448/1998). Mediation should become one of the most significant measures in the intervention project developed by juvenile justice services in co-operation with local authorities' services. It should in fact represent 'the implementing arrangements aimed to remedy the consequences resulting from commission of the offence and foster reconciliation between youth and victim' (Art. 27(3) of Legislative decree no. 272/1989). Fundamental is the co-operation between juvenile judges and local authorities including law enforcement bodies - which are required "to attempt the amicable settlement of disputes" - with a view to implementing ad-hoc joint training.



The lack of specific legislation has not limited research about mediation's application, on the other hand, the flaws in its implementation at local level prevented it from having an impact on judicial culture at a national level as well as on social policies addressing juvenile deviance. As highlighted in the first part, the Restorative Justice approach proposes for the first time, a model of justice able to restore the centrality of the relational dimension and to promote solutions addressing the victims' needs ensuring, through the direct involvement of the community, the restoration of social ties. The evolution of the restorative paradigm was nourished by movements promoting the return to models of "community justice".

It is, therefore, necessary to evoke the concept of community, considering different perspectives:

- a. as victim, focusing on the legal interests protected by the criminal standard and the suffered damages;
- b. as beneficiary of the reparation process aiming to strengthen the sense of collective security;
- c. as social actor of the reparation pathway.

Restorative justice and community seem hence to be inextricably linked. Such a connection leads to the issue of the definition of the concept of "community", It tends, in fact, to be seen as an abstraction, a theoretical entity. Restorative Justice, according to this perspective, has hence the task to strengthen the social field and to foster a greater sense of "community". Restorative Justice, serving as a possible alternative to traditional responses to the offence, has given origin to many different practices in the field of Victim Offender Mediation (VOM). This operational model, has allowed the

identification and the highlighting of its intrinsic potentialities, conferring dignity and legal justification to Restorative Justice. The relevance of restorative approaches is also recognised by international and European legislation.

Having considered the general framework, in the next paragraph we will focus on the Italian context i.e. we are going to see whether and how the Restorative Justice has found legitimacy in Italy.

The Restorative Justice seeks to go beyond the traditional approach where involved parties, in particular the victim, have a marginal role within the criminal process.

According to this VOM, indeed, the victim is considered the key actor of the process and he/she is involved at all stages of the criminal proceedings. The key point is the promotion of the empowerment of the offender, otherwise devoid of real opportunities to become aware of the consequences that his/her actions produced. Such purpose, crucial as well in terms of reduction of recidivism, gives further visibility to the social dimension of the crime, without which the punishment is nothing but a mere affliction producing often counterproductive outcomes.

We must highlight that Italy displays an evident lack of restorative justice programs, both from a quantitative point of view and as regards its implementation. The use of VOM is hence still insufficient, the same access to the different programs is influenced by the territories and by the technical choices/methodological approaches. In particular, with regards to specific programs for the victims, the cultural delay impacts on the current cut on the investments in the justice and social field (Mastropasqua, 2013).

The issue is hence fundamental as it is born on the shortcomings of the other classic criminal justice models, i.e. the *retributive* and the *rehabilitative* ones. These models

have demonstrated firstly their inability carry out an action of containment and social control, and secondarily in offering useful tools targeted at the prediction of social danger, and the reducing of re-offending. In Italy, despite a legal system is often opposed to restorative approaches, new initiatives trying to regulate the most significant experiences of mediation practices experienced abroad have been planned (Ciappi S., 2008).

Finally, in the presentation of the 1st National Report on juvenile criminal mediation the Head of the Department of Juvenile Justice, Caterina Chinnici emphasises how in our country, even in a situation of legal vacuum, penal mediation is becoming integrated into the field of Juvenile Justice, developing even more systematic exchanges between lawyers and third sector (Chinnici, 2013).

### **3.2.2 - Restorative justice in pre-trial proceedings**

Traditionally two kind of mediation are distinguished: that “trial-like” and that “like-like”, it depends if it is a constituent part or not of the process phase. In the absence of explicit normative recognition, we could conclude that, within the Italian framework, we can talk only about “like mediation” given the difficulties in harmonising the articles (of the Italian Constitution) related to the exercise of the criminal action recalling a system based on the principles of legality, the obligatory nature and certainty of legal punishment (art. 24, 25, 111 and 112 Const.). In this context, mediation represents an “accessory” possibility, in respect of the other traditional tools of conflict resolution parallel to the judicial pathway (the normative provisions of reference are art. 9, 27, 28, 30, 32 D.P.R. 448/1988). The diversity and heterogeneities of the recalled provisions demonstrate the different fields of application of mediation, the possible premises for its start, the impact of its outcomes. Nevertheless, we cannot simply speak about “mediation”, as it is both developed from and applied during the judicial process.

### **3.2.3. The mediation in the phase of preliminary surveying and the involvement of the victim**

The first “stratagem” adopted by the Italian system in order to apply mediation during the phase of preliminary hearing, is to activate the same within art. 9 i.e. “assessments on the personality of the minor”. Such a solution has been developed to harmonise the need for guarantees by the public prosecution, the need for rights’ protection of the person being investigated and, last but not the least, mediation mechanisms, especially in case of like mediation, where the eventual resolution of the conflict does not have an immediate impact on the trial-sentence. The meeting between offender and victim can however happen, voluntary and confidentially, from the very first phase of the investigation, since art. 9 D.P.R. 448/1988<sup>7</sup> confers to the G.i.p and the P.M the power to acquire key elements and information about the minor through the consultation “of experts, without formality”. It also allows the Judicial Authority to address to specialised operators the opportunity to try to develop a concrete attempt at mediation. If such a procedure is carried out, the Public Prosecution or the judge obtains further elements about the child’s personality allowing a final decision to be made. In fact, the outcome of the mediation test cannot inhibit the freedom of initiative of the P.M., with whom the power to make the final decision resides. In the absence of an explicit normative provision linking the specific trial-like effects to the attempt at mediation, conciliation or repair, based on the principle of the obligatory nature of the criminal procedure (art. 112 Cost.), the P.M cannot decide to refuse to proceed with the penal process in case of concrete elements. The judge does not have the ad hoc tools to dismiss the case based on the outcomes of mediation, but he/she is able

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<sup>7</sup> Art. 9 (Minor personality assessment) 1. Prosecutor and judge acquire information about minor personal familiar and social condition in order to value responsibility and its level, the importance of event and adopt adequate penal and civil measures. 2 Prosecutor and judge can acquire information also from person close with minor and to expert without formality.

however to adopt provisions considering mediation results. Multiple are however the advantages of the mediation during the first part of the judicial process. In the first instance, the child benefits from the opportunity for immediate reconciliation, in fact, the analysis of the crime in the short term has a different emotional impact compared to intervention carried out a long time after the crime was committed.

Secondly, always taking into account the educational needs of the child, it is easy to imagine that the application of mediation operated during the pre-trial-stage allows the Judicial Authority to take advantage of the multiple tools forecast by the Juvenile Judicial process, avoiding the associated negative effects. It is of note that the adoption of mediation techniques in a legal centre leads to a more effective and punctual cognitive analysis of the personality of the minor.

The assessment of responsibility could prove inaccurate if carried out many months after the crime, especially if, in the meantime, the child has begun to experience the implementation of criminal action. Furthermore, results will be uncertain and approximated. Moreover, considering the position of the victim, mediation can provide a response to the sense of frustration accompanying the slowness of the judicial action. The victim's participation must be secured soon after the crime, however at the same time the reaction must not be too swift as this could give the impression that the use of mediation is due to mere contingent requirements (ie. the necessity to decrease judicial workload or to draft a prompt plan for child's rehabilitation), without considering the real needs of the victim<sup>8</sup>. On the contrary, the application of mediation

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<sup>8</sup> To activate mediation as soon as the event happen in praxis has been promoted the possibility for prosecutor to meet parts involved before preliminary enquiry (art 564 i.e.). This article has been cancelled by reform (law 16 December 1999 n. 479) and replaced by art. 555 c.p.p. That makes obligatory conciliation attempt and modify the official actor that now is preceding judge. After the unique judge reform conciliation attempt are not operated during preliminary enquiry but during process. Mediation therefore loses possibility to be a valid alternative to trial. The Article 555 establish that it can't be used to close in advance the judicial iter. However the article 564 didn't furnished positive results as mediation was operated too early respect judicial iter, this problem could be solved having a unique judge during all the judicial iter.

a long time after the date of the crime may make the victim feel that the case was not given adequate interest by the justice system and represent an obstacle to the reparation of the damage. The practical feasibility of the plan is hence required as well as the promotion of the victim's motivation to be actively involved in the process of reparation of the conflict produced by the crime. As already stressed, the dispute could be defined through the involvement of an independent extra judicial board. To be highlighted as well that that the application of mediation during the preliminary hearing appears more apt, also in the case of an exchange among involved parties, always taking into account the need to guarantee and protect the minor's rights.

A tacit assumption of responsibility by the minor would be required before the exchange between victim and offender, however this does not request the draft of specific declarations and the maximum confidentiality must be guaranteed as forecast by the nature of mediation. Mediators must be neutral and avoid any kind of judgment or comment transmitting the declarations given by the parties (youth offender and victim) to the Judicial Authority without giving their opinion.

The international standard, aiming to avoid negative impacts on the right of defence of the youth in conflict with the law, provide for clear indications in this sense. With this aim in mind, they invited the various States Members to guarantee professional secrecy on the information gathered during such extra judicial meetings. Hence, the recognition of guilt has circumscribed importance with regards to the related sentence and the opportunity to apply or lessen the mediation. The Italian framework in terms of juvenile mediation has characteristics typical of the early stages of experimentation. This can be linked perhaps to the lack of a social-judicial culture on one hand, and the enduring widespread opinion of punishment, and consequently an effective retributive system, as the guarantor of social defense. This of course makes it difficult to redefine the relation between victim and offender. On the other hand, mediation (VOM) as the

meeting point between parties has been and continues to be the most implemented practice within the current juvenile justice context given the lack, as previously mentioned, of a specific regulatory framework (Mastropasqua, 2013).<sup>9</sup>

In practice, in fact, the only adopted model is the victim–offender model, more specifically the humanistic approach of Jacqueline Morineau. Such an approach aims to reestablish communication and overcome the separation between the parties. In accordance with Morineau’s model, even if mediation can lead to a reconciliation between perpetrator and victim, and eventually to the reparation of damage, the reparative agreement is not the primary aim of mediation, but one of its possible (but not necessary) outcomes.

Although the Italian juvenile justice system neither contains specific offenses or penalties for minors, who are subject to the same sentences as adults (even if the sentence, if imposed, will be proportionately reduced), this peculiar logic has led the juvenile justice system to take on an independent physiognomy compared to the traditional one.

The Italian Juvenile Justice System is hence characterised by the simultaneous presence of two procedural stages: the first one related to sanctions, quite similar to that of ordinary justice, the second more constructive and focused on the child in conflict with the law aiming to work towards, with the support of social services, the rehabilitation and social re-inclusion of the same.

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<sup>9</sup> Isabella Mastropasqua, “Oltre la Mediazione penale minorile in Italia: riflessioni e prospettive” in 1° Rapporto Nazionale sulla mediazione penale minorile in: I Numeri Pensati – Quaderni dell’Osservatorio sulla devianza minorile in Europa, Dipartimento per la Giustizia Minorile Centro Europeo di Studi di Nisida, pg .33.

As part of this second phase some possible spaces for mediation were identified with a specific focus on the victim. Awareness about the considerable educational impact that a meeting with the victim could have on the juvenile offender, and consequently the psychological affect on the development of the child-offender are the main reasons of the transfer of this practice in this context, in which the educational needs and the re-socialization process play a key role.

In Italy, the legal framework within which the Institute of Juvenile Mediation is placed, concerns the DPR of 22 September 1988, n. 448. The Presidential Decree 448/88 explicitly introduces restorative justice within art. 28, which governs the institution of probation. Here, in fact, the legislature states:

*"With the suspension order the judge entrusts the minor to the juvenile services of the administration of justice to carry out, in collaboration with local services, the appropriate observation activities, treatment and support. In the same resolution, the court may issue prescriptions to repair the consequences of the crime and to promote the reconciliation of the child with the victim of the crime. "(Art. 28, paragraph 2 of Presidential Decree 448/88).*

It is worth noting, however, that such restorative measures are not considered as the main instrument, but simply as one of the possible prescriptions regarding the probation, thus relegating them to a marginalised position, even compared to the procedural consequences. As well as the aforementioned DPR, further regulatory provisions are also made in art. 9:

*The prosecutor and the judge acquire useful elements on the conditions and the individual, family and social/environmental resources of the child for the purpose of determining the imputability and the degree of responsibility to*



*evaluate the social significance of the fact and adopt the appropriate criminal measures and the eventual needed civil measures. Art. 9 (Personality assessment - DPR 448/88).*

This article gives the power to acquire facts and information relating to the child through the consultation "of experts, ... without any formality" to the judge for the preliminary investigation and the prosecutor. This allows the court to consult specialised professionals to assess the opportunity to make use of mediation. Mediation activities are hence mainly used within art. 9. The 1st National Report on juvenile criminal mediation states that in Italy there are currently 20 centers for juvenile criminal mediation, arising from ad hoc institutional agreements between local authorities, juvenile justice services, the judiciary and the voluntary sector, with differing levels of experience.

To conclude, it is necessary to emphasise that art. 9 D.P.R. 448/1988, can be applied at all stages of the penal procedure when an assessment of the child's personality is required. As for the division of competences, a marginal space of participation also for the G.I.P has been forecast during the phase of the Preliminary Hearing.

### **3.3. STATISTICS**

In this paragraph we will introduce some data regarding the effectiveness of restorative justice practices in Italy. It must be indicated that the main application of such an instrument is within the juvenile criminal system. In Italy, there are approximately 1,200 juveniles on pre-trial probation each year (Nelken 2006). At the trial stage, judicial options are more restricted, however, if a judge finds a minor guilty, he/she has the discretion to suspend or reduce the sentence and order community supervision, probation, or a semi-custodial sentence. Only 20% of youths in conflict

with the law are convicted and placed in Juvenile Penal Institution (McAuley 2010), however, suspended or reduced sentences often require that a family or community takes charge of the minor, hence, this option is less accessible to foreign minors and those involved in mafia networks, as they typically do not have a social network (families or communities) able to support them (Meringolo 2012). Communities taking charge of these youths must be certified and provide education and rehabilitation services (Peirce, 2015; Istituto Don Calabria 2013).

Italian youth courts have reduced prison sentences despite the fact that the arrest rate for minors ages 14-17 has increased (from about 1400 to 1828 per 100,000 youth (Padovani and Brutto 2008)). In general, only youths committing serious crimes are sent to juvenile detention centers (Istituto Penale Minorile or IPM (Nelken 2006; Istituto Don Calabria 2013)). There are 16 Juvenile Penal Institution in Italy, with almost 1,400 employees (Meringolo 2012). The first reception centers (CPA), indeed, are specific facilities where youth offenders are kept for short periods after arrest or during pretrial stages, and provide some basic social and psychological services (Peirce, 2015; Istituto Don Calabria 2013).

In 1988, there were approximately 7,500 juveniles in prison facilities (IPMs) throughout the year. Two years later, there were less than 1,000 juveniles in these facilities. The number of imprisoned youth increased to about 2,000 the following year, and remained stable through the 1990s, dropping to 1,200 in 2009 (Meringolo 2012), and to 992 in 2014 (Ministry of Justice 2015). Despite the high number of youths entering prison each year, the daily average rate of youth convicted in juvenile penal institutions is much lower: approximately 452 in 2013, 184 of whom are foreign minors (Istituto Don Calabria 2013). At least half of these youth are aged between 18-21 years old, as those sentenced to detention before 18 years of age can remain in the juvenile justice system until they turn 25, in line with international recommendations about the maturation processes of young adults.

Throughout the 1990s, judges sentenced between 300 and 500 youths to prison sentences each year. Since 2001, courts have sent less than 200 youths to prison annually (McAuley 2010). The total number of minors in the care of Social Services has increased from 14,744 in 2007 to 20,222 in 2014 (Ministry of Justice 2015), with a significant increase of foreign minors. The rate of youths placed in communities has increased steadily since 2006 (1,716 youths in 2014, Ministry of Justice, 2015) as well as the use of alternative measures (n.408 in 2013, Istituto Don Calabria 2013).

The decrease of youth prison sentences suggests that the Procedural Reform Act has been achieving its primary goal. Youth courts make use of alternative sanctions to divert delinquents from legal proceedings, prescribing them to participate in tailored educational programs supported by the competent social services to offer rehabilitation and social re-inclusion. Community placements are also much less costly than detention: 111 euros per day, compared to 424 euros for a detention facility (Istituto Don Calabria 2013). Furthermore, in partnership with non-governmental organizations, the Italian government has piloted and expanded victim-offender mediation and restorative justice programs focused on juveniles in conflict with the law (Ciappi, Padovani and Brutto 2008).

There have not been any formal evaluations of these programs in terms of recidivism or other social outcomes yet, but anecdotal evidence is positive and communities are requesting such services with much greater frequency. It took more than a decade to establish alternative and rehabilitative sanctions in Italy, but the country has now one of the lowest youth detention rates.

Nevertheless, there are growing concerns about the disproportionate involvement of foreign and Roma youth in the Italian juvenile justice system. The foreign minors involved in the juvenile justice system are primarily migrants from Eastern Europe and

North Africa, many of whom arrive in Italy unaccompanied and with few resources (Meringolo 2012). Of the total juveniles charged from 2000-2003, a higher proportion of foreign and Roma youth ended up with a sentence or detention. More than 40 % of youth in the IPMs are foreigners or Roma (and this proportion reaches 70% in Northern Italy), even though only about 25% of youth charged with a crime and 20% of all youth under the juvenile justice system's supervision in Italy are foreigners (Meringolo 2012; Ministry of Justice 2015).

This imbalance is more striking considering the fact that foreign and Roma youth are primarily charged with property crimes, while Italian-born youth form the majority of those charged with violent and crimes against the person. In the South of Italy, many Italian-born minors are also charged for involvement in organized crime (Meringolo 2012). A larger proportion of the foreign and Roma minors in detention are girls, compared to Italian minors – 38 % compared to 5 % (Padovani and Brutto 2008). Critics contend that minors with few economic resources and little access to social networks in Italy are less able to access the range of alternative and educational services that are, in principle, available to them in the juvenile justice system (Ciappi, Padovani and Brutto 2008; Istituto Don Calabria 2013, Peirce, 2015).

#### 4. THE VICTIM IN RESTORATIVE JUSTICE PRACTICES

Reparation and mediation in Italy is currently limited to the juvenile justice system. The introduction of Restorative Justice (RJ) practices even before the birth of formal VOM services in 1995 demonstrates the attention paid to alternative procedures inspired by RJ in the Italian juvenile justice context (Ciappi, Padovani e Brutto, 2010).

Such attention ultimately led to the establishment of VOM (Victim Offender Mediation) groups promoted by juvenile prosecutors and judges, and supported by social workers and/or judges, some of whom were directly involved in mediation. It was in fact a small group of juvenile magistrates of Turin (an important city in the North West of the country) that promoted VOM in Italy. Accordingly, it is unsurprising that the first Italian VOM service was founded in Turin in the following year, 1995, located in the juvenile prosecution office. Subsequently, VOM was gradually adopted elsewhere: in 1996 VOM services were created in Trento, Catanzaro, Bari and Rome, in 1998 in Milan, in 1999 in Sassari, in 2000 in Cagliari and Foggia. The institute of probation differs substantially from similar institutes in other countries because instead of being a real sentence, it results in the suspension of the trial. During the time of suspension, the juvenile may participate in programs or projects aimed at rehabilitating him or her and/or guaranteeing a positive outcome of the sentence. The judge (frequently the judge of the preliminary hearing) may in fact refer the case to the social service and/or to the VOM service with the aims of “conciliation”, “reparation” or “mediation”. At the time of the sentence, if the outcome of the mediation is positive, the judge may bring the judicial process to a close with the exit of the youth from the juvenile justice system. It may be added that until 1993, VOM lacked a real structure and any form of organisation. Social workers were the only professionals implementing mediation, but they were not sufficiently skilled to do so, little attention was given to the victims’

interests and needs, and in most cases the focus was on young offenders. A minority of these cases (40.5%) directly involved Victim Offender Mediation but for the majority of cases (59.5%), mediation did not involve a direct meeting between the parties, probably because social workers acting as mediators preferred to ask the offender to write a letter of apology to the victim. Thus RJ practices arose spontaneously in Italy in the 90s even before the formal establishment of VOM services. This is confirmed also by the results of a longitudinal analysis on the application of probation in the period 1991-96 that we carried out in Bari, an important coastal city in the South-East (Meringolo, 2012). This research showed that probation was applied mainly with reference to the RJ model. In fact, RJ strategies were part of probation projects for the large majority (81.1%) of the sample (190 probation cases). Mainly restorative prescriptions entailed the reparation of the damages caused by the crime (either materially or symbolically) and/or the reconciliation with the victim.

Another form of reparation is represented by *community service*.

Crimes committed by minors, in so far as the behaviour harms the rights of others, shifts evaluation and decisions regarding behaviour from the “private” sphere to the “public” one. In this way, infractions of the “social uses and laws” take on “public visibility” gives rise to a conflict which involves the entire community. The most recent studies on the topic of justice refer to the development of open forms of reconstructing the conflict, considering offenders as capable of carrying out community service with both concrete and symbolic value. In essence, this means that employability should be considered one of the most powerful developmental instruments in social responsibility in relation to Judicial Policies and Treatment of deviant minors. The youth has in this way the opportunity to demonstrate his/her abilities and play an active role in terms of direct citizenship, responsibility and solidarity. The aim of community service is to support the youth in reflecting on and

possibly repair the committed offence doing something useful for society. This gives him/her as well the opportunity to test himself/herself and his/her skills and abilities within a safe and controlled environment facilitating his/her social-working re-inclusion and promoting the direct participation of civil society, the identification of requests/offers and the assessment of minors' skills/capacities.

Specific community service actions are:

the assessment of skills and abilities of young people (the main protagonists in the process of re-building their own lives) by putting their skills to the test in regards to restorative actions;

the promotion and organisation of useful activities in Public Organizations and Social Private Associations.

Penal mediation can be defined as a method for the managing of conflicts connected to a crime. It seeks to promote contact between the victim and the offender, through the support of a mediator. It represents therefore, a connection between a relational process and an institutional process, trying to promote the acceptance of the single responsibilities by involved parties while at the same time seeking to favour the voluntary resolution of the conflict, stimulating the spirit of cooperation within the community. The aims of penal mediation are, in more concrete terms, to promote a dialogical model of criminal law, directly involving all the protagonists of the crime. The fundamental objective of mediation is not in fact to assess the crime, but to analyse and to comprise the concrete reasons of the crime and find an adequate answer in order to elaborate with the parties ad hoc solutions for their mutual satisfaction. It allows the expression of feelings and the comparison on the motivations of the conflict; it supplies the information necessary to arrive at a concrete

solution, promoting if possible the compensation or the reparation of the damage or mutual satisfaction through reconciliation. Mediation also allows the victim to express their own points of view, states of mind, difficulties and necessities, and eventually ask for the repair of the damage caused. In this way, it allows the youth in conflict with the law to mature and understand the consequences of the act and the sense of their own responsibility and also, if and when possible, to repair the damage. Both parties need therefore the adequate space and time to manage the consequences of the crime, beyond the search for responsibility of the involved person. Accordingly, it can be deduced that the aims of mediation are the following: 1. the restitution to the parties of the power to negotiate the solution of the conflict; 2. to predispose ad hoc rehabilitation tools; 3. to assess the role of the victim; 4. to manage the emotional and social consequences of the crime repairing these if and when possible.

Recently in Italy some important steps have been taken to protect victims' rights and promote their active participation. This is particularly true with regards to so called 'special groups' of victims being – almost formally – entitled to benefit from a sort of special legislation for crimes of great social concern: i.e. victims of domestic violence, sexual assault, terrorism, mafia and organized crime, exploitation and racketeering. In some cases procedures guaranteeing victims' participation in criminal proceedings have been reinforced, and sometimes partially extended. However, there are situations in which the position of victims is still quite different. As for their role inside the juvenile justice system, a very "special procedure" is detailed in DPR n. 448 enforced in 1988, where some ambiguities in the implementation of victims' fundamental rights clearly emerge. There is no distinction made victims that are adults or children like the minor.

But anyway in many cases victims remain nevertheless invisible. There are some legal provisions that encourage victims' participation. In this respect, it is important to



remember that DPR n. 448/1988 introduced in Italy through articles 28 and 29 the “*messa alla prova*”, a measure very similar to probation. Moreover, article 27 introduced the “*irrilevanza del fatto*”, implying the possibility to stop the proceeding every time the crime is considered by the judge (in accordance with the prosecutor) first as mild and, secondarily, as result of an occasional conduct. In any case, the Court shall consider pedagogic interest so that victims are frequently asked to cooperate and in doing so help contribute to the aim of juvenile well-being and socialisation. Of course, such principles are addressed to youths in conflict with the law, not to victims. In fact, according to the Juvenile Criminal Code priority shall be given to support and protect juvenile offenders during all the stages in the penal process, in order to prevent, reduce and limit every eventual stigmatisation resulting in the contact with the criminal justice (and judiciary) system. It is well known that minors’ personality development is easily influenced by external opinions. Negative labels such as “delinquent”, “sex offender”, “inmate” have extremely dangerous consequences on self image, self esteem and on future social conducts. In this regard it is necessary to prevent youth offenders identifying with negative labels.

The aim of the judiciary system is also, indirectly, to prevent minors from becoming targets of social exclusion and being blamed and stigmatized, as this social dynamic can negatively influence their growth, their personal and social identity, present relationships and future relations (Ciappi, 2007). Minors’ education and socialization are thus considered of great importance, it is also the case that victims have their own interests, which often differ from the above. For this reason they are often aware of a clear limitation to their participation in criminal proceedings, it is no exaggeration to state that they frequently become invisible to the legal system.

The Italian Juvenile Criminal Code ensures the protection and safeguard to youths in conflict with the law in the penal process through peculiar legal guarantees: 1) the

right to be processed and judged before special courts, by specialised judges and prosecutors, where “specialised” means specially qualified and trained to work inside the juvenile (criminal and civil) justice system; 2) the right to a trial; 3) the right to a special hearing; 4) the right to privacy; 5) the right to be psychologically and emotionally supported by relatives (or the holder of parental authority), experts in pedagogic disciplines during whole criminal proceeding (14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding which shall allow the juvenile to participate therein and to express herself or himself freely” – see again ‘The Beijing Rules’).

Things are definitely different for victims, especially for underage victims.

An attempt to explain such a paradox can be found by looking at the legal definition of “victims”, considered as the direct witnesses of the crime. If the offence is seen primarily as a violation against the state and only marginally against individual human rights, it is easier to understand why there are so few provisions on supporting and protecting victims inside criminal proceedings. According to the law (see art. 31 DPR 448/88, and art. 90 of the Italian Procedural Penal Code), victims are allowed to present written memories and indicate probationary elements. They also shall receive formal communication of the primary judicial hearing. There is not a lot more that one can do – irrespective of whether one is being legally assisted (or not) by a lawyer. On the contrary, it is rather interesting to note that victims are not allowed to enter into a civil lawsuit - while it is allowed for adults on trial – which can be considered as contrary to the pedagogic principles inspiring the juvenile criminal justice system (art. 10 DPR 448/1988).

Hence, even if the victim and the offender are both minors, their situation before the law is completely different. According to the Chart of Noto, the positive concerning

young victims of sexual abuse, rape and exploitation, is the implementation of particular legal measures to protect and safeguard more vulnerable victims. For example, vulnerable victims have the right to have protected hearings before the judge and to be supported by experts in pedagogic and psychological matters as clearly required by law. Again, when possible, participation of victims' relatives is considered of great importance in order to assure emotional support (art. 392 co. 1-bis CPP; art. 398, co. 5-bis CPP; art. 190-bis CPP; art. 498 CPP<sup>11</sup>). However, it must be noted that the "special attention" required by law can sometime produce unexpected consequences, largely due to the fact that the theory does not always correspond to the practice. The collection of evidence before a criminal trial occurs only if previously required i.e. by prosecutor or by victims (or, again, their lawyers), but experience demonstrates that such a legal instrument is frequently not implemented.

In conclusion, with regards the position of victims in restorative justice procedures, we can conclude that normally the participation of victims is high. Thus far we do not have experience of enlarged restorative justice procedures like family conferencing or peace-making circle, aimed at broadening the concept of victim to relatives and friends.

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## CHAPTER III:

### ANALYSIS OF PRACTICES ON SUPPORTING VICTIMS WITHIN THE JUVENILE JUSTICE SYSTEMS

## INDEX

METHODOLOGY OF GOOD PRACTICE

PRACTICES



## METHODOLOGY OF GOOD PRACTICE

For the analysis of the different restorative practices that are carried out within the juvenile justice systems of the participating countries of this project, the following methodological criteria were examined:

**Participation:** giving the opportunity to different partners involved in the project to be an active part in developing the followed methodology for the analysis of practices, and creating a forum for discussion and the exchange of knowledge.

**Cooperation:** involving different external agents in the project (public administrations, restorative justice services, etc.).

**Evaluation:** setting clear criteria regarding what is considered a good practice within the actions carried out in the systems of restorative justice in the youth field.

Thus, taking into account the above methodological criteria, the following procedure was followed:

### Definition of "good practice"

In accordance with the provisions of the current project, for the definition of "good practice" in restorative justice services within the juvenile justice systems in each country, we rely on Article 12 of the EU Directive 2012/29 of the European Parliament and of the Council of 25 October 2012 which establish minimum standards on the rights, support and protection of victims of crime. Thus, it would be considered good practices to those that meet all the stated conditions in said Article.

## METHODOLOGY

### Creation of analysis sheet

Once an agreement has been reached with the project's partners as to the definition of "good practice", an analysis sheet and evaluation of restorative practices were developed jointly.

### Location of restorative justice services within the different juvenile justice systems

Firstly a review was developed at a national level about commissioned agencies that build restorative practices within juvenile justice systems. To this end, a first contact was established with different public authorities with competency in the juvenile justice field, which facilitated access to these bodies and /or programs.

### First contact

After selecting the responsible agencies and/or programs for developing restorative processes they were contacted by telephone in order to explain the REVIJ project, and the importance and necessity of collecting information about practices that were being established within each country. At the end of the conversation, the confirmation of their participation in the project by involved agencies and/or programs was requested, as well as a reference for subsequent contact.

### Development of semi-structured interviews

Once the participating entities accepted their involvement in the project, a semi-structured interview was carried out in order to gather detailed information about the activities undertaken by the service, specifying whether it is a public or private institution, the number and type of professionals that make up the service, actions carried out, statistics and results.

### Evaluation of practices

Finally, it was evaluated via the analysis sheet, if these entities meet the criteria contained in Article 12 of Directive 2012/29 / EU and how, in addition to providing participants with the opportunity for reflection which could include their own views and comments for each section of the Directive.





PRACTICES:  
SPAIN



## PRACTICE N°1

### DESCRIPTION

#### NAME OF SERVICE

Mediation programme: conciliation and reparation to the victim

#### PUBLIC/PRIVATE INSTITUTION

Managed by Fundación Diagrama and under the Public Administration

#### PROFESSIONALS (NUMBER AND TYPE)

The human resources of the service are composed by 3 professionals, all of them with a university qualification in educative, social, psychological or juridical disciplines. All of them with more than 2 years experience with people at social risk and also with specific postgraduate training in juvenile penal mediation.

Among the three professionals involved in the service, one of them is the coordinator that is also the contact person with the Public Administration.

### ACTIONS CARRIED OUT

Throughout the programme, the extrajudicial settlements provided by the Organic Law 5/2000, January 12, Regulating the Criminal Responsibility of Minors are implemented/executed. The measures are:

- Conciliation.
- Reparation activities.

### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

In 2015, the programme cared for 145 minors, with an average age of 15, 8 years. Regarding the gender, 32% were girls and 68% boys.

The average duration/length of interventions has been of 2 months as minimum, and is adapted to the minor' and victim individual needs, and also to the offence nature. Conciliation and reparation is carried out at the same time, along with the economic compensation of the damages caused.

Regarding to the victim participation, it rises to the 17.24% of cases, being more frequent that the victim accepts to participate in the procedure in an indirect way.

In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

#### COMMENTS

The programme is carried out when it is considered that it is going to be beneficial for the offender and also for the victim. Both have to consent freely before starting the process.

The conciliation is carried out taking into account the victim's security conditions. The victim can leave the process at any time.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

#### COMMENTS

Both parts are informed in a comprehensive way since the procedure begins, being possible to leave at any moment. In fact, the participation of the victim is usually in an indirect way as most of them would prefer not to face with the offender, carrying out an indirect conciliation and community reparation.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

**COMMENTS**

In order to start the extrajudicial settlements, the minors must recognize the criminal offences charged, which is an essential requirement.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

**COMMENTS**

Both parts take part in the programme in a voluntary way, although the victim usually does it in an individual way. That implies that the victim accepts an apology by the minor through a letter, however the victim does not participate in the decision regarding the repair activities that the minor has to develop in the society.

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

In no case, discussions will be disseminated as in addition to respecting the rights of the victim, it is important to have into account that the other party in the procedure is under 18 years old.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

COMMENTS

Cases are referred to the programme directly from the Juvenile Prosecution Service, which has established a referral/coordination procedure to the programme.



## PRACTICE N°2

### DESCRIPTION

#### NAME OF SERVICE

Technical team of the Public Prosecutor for minors and the Juvenile Court of Murcia and their province

#### PUBLIC/PRIVATE INSTITUTION

Public Administration of Justice

#### PROFESSIONALS (NUMBER AND TYPE)

The technical team is formed by educators, psychologists and social workers. Concretely there are 4 professionals from each area

#### ACTIONS CARRIED OUT

Issue of technical reports as regards to minors charged with crimes by the Public Prosecutor.

Carrying out technical advising to Public Prosecutors, Judges and Lawyers on minors in conflict with the law (psychological, social and educative situation).

Issue of technical reports in the phase of judicial measures execution.

Attending to hearings for the adoption of pre-trial measures.  
Attending to trials.

Carrying out mediation tasks between the offender and the victim, in the scope of the juvenile justice field.

#### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

Data from the prosecutors' office last report

Reeducative files

Proceedings initiated	1015
Extrajudicial settlements	66
Dismissal Art. 27.4	139

In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

COMMENTS

The four previous items are positive.

The greatest psychological and emotional satisfaction for the victim is looked for.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

COMMENTS

The victim is informed on the scope of mediation, the purpose, the possibilities and type of participation. We try to minimize the negative effects/damages that mediation process could involve.

It is convenient to know the purpose of the process, both parties are informed about the agreements adopted, trying to normalize their lives and proving the parties greater personal resources.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

#### COMMENTS

Undoubtedly. The assumption of responsibility is a key element in the juvenile justice scope.

The minor must be able of assuming responsibility, in order to from there along with other essential elements, move forward, in the mediation process.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☐ The agreement may be taken into account in any further criminal proceedings.

#### COMMENTS

The agreement has to be reached voluntarily, but just will be referred to the case in question. The agreement is not usually extrapolated to other processes unless they might have a close connection and being justified and considered convenient.

PRACTICES: SPAIN

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☐ There are procedures and guidelines on the conditions of referral.

### COMMENTS

Absolutely true the first point, understanding as restorative justice the possibility of carrying out a mediation procedure, just reparation as much conciliation, in the juvenile justice scope.

As regards the second point, in addition to the functions developed by the technical team, a referral protocol has been signed in September with an external intra-judicial mediation unit in Murcia (cases which need more intense mediation efforts to resolve the conflicts).

## PRACTICE N°3

### DESCRIPTION

#### NAME OF SERVICE

Victim assistance office

#### PUBLIC/PRIVATE INSTITUTION

It is a office under the Justice Ministry

#### PROFESSIONALS (NUMBER AND TYPE)

1 manager and 1 psychologist (2 people)

#### ACTIONS CARRIED OUT

Comprehensive, specialized and coordinated support to victims at juridical and psychological level

#### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

Approximately 500 new victims are attended every year



In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

**COMMENTS**

Currently a low number of cases have been derived/referred, due to an action protocol with the restorative justice service has not been signed yet.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☐ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

**COMMENTS**

From this service (office for victim attention), currently we only inform on the procedure for victim derivation, but we can not make a stronger monitoring.

c) the offender has acknowledged the basic facts of the case.

☐ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

**COMMENTS**

As a service for victim assistance we do not contact directly with the offender.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☐ The agreement is arrived at voluntarily.

☐ The agreement may be taken into account in any further criminal proceedings.

**COMMENTS**

We have not arrived to this point of the process, given that we are in the beginning with the implementation of the protocol of derivation.

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☐ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

#### COMMENTS

We have not arrived to this point of the process.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

#### COMMENTS

We are waiting for the approval of the protocol on referral and coordination with the mediation unit.

PRACTICES:  
UNITED KINGDOM



## PRACTICE N°4

### DESCRIPTION

#### NAME OF SERVICE

Northamptonshire Youth Offending Service (YOS)

#### PUBLIC/PRIVATE INSTITUTION

Public

#### PROFESSIONALS (NUMBER AND TYPE)

A multi-agency organization made up of social work staff, seconded Police Officers, seconded Probation staff, substance mis-use staff, RJ workers and other staff from the criminal justice field. Approx 55 members of staff.

#### ACTIONS CARRIED OUT

The main aim of the YOS is to reduce re-offending by children and young people aged between 10 -17 yrs old. The YOS supervises young people subject to Court Orders, Youth Conditional Cautions and Youth Cautions and Community Resolution Disposals.

An important part of YOS work is the use of Restorative Justice which is a theme that runs through youth justice legislation. To that end the YOS has a Restorative Justice Team that is responsible for Restorative Practice and Victim work.

PRACTICES: UNITED KINGDOM

STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

In terms of RJ work the YOS has contacted over 260 victims of youth crime in the last financial year, of that approx 40% have engaged with our service. Further information is available by request and discussion.



In order to assess the practices carried out in restorative justice services in juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

COMMENTS

The YOS operates to Youth Justice Board National Standards, in line with the Victim Code of Practice and Restorative Justice Council guidelines.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

COMMENTS

The YOS has procedures for engaging victims in RJ interventions and obtains written consent to take part.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

**COMMENTS**

A full assessment of the offender is carried out and information gathered from a number of sources to verify the account of criminal acts. Offenders are also assessed that they have taken a degree of responsibility for their acts and it is safe for them to engage in a RJ intervention.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒

The agreement is arrived at voluntarily.

Dependant

The agreement may be taken into account in any further criminal proceedings.

**COMMENTS**

RJ agreements are arrived at voluntarily, any agreements may be taken into account in criminal proceeding depending on the stage in such proceedings that a RJ outcome is reached.

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

Discussions are confidential and would only be shared should they indicate the intention to commit further offences, indicate the possibility of harm being caused to others or would give concerns to the vulnerability of participants.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

## PRACTICE N°5

### DESCRIPTION

#### NAME OF SERVICE

Sussex Restorative Justice Partnership : Post Sentence Restorative Justice

#### PUBLIC/PRIVATE INSTITUTION

Public – Office of the Sussex Police and Crime Commissioner, Surrey and Sussex Criminal Justice Board

#### PROFESSIONALS (NUMBER AND TYPE)

RJ Strategic Lead, Three Hub Coordinators, Three Restorative Justice Delivery Officers, 33 Hub Volunteers.

E-Cins is used as a secure case management tool and can be accessed by all RJ practitioners and volunteers.

Partners:

Victim Support: Senior Service Delivery Manager, 3 Managers, 17 Volunteers

Sussex Pathways: Director, Project Lead, 20 Volunteers

PACT: 1 Manager, 7 Volunteers

### ACTIONS CARRIED OUT

Direct RJ: Personally deliver face to face conferencing at either Out of Court - Community Resolution / Caution - or Post Sentence level) - Record number and type.

Indirect RJ: Shuttle communication, letters, correspondence, video or digital conferencing)- record number and type.

### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

125 Post-Sentence RJ Outcomes in 2015

1,183 Community Remedy Outcomes

107 YOT Restorative Outcomes April-September 2015

The Sussex Restorative Justice Partnership will consider all types of offences.

In order to assess the practices carried out in restorative justice services in juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

COMMENTS

Post-Sentence RJ in Sussex victim-led and reliant on all of the above criteria.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

COMMENTS

Post-Sentence RJ in Sussex is victim-led and reliant on all of the above criteria.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.



**COMMENTS**

Even though post-sentence RJ is victim-led, the wrongdoer must have admitted the offence and have a desire to meet the victim to acknowledge what they have done.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

**COMMENTS**

Agreement for RJ is entirely voluntary. As the RJ is post-sentence, the RJ process has no effect on formal criminal proceedings.

e) discussions in restorative justice processes that are not conducted in public a confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

Discussions are confidential unless explicitly stated otherwise, for instance by agreement of all participants or as required by national law.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

COMMENTS

All case referrals go through one of the three Hubs. There are guidelines on the conditions of referrals. Other procedures include risk assessments of both parties.

## PRACTICE N°6

### DESCRIPTION

#### NAME OF SERVICE

Victim Support

#### PUBLIC/PRIVATE INSTITUTION

Charity

#### PROFESSIONALS (NUMBER AND TYPE)

Local RJ Projects

Locally Victim Support is running the following projects:

1. Cheshire RJ & Mediation Hub – RJ delivery with police, prisons, Youth Offending Service (YOS) and Probation.
2. Hull – providing advocacy of RJ.
3. Norfolk and Suffolk – RJ coordination and delivery across two counties.
4. Hounslow – RJ coordination and delivery in partnership with London YOT team.
5. Barnet – Deliver RJ element of ASB service.
6. Thames Valley RJ partnership – VS provides victim contact as

8. Staffordshire – new RJ coordination service.
9. Lincolnshire – ran a post sentence RJ project with Lincoln prison for 18 months. The project resulted in a number of successful RJ conferences as well as developing an effective model of case evaluation and progression in collaboration with the prison.
10. Eastleigh Borough Council funded ASB RJ project.
11. VS is the national delivery partner with Restorative Solutions in 10 Crown Courts piloting pre-sentence RJ. This 18 month national initiative is an MOJ funded pre-sentence pathfinder programme testing the viability of pre-sentence RJ and the use of volunteers for this. VS is providing the delivery infrastructure to host project managers within our local teams, use of VS secure case management system where appropriate and our experience of managing volunteers to develop volunteer RJ facilitators.

#### ACTIONS CARRIED OUT

See above

#### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

In summary, over the last year we contacted over 700 victims to discuss the possibility of RJ with them and have enabled around 140 RJ interventions to take place and can support Victim Centred Restorative Justice in a number of ways:

We can work with local RJ facilitators, CRC RJ provision and current prison programmes to enable delivery of victim centred RJ;

To deliver RJ interventions VS can provide an RJ coordinator and a team of volunteer RJ facilitators;

All RJ training and delivery will be compliant with Restorative Justice Council best practice guidelines;

We have a history of successful partnership working and a proven track record in secure data protection. We can work alongside probation or within prisons, facilitating multi-agency cooperation and a victim centred approach to RJ;

Our early contact with victims and expertise to provide wraparound support throughout the victim journey enables provision of a victim centred approach to RJ;

We have experience of delivering RJ in a variety of contexts, including pre and post sentence;

Where there are local RJ service providers running PCC funded RJ services for example, we will seek partnership and referral mechanisms to avoid duplication and optimise resources.

In order to assess the practices carried out in restorative justice services in juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

COMMENTS

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

COMMENTS

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

COMMENTS

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

COMMENTS

e) discussions in restorative justice processes that are not conducted in public a confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS



PRACTICES: UNITED KINGDOM

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

COMMENTS

Restorative Justice Council guidelines adhered to.



PRACTICES:  
PORTUGAL



## PRACTICE N°7

### DESCRIPTION

#### NAME OF SERVICE

Probation Services.

#### PUBLIC/PRIVATE INSTITUTION

Public.

#### PROFESSIONALS (NUMBER AND TYPE)

Not specified.

#### ACTIONS CARRIED OUT

Intervention with young offenders; monitoring of youth justice measures

#### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

In 2015, 1050 requests entered in the service, including pre-sentence advisory to the courts and post-sentence advisory services (monitoring of youth justice measures).

In order to assess the practices carried out in restorative justice services in juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

#### COMMENTS

The reparation to the victim implies the availability of the victim and his/her informed consent; however sometimes it is not possible to hear the victim in the court.

The interest of the victim is being more considered nowadays; but there is still a long way to go as the victims continue to feel doubly victimized when they are exposed again to the situation on court.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

#### COMMENTS

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

**COMMENTS**

Whenever a youth justice measure starts to be implemented, there is an initial interview with the youngster to explain the court order and to assess the youngster's expectations. In addition, he/she has, from the first moment, a lawyer and is always enlightened and informed.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.



#### COMMENTS

In general, the young offender shows interest in participating in the implementation of the measures proposed by the court and reveals or expresses willingness to collaborate. There is not an official signature or informed consent but the youngster has the opportunity to pronounce, when in the presence of the judge, and he/she may even say that they do not agree with the measure.

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

#### COMMENTS

PRACTICES: PORTUGAL

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

COMMENTS

There are procedures, guidelines and criteria on the conditions of referral; in principle, not all situations can be subject to an intervention of this scope. Referral of cases would be facilitated if restorative services were external and extra judicial services under the direct supervision of the Justice Ministry.

## PRACTICE N°8

### DESCRIPTION

#### NAME OF SERVICE

Family and Minors Courts.

#### PUBLIC/PRIVATE INSTITUTION

Public.

#### PROFESSIONALS (NUMBER AND TYPE)

Prosecutors and Justice Technicians (Numbers not specified).

#### ACTIONS CARRIED OUT

Provides mediation services in specific types of crimes, as well as other kind of practices of reparation.

#### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

No available statistics.

In order to assess the practices carried out in restorative justice services in juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

### COMMENTS

The participation of the victims may require some prior intervention work to raise awareness for a more active work by the victim to help re-educate young offenders.

Nevertheless, in some cases they are not willing to participate and they do not want to deal with the situation again.

Sometimes the victims want something more than the measure proposed by the court but it is not always possible to meet that.

The safety of the victim has been increasingly considered, particularly in some specific crimes and situations.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

COMMENTS

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

COMMENTS

The agreement is arrived at voluntarily as what is aimed with the measure is the adhesion from the youngster and the family to the measure. If there is no voluntariness the adhesion to the measure is compromised.

PRACTICES: PORTUGAL

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

COMMENTS

In this regard the Portuguese law is advanced and follows the best practices in the field, always ensuring the rights and guarantees of the young offenders. There is collaboration between the services involved, which are guided by the same objectives.

## PRACTICE N°9

### DESCRIPTION

#### NAME OF SERVICE

Victim Support Services.

#### PUBLIC/PRIVATE INSTITUTION

-

#### PROFESSIONALS (NUMBER AND TYPE)

Not specified.

#### ACTIONS CARRIED OUT

Victims' support (psychological support; legal support; social support).

#### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

No available statistics about the number of victims who were supported by the institution.

Several actions to prevent gender violence.



In order to assess the practices carried out in restorative justice services in juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

### COMMENTS

Restorative services are used in the interest of the victim, however sometimes the victims' will and interests may be subjected to some external pressure (e.g., social pressure, or pressures by their relatives).

Safety considerations of the victim are met and considered relevant but there is still a long way to go.

Victim's participation is voluntary, based on a voluntary decision and assumption to participate.

Information is given to the victim and a written document with her rights and duties, where is stated that she/he can leave the process/give up at will at any time.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

COMMENTS

Unbiased information is given to the victim and a document with her rights and duties and guarantees are provided to the victim, nevertheless in some case this may not happen.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

COMMENTS

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

**COMMENTS**

The agreement is arrived at voluntarily, however sometimes the victims' will and interests may be subjected to several kinds of external pressure (e.g., social pressure, or pressures by their relatives).

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

**COMMENTS**

Given the ethical principles of the professionals of these services what is shared by the victim within these proceedings is confidential.

PRACTICES: PORTUGAL

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☐

Referral of cases is facilitated as appropriate.

☐

There are procedures and guidelines on the conditions of referral.

COMMENTS



PRACTICES:  
FRANCE





## PRACTICE N°10

### DESCRIPTION

#### NAME OF SERVICE

SRJR of APCARS Organism. Service created on 2014, june the second.

APCARS is an acronym for Association for criminal policy application and social re-intégration (Association de Politique Criminelle Appliquée et de Réinsertion Sociale in french...). SRJR stand for Regionnal Service for Restorative Justice (Service Régional de Justice Restaurative).

#### PUBLIC/PRIVATE INSTITUTION

APCARS is an association whose status are made in accordance to the 1901 Law. The SRJR has mixed funds, publics and private investors.

#### PROFESSIONALS (NUMBER AND TYPE)

2 full time employees, coordination and animation of the measurement in restorative justice. 1 full time Manager.

#### ACTIONS CARRIED OUT

Coordination and field actions for organizing the devices and actions of restorative justice at a local stage.

**STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)**

Since the opening of the service, we set up a meeting condemned-victims (RCV in french) to three victims of assault or robbery causing significant damage and 3 others around the same kind of facts. These sessions of several weekly meetings are organised for people who do not know each other but are affected by the same types of facts. Because of the ignorance of restorative justice in France, the service had to be in a pro-active approach to information and participation in public proposal. More than sixty victims were offered participation and thirty authors were informed about this possibility. Twenty people have met the two dedicated animators at the time of preparation for multiple individual interviews. These RCV concerned for now a major public and will soon develop and extend to minors. The authors who participated in the meetings were followed by the SPIP under parole. The will of the service, a term to be able to offer all types of restorative measures (restorative mediation, restorative conferences or meetings held RCV-victims, Circles of Support and Accountability) to major and minor in order to adapt offer to the expectations and needs of the public.

In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

#### COMMENTS

The practice of our service meets the code of ethics of the French Institute for Restorative Justice (IFJR).

Our service carries an equal interest in the author and the victim, a measure of restorative justice will be implemented in the interest of the victim but also the author.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

#### COMMENTS

The Act of 15 August 2014 (art. 10-1 cpp) provides Restorative Justice measures implemented at all stages of the procedure. However, our service does not implement measures in pre-sentence yet. However, Restorative Justice own ethics and practice lead us to make a complete information of the device and therefore the implementation of a restorative agreement that may be adopted as part of a measure.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

**COMMENTS**

Acknowledgment by the offender is one of the conditions provided by the new law (august 2014).

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

**COMMENTS**

Our service, so far, has only organised victims / convicted-meetings (RCV in french) which do not require the conclusion of a restorative agreement. In the implementation of measures in view of pre-sentence, mid-term, these fundamental principles will of course be appropriate

The implementation of reconciliation and restorative activity will be taken into account in future records that the minor could have within the juvenile justice system.

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

This is a guarantee offered to participants and a fundamental element of the framework guaranteed by the facilitators of restorative meeting.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

## PRACTICE N°11

### DESCRIPTION

#### NAME OF SERVICE

DTPJJ Territorial Direction of Juvenile justice protection (i.e. in french “Direction Territoriale de la Protection Judiciaire de la Jeunesse”).

#### PUBLIC/PRIVATE INSTITUTION

Public institution – French official administration.

#### PROFESSIONALS (NUMBER AND TYPE)

In 2013, there were 118 facilities who practicing this measure in France only on the public sector.

In addition to the public sector, many facilities are manage by the private sector.

### ACTIONS CARRIED OUT

The scope of the DPJJ extends the design standards and organizational frameworks, implementation and verification of the quality of these implementations. The DPJJ is also in charge of policy and human resources management, training policy, operational and budget management (mission "support" described in OIC 2008-689). Since the law of 5 March 2007, the President of the General Council, meanwhile, the leader of the Child Protection (support for children at risk).

Specifically, the direction of the Judicial Protection of Youth (DPJJ) is the direction of juvenile justice (decree of 9 July 2008). As such, it

- contributes to the drafting of the texts concerning juvenile delinquents or endangered: bills, decrees and various organizational texts);

- providing ongoing assistance to judges for juvenile offenders and minors in danger, including measures called "investigation" to evaluate the situation of minors;

- implements the decisions of the juvenile courts in 1500 investment structures and open environment (300 public sector structures, 1200 authorized the voluntary sector);

- ensures the educational supervision of minors detained in the minors or juvenile prison (EPM);



monitors and evaluates all public structures and empowered after minor under judicial mandate.

Every day, professionals from the Judicial Protection of Youth conduct educational activities, social, educational and professional integration for the benefit of young people under court order, criminal or civil, and their families.

#### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

At the national level.

In 2013, 9383 reparation measures in alternative to prosecution and 36 334 after trial had been pronounced by the magistrates. In total, 45717 reparation measures had been pronounced in 2013.

At the regional level (west direction of the juvenile justice):

2013 : 3090 measurement, 1898 youngsters  
17.28 % girls (328/Total),

2014 : 3018 measurement, 1845 youngsters  
18.16 % girls (335/Total),

In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☐ Restorative justice services are used only if they are in the interest of the victim.

☐ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

#### COMMENTS

The reparation measure is mainly focus on the author. The reparation measure can be direct, carried out for the good of the victim, or indirect, for the good of the community. In reality, a very large proportion of reparation measures are indirect. The actual victims have little involvement in reparation measures.

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☐ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

#### COMMENTS

first : yes, if contact with victims.

second : Victim solicited only at one time of the procedure.

Then the victim – helping associations follow to take care of the victims.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

**COMMENTS**

The Deputy prosecutor's ensure the guiltiness recognition by the author during pré-trial phase, and then decide reparation measurement.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

**COMMENTS**

Victim tells if he/she agrees with the principles of the agreement, and especially on the form of the restoration (direct or indirect).

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

Yes to all, except If the person, guilty, reveals other éléments during the trial, then informations are able to be disclosed.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☐ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

COMMENTS

Procedures and guidelines are existing since the end of 2014. They are not implementing yet.



PRACTICES:  
ITALY





## PRACTICE N°12

### DESCRIPTION

#### NAME OF SERVICE

“Help desk for victim”

Pilot service for victim and offender

Verona - Italy

#### PUBLIC/PRIVATE INSTITUTION

In this service are involve with a specific agreement:

1. Municipality of Verona
2. Voluntary Association
3. Don Calabria Institute

The agreement has been signed in 2013.

#### PROFESSIONALS (NUMBER AND TYPE)

The staff involved is composed by volunteers coming from:

organizations supporting victims of crimes in general (gambling, extortion, etc)

VOM service with n.12 mediators.

n. 3 lawyers

n.10 organizations supporting victims of sexual violence or other organization

### ACTIONS CARRIED OUT

This specific service, titled "help desk for victim", aims to provide support and guidance to people who have been victims of a crime. The staff involved in this service is multi-professional and offers a support to all victims of crime. The main actions carried out are the followings:

to inform the victim regarding the penal procedure,

to support the victim after the crime (care, psychological support, listening),

to reduce victimisation and promote personal resources,

to promote VOM with the offender (young or adult),

to accompany victims throughout the restorative processes

STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

Year 2013: (first year)

Number of victims supported by the service: n.15 (of these, only n.2 in VOM pathways)

Year 2014:

Number of victims supported by service: n. 45 (of these n.17 in VOM pathways)

Year 2015: (half year)

Number of victims supported by service: n. 32 (of these n.6 in VOM pathways)

In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

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a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

### COMMENTS

The VOM services in Verona - Italy respect the right to safeguards of the victim in the context of restorative justice services.

Regarding the service of support to the victim actually, we can say that Italy has begun to adopt some basic principles of this document and other relevant European recommendations, focusing on the offer of dedicated spaces for assistance, support and information on victim's rights within dedicated support centers. In our reality some experiences are public funded but many actions are carried out by social private and third sector organizations. Despite the lack of a national coordination, the services to the victim begin, at least in part, to be secured by the develop of ad hoc actions promoted by voluntary associations as in the case of the Italian Association of Victims of the road (Associazione Italiana Familiari e Vittime della strada).

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

**COMMENTS**

These points are met thanks to the close cooperation between the Service for Victim and the VOM service.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

**COMMENTS**

Such point is met thanks to the close cooperation between the Service for Victim and the VOM service.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

The agreement between victim and offender, after VOM, is confidential and is communicated only the activity of reparation by offender or the final result of meeting.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.

### COMMENTS

In 2008, the Juvenile Justice Department issued the guidelines for the application of the Juvenile Criminal Mediation. Such guidelines allowed to implement at local level specific agreements between the Juvenile Justice Centers and the third sector for the structuring of Juvenile Mediation services. Such services had origin by the national welfare rules of the 90s. The involvement of such mix of actors (institutional, local and private social), however, coherent with a good portion of the continental countries, sees the mediation organized as a public service.

Services for Juvenile Justice who take part in the agreements at the local level are:

1. Centers for Juvenile Justice (CGM) with its offices / services (see. USSM in Social Service Office for Minors).
2. Juvenile Court.
3. Public Prosecutor.

Public bodies participating in the local agreements are:

1. Region with their Departments (cfr. Social Services).
2. Provinces – public local body.
3. Municipalities.



## PRACTICE N°13

### DESCRIPTION

#### NAME OF SERVICE

Sportello di ascolto delle vittime  
Experimental service: counseling centre for victims  
Palermo (Sicily region)

#### PUBLIC/PRIVATE INSTITUTION

Private

#### PROFESSIONALS (NUMBER AND TYPE)

Operators of the network implementing this pilot service i.e.

Penal Mediation Office of Palermo  
Istituto Diaconale Valdese  
Centro Siciliano di terapia della famiglia (Sicilian Centre for Family Therapy)  
Istituto don Calabria;  
Finalmente Association  
University of Palermo

### ACTIONS CARRIED OUT

The pilot service, provided for free to citizens, forecast the notification of a maximum number of n.30 victims of crime within the period of testing (i.e. 1 year from September 2015 to September 2016).

It aims to provide psychological support and assistance to victims of crime in the full respect of their rights to information, protection, privacy, reparation and so on. In specific it focuses on the reactivate the social skills (such as trust in themselves and in the others; the feeling of security; the sense of belonging; communication and productive skills and so on) and the relations that could be compromise by the suffered crime.

It aims furthermore to:

- socially re-include the victim and rebuild the social ties avoiding marginalization and exclusion/self-exclusion;
- provide information and counseling and information to the victim;
- provide support to victims' families;
- promote victims' rights;
- develop the legislative;
- aware, inform and sensitize police forces.

### Specific actions

First reception

Support to victims

Psychological and social support

Information

Awareness/information/sensitization campaigns targeted to police forces

Reporting and sending to the other competent services on the territory (i.e Social-health services and the other related ones)

Close cooperation with Judicial Authorities and sending of the case to Penal mediation office on request of the victim

Building of a network between competent agencies and services

Analysis; monitoring and assessment and evaluation of the testing

### STATISTICS/RESULTS (NUMBER OF PEOPLE CARED FOR, GENDER, TYPE OF OFFENCES COMMITTED,ETC)

Not available as the first statistical data will be available after the end of the pilot.

In order to assess the practices carried out in restorative justice services in the juvenile justice field, a comparison of such practices with regard to Article 12 of Directive 2012/29/UE, of the European Parliament and of the Council concerning the respect of rights, support and protection of victims of crime will be developed. Those practices that comply with all conditions established in the Article shall be considered as best-practices.

*Article 12. Right to safeguards in the context of restorative justice services.*

*1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing ant restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*

a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

☒ Restorative justice services are used only if they are in the interest of the victim.

☒ Restorative justice services are subject to any safety considerations of the victim.

☒ Restorative justice services are based on the victim's free and informed consent.

☒ The victim can withdraw from the procedure at any time.

### COMMENTS

The VOM services in Italy respect the right to safeguards in the context of restorative justice services. The fundamental benefits for victim through RJ approach are:

1. the possibility to express the emotions and overcome the stress after the crime;
2. the chance they get to propose a specific restorative program;
3. the possibility to achieve a more genuine satisfaction;
4. recover the real sense of Justice.

Regarding the service of support to the victim actually, we can say that Italy has begun to adopt some basic principles of this document and many other European recommendations, focusing on the offering of dedicated spaces for assistance, support and information on the rights within victims support centers. In our reality some experiences are public funded but many actions are carried out by social private and third sector. Despite the lack of a national coordination the services to the victim begin, at least in part, to be secured by the develop of ad hoc actions promoted by voluntary associations as in the case of the Italian Association of Victims of the road (Associazione Italiana Familiari e Vittime della strada).

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement.

☒ The victim is provided with full and unbiased information about the process before taking part in it.

☒ The victim is informed about the procedures to follow in order to supervise the implementation of any agreement.

#### COMMENTS

With the cooperation between Service for Victim and VOM service all these points are met.

c) the offender has acknowledged the basic facts of the case.

☒ Acknowledgment by the offender of the basic facts of the case is a necessary condition.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

☒ The agreement is arrived at voluntarily.

☒ The agreement may be taken into account in any further criminal proceedings.

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

☒ Discussions are confidential and are not subsequently disclosed unless both parts are agreed.

COMMENTS

The right to privacy of the victim is respected.

*2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.*

☒ Referral of cases is facilitated as appropriate.

☒ There are procedures and guidelines on the conditions of referral.





## CHAPTER IV:

# EUROPEAN COMPARISON ON JUVENILE RESTORATIVE JUSTICE PRACTICES

## AUTHORS

Cédric Foussard | Sophie Duroy | Angela Seychell  
*International Juvenile Justice Observatory*

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## I. INTRODUCTION

This chapter aims at presenting an overview of some of the juvenile justice systems in Europe. It will provide a comparison between the systems of five European Union Member States: Spain, Italy, Portugal, France and the jurisdiction of England and Wales. The data and individual analysis for each country has been sourced from official country reports while the analysis in this chapter aims to look at the various forms of restorative justice systems currently being implemented within some EU States. This chapter will bring together the five States' approaches to identify methods, best practices and success particularly relating to victims' guarantees, as well as system weaknesses and areas that need improvement. Among those areas that States need to improve is the collection and dissemination of nation-wide data. This will not only facilitate research but is also essential for the development of better practices.

## II. GENERAL OVERVIEW OF JUVENILE JUSTICE SYSTEMS

### A. Age range

All EU Member States have a minimum age of criminal responsibility (MACR) which is a specified age below which a child is not considered to be capable of committing a criminal offence and is therefore not subject to criminal procedure or sanctions. This age varies depending on the jurisdiction, but international instruments recommend

that it be no lower than twelve<sup>1</sup>. There are wide disparities in participating countries, with this age ranging from eight in the UK (Scotland) to 16 in Portugal.

In **France**, children aged 13 to 18 can be criminally sentenced, including to prison terms, and children aged 16 to 18 can in certain circumstances be subjected to adult sentences.

In **Italy**, children under the age of 14 cannot be held criminally liable for any offence and youth aged 14 to 17 (inclusive) can only be held criminally liable where they have been judged capable of forming the necessary criminal intent in relation to the specific offence.

In **Portugal**, children under the age of 16 cannot be held criminally liable. Youth aged 12 to 16 can however be subject to penalties under the Youth Justice Act Law, which allows for the detention of children in closed educational centres.

In **Spain**, no child can be held criminally responsible for an act committed while under the age of 14, but younger children who carry out what would otherwise be a criminal act can be subject to protection measures.

In the **UK**, legislation varies depending on the jurisdiction:

In England and Wales, children can be held liable for criminal offences from the age of 10, as is the case in Northern Ireland.

In Scotland, on the other hand, no child under the age of eight can be found guilty of

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<sup>1</sup> CRC, General Comment n°10: *Children's Rights in Juvenile Justice*, §§30-35 ; United Nations Standard Minimum Rules for the Administration of Juvenile Justice "Beijing Rules", Rule n°4.,

any criminal offence, but no person under the age of 12 may be prosecuted for an offence. Moreover, a person aged 12 or older may not be prosecuted for an offence committed while under the age of 12. The gap between the minimum age of prosecution and the minimum age of criminal liability means that criminal offences committed between the age of 8 and 12 may be included on a child's criminal record, although prosecution may not take place.

In general, EU Member States provide for educational measures for children under the MACR, and generally provide for a different range of measures depending upon the age of the child above the MACR.

## **B. Typology of measures**

In all five participating EUMS, both non-custodial and custodial measures can be imposed on juveniles convicted of an offense. Although juvenile justice systems differ quite significantly in their structures and the availability of measures, some trends are shared by all participating States.

In the **UK**, young people under the age of 18 cannot be sentenced to adult prisons, but custodial sanctions are available from the age of 15 onwards and in exceptional cases for offenders aged 12 or older. In cases of very serious crimes, children from the age of 10 can be sentenced to long-term detention (up to life imprisonment) by the Crown Court.

In **France**<sup>2</sup>, the law sets forth a range of age groups that differ in terms of whether educational measures, sanctions and penalties can be applied to them. Juveniles under the age of 10 can only receive educational measures from the juvenile judge or juvenile

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<sup>2</sup> International Juvenile Justice Observatory (2014) National Report on Juvenile Justice Trends: France.

court. Juveniles aged between 10 and 13 can be subjected to educational measures and sanctions from the juvenile court. Young persons aged between 13 and 18 can receive educational measures, sanctions and penalties. In principle, the sentences that juveniles receive are half of what the law provides for adults, except in cases in which the circumstances or personality of the juvenile justify a different response, or the offence concerns a person's life or physical or mental integrity and is a repeat offence.

In **Italy**<sup>3</sup>, juveniles aged 14-17 can receive the same sanctions that are applicable to adults, including non-liberty depriving and liberty depriving measures, but young offenders can, under certain conditions, benefit from home-custody, probation or serve part or all of their sentence in a semi-open facility. Juveniles serving custodial measures in closed facilities (pre-trial detention and imprisonment) are placed in one of the 17 Youth Detention Centres across the country.

In **Portugal**<sup>4</sup>, young persons aged 16 to 21 who have committed an offence fall under the adult criminal law, but are subjected to a Special Penal Regime. In principle, from age 16 onwards, young people can be sentenced to imprisonment in the same detention facilities as adults. Specific provisions refer to the mitigation of sentences and alternative measures to imprisonment, such as for instance corrective measures in determined cases. These measures include: warnings, certain obligations, fines and imprisonment in a specific detention centre (however, these detention centres have not been established yet and therefore the measure cannot be applied in practice). Since 2007, the law has also provided for house arrest (or "home detention"), which includes electronic monitoring, to be applicable to young offenders aged 16 or above. Juveniles aged 12 to 16 can only be subjected to the educational measures provided by the Educational Guardianship Law (LTE), regardless of the gravity of the offence

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<sup>3</sup> Gatti, U. & Ceretti, A. (1998). Italian experiences of victim-offender mediation in the juvenile justice system. In *Restorative Justice for Juveniles. Potentialities, Risks and Problems for Research* (1st ed.). Leuven: Lode Walgrave.

<sup>4</sup> International Juvenile Justice Observatory (2014) National Report on Juvenile Justice Trends: Portugal.

committed. Those educational measures are graded according to their intensity and are divided into non-liberty depriving and liberty depriving measures<sup>5</sup>.

In **Spain**<sup>6</sup>, if a case comes to court, the law provides for a wide range of measures and sanctions applicable to juvenile offenders. Juvenile offenders can be sentenced to time in a closed detention centres, a semi-open detention centre or an open detention centre.

The general maximum limit of these sentences is two years, which the judge has to split into a detention and probation period. Under extremely serious circumstances the detention period can be up to five years for juveniles aged 14 to 15, and up to eight years for juveniles aged 16 to 17<sup>7</sup>. Prison sentences can be suspended under probation, and this possibility is often used in practice. In cases of psychiatric disorders or alcohol or drug abuse, juvenile offenders can be sentenced to a stay in a closed therapeutic detention centre or to visit ambulant (non-residential) treatment services. Juvenile offenders can also be sentenced to “weekend-detention” which can be conducted both at the home of the offender or in a special centre.

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<sup>5</sup> Article 4 LTE.

<sup>6</sup> International Juvenile Justice Observatory (2014) National Report on Juvenile Justice Trends: Spain.

<sup>7</sup> More information on these different measures and their application can be found in the national report of Spain.

### III. RESTORATIVE PRACTICES OF JUVENILE JUSTICE SYSTEMS

#### A. Principles

The Directive establishing minimum standards on the rights, support and protection of victims of crime was adopted on 25 October 2012 (hereafter, the “Directive”). The Directive strengthens the rights of victims and their families to information, support and protection and lays out the procedural rights of victims when participating in criminal proceedings. It expects EU Member States to ensure that professionals are trained on victims’ needs. The EU Member States had to implement the provisions of this Directive into their national laws by 16 November 2015.

Article 12 establishes the right of victims to safeguards to ensure that “victims who choose to participate in restorative justice processes, have access to safe and competent restorative justice services”. Member States must also agree to ensure that victims are offered information on the availability of restorative justice services and that victims who participate in restorative justice services are treated “respectfully, sensitively, professionally and in a non-discriminatory manner”. It further protects victims by requiring that factors such as “degree of trauma, the repeat violation of victim’s physical, sexual or psychological integrity, power imbalances and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim’s ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting restorative justice processes” (recital 46).



The Directive defines restorative justice as “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” (Article 2).

The proactive attitude of European institutions on children’s rights in general, as well as child friendly justice and victim protection in particular, has created a favourable environment in the EU for justice reform. The Council of Europe Recommendation (2003) concerning new ways of dealing with juvenile offenders and the role of juvenile justice<sup>8</sup> underlines the importance of alternatives to formal prosecution, which should be easily accessible as part of a regular procedure, and based on proportionality and free admission of responsibility. Notably, innovative and effective responses should have a broad scope and address not only minor offences, but also serious, violent and persistent ones. In such cases, it is specified, measures should “where possible and appropriate, deliver mediation, restoration and reparation to the victim.” In this context, restorative justice plays a major role in enhancing guarantees for children and young people involved in the process both as perpetrators and victims of harm.

Research in Europe and in other regions reveals that victims report lower levels of fear and post-traumatic stress symptoms after a restorative justice process. This study shows that at least 85% of victims that have participated in a restorative justice process express satisfaction, and that both victims and offenders associated restorative processes with being treated fairly and with effective conflict resolution. A meta-analysis of both youth and adult studies also demonstrated restorative processes to be associated with greater victim satisfaction over offender compliance with restitution. After a restorative process people who have been harmed say that they are less afraid that the offender would commit further crimes against them. Victims are

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<sup>8</sup> Council of Europe (2003). Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

also less likely to express feelings of revenge, and are far more likely to forgive their offenders after they hear their story<sup>9</sup>.

If restorative processes are to be satisfactory to people who have been harmed, they must enable them to articulate their particular narrative. The outcomes of such a process must be to restore as much as possible what has been lost, damaged or violated. This may include regaining a sense of safety in their home or on the street, reclaiming control over their lives, being vindicated as a person who has suffered an injustice and reconnecting with a benevolent community, and moving on with their lives. These needs are addressed through victims regaining some power over their lives by having the person who harmed them make himself or herself accountable directly to them, by receiving answers to their questions, and by telling their story of the harm and its impact. These needs are also met through apology, reparation and compensation. All these processes require communication, preferably face-to-face, between the parties.

It is also important to remember that many people harmed by young people are themselves young people. Such young people may have particular vulnerabilities due to their young age and may also have vulnerabilities associated with the victimisation that they have been subjected to.

The particular vulnerability of young people as victims is referred to repeatedly in the Directive (Article 24). In general, children are far more vulnerable to victimisation than adults due to their developmental immaturity, which means they have limited knowledge, experience and self-control and may also engage in risky behaviours<sup>10</sup>.

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<sup>9</sup> Latimer, J., Dowden, C., & Muise, D. (2005). The Effectiveness of Restorative Justice Practices: A Meta-Analysis. *Prison Journal*, 85(2), 127-144.

<sup>10</sup> Finkelhor, D. (2008). *Childhood Victimization: Violence, Crime, and Abuse in the Lives of Young People*. New York, NY: Oxford University Press.

Children are, therefore, vulnerable to victimisation and their being victimised also increases their vulnerability. A correlation between victimisation and offending has also been highlighted in many studies. Restorative justice processes have been shown to have the potential to yield positive outcomes for people who have been harmed. In this way, restorative justice can be seen as a more holistic response to youth crime in that it addresses the needs of both the perpetrator and the victim of a specific act of harm.

Restorative justice is also a crucial alternative measure to ensure that children's deprivation of liberty is a measure of last resort. Not only does it reduce the risk of secondary re-victimisation and violence during the criminal justice proceedings and while deprived of liberty, but it also reduces the risk of stigmatisation of the child in the community, as recommended by the UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice<sup>11</sup>. Children who participate in community-based restorative justice processes have lower recidivism rates. They are also more likely to complete their education and increase their chances of becoming active and productive members of society. Across the five countries considered in this report, there are a number of principles common to all five juvenile justice systems regarding restorative justice. The three main principles that govern the process of restorative justice in these European countries are: the protection of involved children, the importance of education and the prevention of reoffending.

As a general principle, the juvenile justice systems of all five participating States operate on the premise that ensuring the child's protection should be the main concern throughout all of the proceedings. Following the principles set out by the UN

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<sup>11</sup> United Nations (2014). UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice.

CRC, all five States stress the importance of protecting the child's welfare (including access to mental health services) as well as their right to access information and education. In Italy and Portugal, the principle of 'minimum intervention' is also a key guideline.

Education implies not only the safeguarding and continuation of the child's school education and training, but also understanding the consequences of their actions and learning the skills necessary for reintegration into society. In all five participating EU States, this form of rehabilitation is also considered as re-socialisation of the child.

Each country has adopted its own measures to fulfil such objectives regarding education. For instance, the Portuguese juvenile justice system's education and re-socialisation measures are geared towards helping the youngster "to internalise legal norms" (articles 2 and 7 LTE). In France, education supersedes imprisonment in the decision-making process, while both Italy and Spain encourage the adaptation of measures to each youth by taking into account the unique circumstances and relationships of each child (individual assessment). The juvenile justice system of England and Wales also requires that victims be informed of their choice to participate in the restorative justice processes and should they decide not to comply, their decision is to be respected.

Thus, the principle of education that is a priority for all five States encompasses not only obligatory schooling and/or training, but also the passing on of skills necessary for the child to acknowledge the causes and consequences of their actions, to make amends and reintegrate back into society with the social and personal skills needed to ensure a crime-free life.

The majority of crimes against children take place within a 'local' context such as in the family or within their community<sup>12</sup>. The internet<sup>13</sup> has become a modern 'local' context in which crimes can be committed, such as sexual exploitation and harassment.

Restorative justice aims to rehabilitate the offender and provide him or her with the tool and framework to make amends to the victim. Thus, such measures aim to reintegrate both offenders and victims back into society by preventing further offending and victimisation. However, bringing the offender and victim together is not always straight-forward, as victimisation is often multi-faceted<sup>14</sup>. In addition, there are a number of issues to consider including whether they are related or strangers, from the same community, able to participate and engage in mediation and whether the victims have been victimised once or repeatedly<sup>15</sup>. In addition, adaptations of the classical mediation process will also be needed if the victims were themselves previous offenders<sup>16</sup>.

Nevertheless, in all these scenarios, juvenile justice systems should be geared towards preventing reoffending. Victims' protection is based on this principle of 'victim-oriented prevention' that aims to provide both material and emotional restoration to the victim in the forms of reparations and apologies<sup>17</sup>.

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<sup>12</sup> Crimes against children / Crimes against children / Crime areas / Internet / Home - INTERPOL. (2016). Interpol.int. Available at: <http://www.interpol.int/Crime-areas/Crimes-against-children/Crimes-against-children>.

<sup>13</sup> Ibid.

<sup>14</sup> Department of Juvenile Justice, Ministero della Giustizia, Italy (2010). Restorative Justice and Crime Prevention: Presenting a theoretical exploration, an empirical analysis and the policy perspective. P. 70. Available at: [http://www.giustiziaminorile.it/rsi/pubblicazioni/Restorative\\_Justice\\_and%20Crime\\_Prevention\\_Final%20report\\_2010.pdf](http://www.giustiziaminorile.it/rsi/pubblicazioni/Restorative_Justice_and%20Crime_Prevention_Final%20report_2010.pdf).

<sup>15</sup> Dignan, J. (2005). Understanding victims and restorative justice. Maidenhead, England: Open University Press. 22.

<sup>16</sup> Ibid.

<sup>17</sup> Department of Juvenile Justice, Ministero della Giustizia, Italy (2010) Restorative Justice and Crime Prevention: Presenting a theoretical exploration, an empirical analysis and the policy perspective, p. 57.

Statistics have shown that going through the restorative justice process helps decrease victims' fear of secondary victimisation by the same offender but also helps them feel less afraid of crime in general<sup>18</sup>. Additionally, statistics also show that victims' situations improve when they take part in the restorative process<sup>19</sup>.

The role of the community is invaluable when it comes to preventing further offending and victimisation. Community can involve family, friends and neighbours i.e. the offender's and/or victim's networks. Involving the community in the rehabilitation process creates or strengthens existing emotional and practical ties, the latter involving schooling, training and/or work among others. These ties between the offender and various aspects of community life occupy the offender's time, commitments and priorities and, when strengthened, help prevent additional offences. Without such ties young offenders can feel alone, bored and without prospects, thus encouraging them to turn to crimes such as theft, vandalism and being part of gangs among others. The role of the community is essential in fostering human connection between the offender and others, and a supportive community is important for the victim's own well-being.

## **B. Typology of interventions**

The main measure of Restorative Justice taken by all five States with a legal basis is the 'victim-offender mediation'. This measure entails rehabilitation, re-socialisation and supervision of the child throughout the whole process.

The five States in this study have adopted a range of different measures within their juvenile justice systems to achieve the goals of child protection, education and

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<sup>18</sup> Ibid. 59.

<sup>19</sup> Ibid. 62.

prevention of re-offending. Nevertheless, most of these five EU States allow and encourage the adaptation of interventions. All of the countries offer distinctions between cases which require the deprivation of the child's liberty and the ones which do not. In all instances, however, juvenile cases are treated with less severity than adult ones.

In England and Wales, for example, a third of all juvenile sentences involve 'referral orders.' According to UK law:

A referral order is an order available for young offenders who plead guilty to an offence whereby the young offender is referred to a panel of two trained community volunteers and a member of the youth offending team. It can be for a minimum of three months and a maximum of twelve months. The youth offender panel is headed by two volunteers from the local community and a member of the youth offending team. Referral orders can include reparation or restitution to the victim, for example, repairing any damage caused or making financial recompense, as well as undertaking a programme of interventions and activities to address their offending behaviour<sup>20</sup>.

When it comes to measures that do not deprive the child of his/her liberty, the States' juvenile justice systems place focus on ensuring and facilitating access to a number of important factors necessary for the child's development and reintegration. These include access to mental health services to assess and treat any psychological issues as well as helping the child live and settle in a safe community. In addition, most States' systems involve third parties in the process of rehabilitating the juvenile and contributing to his/her development. In Spain, for instance, emphasis is placed on

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<sup>20</sup> UK Government, Fact Sheet on Youth Referral Orders, accessible at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/322209/fact-sheet-youth-referral-orders.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322209/fact-sheet-youth-referral-orders.pdf) [Last Accessed 24/05/2016].

psychological assessments and community help while in the UK there are strong links between the Youth Offending Service, the police and the Crown Prosecution Service with the goal of diverting low-level offenders away from the formal justice system.

Nevertheless, obstacles towards the proper implementation of restorative justice remain and in some instances, effective intervention is hindered by other long-standing judicial practices. In France in particular, measures towards restorative justice are, in reality, “applied very rarely, in particular at the level of court sentencing.”<sup>21</sup> In Italy, despite the emphasis on ‘victim-offender mediation,’ in practice, there is ‘an evident lack of restorative justice programmes’ partially due to ‘territorial’ differences within the country (see country report).

There are also different options within the range of measures that restrict young people’s liberty. In England and Wales, for instance, there are three types of facilities in which young offenders up until the age of 18 can be held, these being, in order of severity: a Secure Children’s Home (SCH), a Secure Training Centre (STC) or a Young Offender Institution (YOI). Spain also offers a broad range of possible interventions ranging from weekend-only stays at specialised units to closed facilities and detention centres of different levels.

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<sup>21</sup> Cario, R. and Dünkel, F. (2015). France. In: F. Dünkel, P. Horsfield and A. Parosanu, ed., *Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe*, 1st ed.



### C. Guarantees enjoyed by victims in criminal proceedings

In addition to the safeguard for juveniles provided for by the UN Convention on the Rights of the Child, the Riyadh Guidelines<sup>22</sup> and the Beijing<sup>23</sup> and Tokyo Rules<sup>24</sup>, victims of crimes are also given guarantees in the domestic law of each of the five States in this study. These States follow in particular the obligations set forth by the Directive 2012/29/EU of the European Parliament and of the Council setting minimum standards on the rights, support and protection of victims of crime, the purpose of which is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings<sup>25</sup>.

The Directive provides for a series of fundamental rights, such as the right to understand and to be understood (Art. 3); to receive information (Art. 4 and 6); to access victim support services (Art. 8); to be heard (Art. 10); to receive legal aid (Art.13) and to protection (Art. 18-24), among others. It is important to note that, according to the Directive 2012/29/EU (recital 19), the victim should always be given the status of 'victim' and the rights that come with it even where the offender is not apprehended. This is reinforced by the wording of Article 2(a) defining a victim as:

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<sup>22</sup> General Assembly resolution 45/112, United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), A/RES/45/112 (14 December 1990), available at: <http://www.un.org/documents/ga/res/45/a45r112.htm>.

<sup>23</sup> General Assembly resolution 45/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33 (29 November 1985), available at: <http://www.un.org/documents/ga/res/40/a40r033.htm>.

<sup>24</sup> General Assembly resolution 45/110 United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), A/RES/45/110 (14 December 1990), available at: <http://www.un.org/documents/ga/res/45/a45r110.htm>.

<sup>25</sup> Directive 2012/29/EU of the European Parliament and of the Council setting minimum standards on the rights, support and protection of victims of crime, Article 1.

- (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
- (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death

Directive 2012/29/EU also provides specific safeguards for child victims and victims with specific protection needs during criminal proceedings. Article 23 therefore provides for special measures of interviews, the avoidance of harmful contact with the offender, and in camera hearings for victims with specific protection needs (victims of sexual violence, gender-based violence or violence in close relationships in particular). In addition, Article 24(1) provides that, when the victim is a child, interviews may be recorded and used as evidence, a special representative may be appointed to represent the child, and that where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, especially where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.

In the UK for example, additional guarantees have been put in place for child victims such as filming their cross-examinations away from court. This would remove the additional daunting experience of having to appear in court –an option which is nevertheless still available should they favour it. Such provisions also exist in France, where special secured rooms have been put in place in some cities to interview, assess and medically examine child victims of violence, mistreatment or sexual abuse in hospitals<sup>26</sup>.

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<sup>26</sup> Called UAMJP (Permanences et Unités d'Accueil Médico-Judiciaires en milieu hospitalier), those units have been implemented by the French NGO « La Voix de l'Enfant » in application of the French law of 17th June 1998 “relative à la prévention et à la répression des infractions sexuelles ainsi qu'à la protection des mineurs”.

Regarding the rights of victims in restorative justice procedures, Article 12 of the Directive provides for several safeguards:

#### Right to safeguards in the context of restorative justice services

1 Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:

- (a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;
- (b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;
- (c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.

In the implementation of restorative justice measures, the participation of the victim is beneficial towards their proper reconstruction and reintegration into society. Including the victim in restorative justice and engaging in mediation or related processes can obviously help resolve the victim's own grievances, allowing them to come to terms with the experience and move on. This contributes to reduced post-traumatic stress, higher levels of satisfaction with the criminal justice system and less fear of repercussions and re-victimisation. Because victims, and especially child victims, are vulnerable much like the juvenile offenders themselves, a number of guarantees have been put in place in all five States that make up this report, following the obligations set forth by Article 12. In most cases, this involves the application of a statutory code that specifies what victims are entitled to, including the minimum level of services that

victims should receive. Such a code also tends to oblige those carrying out the restorative justice procedure to inform the victim of the ongoing process and of any development. In addition, such codes help give the victims a voice in courts while also avoiding secondary victimisation.

The aim of Restorative Justice is to bring the victim and offender together to find common grounds for rehabilitation and moving forwards. However, in cases involving juvenile offenders, special provisions have been made for the victim in such proceedings. According to recital 46 of the Directive 2012/29/EU,

Such services should therefore have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm. Factors such as the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim's physical, sexual, or psychological integrity, power imbalances, and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process. Restorative justice processes should, in principle, be confidential, unless agreed otherwise by the parties, or as required by national law due to an overriding public interest. Factors such as threats made or any forms of violence committed during the process may be considered as requiring disclosure in the public interest.

The involvement of the child victim and his or her family helps the child offender understand the consequences of his/her actions while also making amends to the victim and the community.

The measure known as ‘community resolution’ is one of the methods applied to the resolution of children offending and anti-social behaviour. ‘Community resolution’ entails an informal agreement between the parties involved and the police instead of resorting to the traditional criminal justice process. Community resolution is particularly important in the juvenile justice system of England and Wales. It takes into account the victim’s views and needs so as to reach a fair outcome for both parties, thus establishing a ‘restorative-based commitment’ to the child offender’s development while safeguarding the child victim’s rights and well-being.

In most of the participating States, the victim is involved from the beginning of the pre-sentence restorative justice process, that is, in the pre-trial phase. For example, the UK ‘Victim’s Code,’ created in 2013, obliges authorities to inform the victims of the process of restorative justice (this code also applies to victims of adult offenders), including information about the sentence of the offender<sup>27</sup>. The Code sets out a strict requirement that any offer of RJ must be appropriate to the particular case and also makes clear that RJ activities must be conducted in a safe, secure environment with an appropriately trained facilitator according to recognised quality standards.

Some States, such as Portugal, require a Prosecutor’s decision to carry out this kind of process, and will often involve third parties such as the family of the child offender. In addition, a number of conditions must be met before mediation can proceed, such as the victim’s willingness to participate and the offenders’ willingness to make amends. However, data in Portugal shows that the effective implementation of mediation is scarce and that often, victims are not willing to take part in such process<sup>28</sup>.

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<sup>27</sup> UK Ministry of Justice (2013). Code of Practice for Victims of Crime’.

<sup>28</sup> Portugal National Report.

An additional facet of the protection of victims' rights during Restorative Justice processes may include the participation of non-governmental organisations in assisting victims as well as in providing policy recommendations to governments.

In France, there are 177 associations that help victims throughout the proceedings and offer legal, psychological and social assistance, 150 of which form part of the National Federation for Victims' Aid and Mediation<sup>29</sup>. In 2012, these Associations assisted over 200,000 victims of crime. When it comes to implementing the 'community resolution' form of Restorative, the EU encourages the active participation of civil society and for States to consult stakeholders and non-governmental organisations. Recital 62 of the Directive 2012/29/EU recommends that "public services should work in a coordinated manner and should be involved at all administrative levels — at Union level, and at national, regional and local level." This is so victims' queries are answered as quickly and efficiently as possible by avoiding constant referrals.

Ideally, authorities guarantee that victims can access all the information they need and are entitled to, from a unique place that is convenient to them. Doing so would avoid or minimise delays, costs and prolonging the proceedings for both the victim and the offender. Such an endeavour to create a 'one-stop shop' has been undertaken in the UK to develop the Victims' Information Service into a service "where victims can submit complaints to the relevant agency and provide feedback about their experience, so that the performance of CJS agencies can be judged on their customer ratings." Parallel to this endeavour has been the introduction of both a helpline and an online portal to address victims' concerns when they arise<sup>30</sup>.

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<sup>29</sup> Fédération Nationale d'Aide aux Victimes et de Médiation. "Les droits des victimes," Ministère de la Justice, Avril 2012.

<sup>30</sup> 'Our Commitment to Victims' Ministry of Justice, September 2014.

Spain's Organic Law 5/2000 on the Criminal Responsibility of Minors<sup>31</sup> also offers a comprehensive legal code of the guarantees benefiting victims. Regulations not only address victims' needs but also facilitate proceedings for economic compensation for the victim. Law 4/2015 of 27 April 2015 on the Statute of Victims of Crime, implementing the Directive, refers to the "Rights of the victims" (art. 3.1), and in consequence establishes that 'the victim has the right to protection, information, support, assistance and attention, as well as the right to actively participate in the criminal trial and receive respectful, professional, tailored and non-discriminatory treatment from their first contact with the judicial system, during the implementation of restorative justice services, during the criminal proceedings and for an adequate time after it has ended.'

Other guarantees given to the victim according to Articles 13-16 of the Directive 2012/29/EU include not being made to incur additional costs during the proceedings and that Member States should be required to reimburse the expenses deemed as necessary to the fulfilment of proceedings. In England and Wales, plans to pay compensation to victims upfront have also been made<sup>32</sup>. In addition, EU law stipulates that the victim's EU country of residence is to be responsible for ensuring the adequate protection and assistance even if this is not the same State where the crime was committed (Article 17).

While ideally the procedure of Restorative Justice involves the cooperation of both the victim and the offender, if the latter still poses a risk to the victim, he/she cannot be made to comply in order to safeguard their right to be protected and to avoid secondary victimisation in the form of intimidation and/or retaliation. In any case, adequate practical safeguards must be put in place to separate the two parties and

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<sup>31</sup> Ley Orgánica 5/2000 de Responsabilidad Penal de los Menores (LORPM), 12 January 2000.

<sup>32</sup> UK Ministry of Justice, 'Our Commitment to Victims', September 2014.



provide protection for the victim during trials and other proceedings. In the UK, for example, courts are to be modernised to include separate waiting areas for victims and defendants. In Portugal, the recent approval of the Victim Statute (Law 130/2015), defines victims' rights regarding support and protection: equality, confidentiality, voluntariness and the right to be informed and to be protected.

In order to ensure the ideal implementation of and adherence to victims' rights, Article 25 of the Directive 2012/29/EU calls for proper training of police, prosecutors, lawyers, judges and court staff, to be able to respond to victims' needs and concerns in "impartial, respectful and professional manner". This endeavour has been undertaken especially in the UK<sup>33</sup>.

#### **D. Statistical data**

As mentioned in previous sections, the use Restorative Justice has been declared by virtually all five States to be a guiding principle for the treatment of cases in their juvenile justice systems. However, as highlighted with the case of France and Portugal, sometimes the actual application of Restorative Justice is insufficient or too slow to become a mainstream practice in dealing with juvenile offenders. Such a situation is detrimental towards the proper rehabilitation and re-socialisation of juveniles that come into contact with the law, and prevents victims from benefiting from a process that has been shown to help them grieve and move on.

Therefore, statistical data has an important role to play in presenting a clearer indication of just how much Restorative Justice practices are actually being implemented and how many juveniles they are being applied to. Once such data is made comprehensive and available, it would enable stakeholders to gain a clearer

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<sup>33</sup> UK Ministry of Justice, 'Our Commitment to Victims', September 2014.

insight into the realities of the juvenile justice system of each State and, from there, it would allow examining how to improve Restorative Justice and identify best practices from each State. In addition, the statistical data for alternative measures, particularly those involving the deprivation of liberty, should also be considered to give a proper overview of which measures are being preferred over others in the five States' juvenile justice systems.

Taking the case of France, statistical analysis has been made difficult as judicial statistics "do not differentiate according to the type of sanctions and measures with regards to mediation and reparation."<sup>34</sup> This creates a lacuna when it comes to understanding how often RJ is used and, from there, how successful it is. However, it has been indicated that "measures of reparation, supervision and community service on average accounted for 9.5% of all sanctions and measures imposed on juvenile offenders"<sup>35</sup> which is strikingly low regarding child offenders. Also, it is to be noted that the role of the victim in such measures is, in practice, 'exceptional.'<sup>36</sup>

In Portugal, statistical data on the use of mediation are neither accurate nor updated. In fact, the last statistics on victim-youngster mediation in this State date from 2008-2009 (country report). However, there are statistics concerning educational measures, including those who are restorative-based. Such statistics indicate that the main form of RJ applied in the Portuguese Juvenile Justice System is "activities in favour of the community" with an average of 179 measures applied per year for the period 2008-2013.<sup>37</sup>

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<sup>34</sup> Cario, R. and Dünkel, F. (2015) "France" In Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe: Snapshots from 28 EU Member States (1st ed., p. 71-74). International Juvenile Justice Observatory.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Out of an average of 1028 yearly total Restorative Measures (including victim reparation, payment of economic benefits and community activities) for the period 2008-2013.

As mentioned in a previous section, in England and Wales, a third of all juvenile sentences involve ‘referral orders.’ On the other hand, 1,004 children were in custody as of March 2015<sup>38</sup>. Nevertheless, statistics show a yearly decrease in the amount of children coming into contact with the law in general since 2002. When it comes to the impacts of Restorative Justice, the Ministry of Justice claims that it has contributed to a 14% decrease in reoffending. In addition, 85% of victims involved in Restorative Justice were ‘satisfied’ with the process/outcomes. In fact, 70% of victims chose to engage in mediation and the vast majority of them (78%) would recommend this process to other victims. For comparison purposes, in 2013/14, 33,902 young people were sentenced for offences. 2,226 were sentenced to immediate custodial sentences (87% of which involved detention). In addition, it is estimated that focusing on Restorative Justice in England could lead to saving the criminal justice system £185 million over a two-year period.

For other countries, such as Italy, statistical data on the use of restorative justice in practice is non-existent at a nation-wide level. This is because juvenile justice systems tend to be administered through regional mechanisms. In other countries such as Spain, for instance, statistical data on Restorative Justice is disaggregated by region, and important disparities exist due to the power of regions in the administration of juvenile justice systems. In Catalonia for example data show that the use of mediation has increased over the past 25 years, and that in the 2000s, mediation represented an average of 20% of measures issued by juvenile prosecutors.<sup>39</sup> In other regions, only the number of extrajudicial solutions is recorded, with wide disparities between the regions (ranging, in 2014, from around 2% of cases in some regions to more than

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<sup>38</sup> UK Ministry of Justice & Youth Justice Board, Monthly Data and Analysis Custody Report, (January 2015), available at: [www.gov.uk/government/publications/youth-custody-data](http://www.gov.uk/government/publications/youth-custody-data).

<sup>39</sup> Gimenez-Salinas, E., Salsench, S., Toro, L., & Dünkel, F. (2015). Spain. In *Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe: Snapshots from 28 EU Member States* (1st ed., p. 168). International Juvenile Justice Observatory.

35% of cases in others). This data can provide a national estimate at around 20% of juvenile cases being settled through extrajudicial solutions. In Italy, juvenile detention has also decreased since the 1980s when around 7,500 juveniles were detained in prison facilities every year. However, by the 1990s, the numbers dropped to 1,000 per year and since the 2000s, less than 200 youths are sent to prison yearly.<sup>40</sup>

The lack of nation-wide statistics presents a number of disadvantages. Firstly, it does not allow for a proper overview of the national state of answers to juvenile criminality. In addition, fragmented regional statistics portray unique circumstances, making it harder to identify both best practices and problems. The staunch regionalisation of juvenile justice policies also make it harder to adopt common practices and improve the processes for both offenders and victims as more specific societal and regional issues need to be addressed. However, at the same time, regional differences can give room for the juvenile justice systems to adapt their Restorative Justice processes to the unique social and economic characteristics of the region.

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<sup>40</sup> Nelken, D. (2006). "Italy: A Lesson in Tolerance?" In: J. Muncie and B. Goldson, ed., "Comparative Youth Justice," 1st ed. p.167

## IV. ANALYSIS OF RESTORATIVE PRACTICES

Analysing restorative practices in the five States that took part in this study involves understanding the statistics as well as the implications and impacts restorative justice measures have had on the rates of juveniles' rehabilitation and risk of reoffending in each of the five States but also collectively to spot trends and good practices.

The typology section of this report has shown that common practices and approaches do exist among the five European States. Firstly, the States comply with UNCRC<sup>41</sup> in protecting children's rights at all stages of the judicial proceedings whether they are offenders or victims. This guiding principle entails protecting the child from both physical and psychological harm, particularly secondary victimisation, and also ensuring adequate assistance to the child. Such basic but fundamental rights are guaranteed by all five States to both victims and offenders.

Additionally, the principle of rehabilitation of the young offender is a major goal of all five States' juvenile justice systems and, although approaches and practices vary among the five States, all justice systems focus on educating, training and re-socialising the youth. Such efforts involve coordination of services and cooperation among police, educators, social workers and medical professionals.

The statistics of Restorative Justices practices in almost all of the States (bar the ones lacking nation-wide data) indicate positive impacts overall: fewer youngsters are being put through the judicial system each year and, as mentioned in previous sections, reoffending has also been seeing yearly decreases in almost all of the five States.

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<sup>41</sup> General Assembly resolution 44/25, Convention on the Rights of the Child, A/RES/44/25 (20 November 1989), available at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

Statistical data also shows that in some States, judicial obstacles such as regionalisation of judicial systems (as in the case of Italy) or other long-standing judicial practices (as in the case of France), impact the use and effectiveness of RJ particularly when other measures are favoured over RJ during trial proceedings. Moreover, judicial professionals in Portugal highlight that the vagueness of the law and the absence of a 'restorative culture' in the Portuguese judicial system (as well as the lack of training on this subject for magistrates) also constitute important obstacles.

The guarantees awarded to the victim also impact the use and effectiveness of RJ. If a State's legislation adequately protects the victim and, in doing so, encourages him/her to take part in restorative proceedings and mediation with the youth, then the results are beneficial overall, especially when the victim is also a child. However, in order to increase the use and efficacy of RJ, State authorities must boost the victim's role and make the process as safe, easy and quick as possible for them, in particular in cases involving child victims. Judicial systems that are cumbersome, long-winding and do not provide adequate safeguards or compensation for victims are detrimental to RJ overall. Therefore, States need to properly invest in victim-oriented services such as compensation and social services, and provide adequate safeguards for child victims is they are to engage in RJ processes.

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## CHAPTER V:

### FINAL CONCLUSIONS AND RECOMMENDATIONS OF REVIJ



## FINAL CONCLUSIONS AND RECOMMENDATIONS OF REVIJ

Prior to the development of conclusions and recommendations regarding the attention received by victims in immersed restorative processes in different juvenile justice systems of the participating countries of the REVIJ project, it is important to highlight particular external factors that mediate the development of practices aimed at the reparation of victims.

Firstly, it must be noted that such practices are subject to specific to the systems of juvenile justice of each country, and hence, it is sometimes impossible to carry them out since there is no place within the criminal legislation referring to juvenile offenders.

On the other hand, the existing differences in juvenile justice systems significantly hinder comparison among countries with regard to the development of restorative processes. Moreover, some countries have specific legislation regarding attention to victims, this sometimes overlaps with the regulation of juvenile justice systems.

Finally, it must be emphasized that the political and economic context has a considerable influence on the type and amount of restorative practices that are carried out. We found that attention to victims is sometimes conditional on the different budget lines available in each country.

Thus, taking into account the report, and the contributions of both professionals and experts who participated in different national seminars which were carried out during the development of the project and the reflections that arose from the analysis of restorative practices in different countries, we can summarize the following conclusions and recommendations:

## CONCLUSION 1

There is a great disparity relating to practices that are carried out in different countries within the field of restorative justice. While it is true that they embrace a unitary definition as contained in Directive 2012/29 / EU, each Member State built a model of restorative justice interpreted in terms of the structure of its previous juvenile justice system and, therefore, different tools of restorative justice were established depending on whether the measure was produced in judicial headquarters (at the extra procedural level) or outside of it.

In spite of this difficulty, all restorative justice practices carried out in the participating countries of the study base their restorative justice procedures on the same operational principles: the protection of involved minors, the importance of education and the prevention of recidivism.

### Recommendation

It is necessary that Member States provide information on different restorative practices that are carried out within their juvenile justice systems, facilitating the creation of a database that enables the exchange of knowledge.



## CONCLUSION 2

Different obstacles for the implementation of restorative practices in certain member countries were found, for example by varying the conditions which must be fulfilled in order to access such practices.

### Recommendation

It would be advisable to conduct an analysis of such difficulties in Member States concerning the implementation of restorative practices, harmonizing as far as possible the conditions of access to restorative practices.

## CONCLUSION 3

Mediation stands out as the most commonly used practice with guarantees that the defense of the victim's rights must come first, thereby satisfying their needs. The conditions necessary to provide the proper context for mediation are achieved by confidentiality, neutrality of the intermediary, providing the necessary information in order to take this decision and the associated consequences, and the consideration of certain factors that could prevent a fruitful, restorative process for the victim and the aggressor-in line with Directive 2012/22/EU this could refer to the nature and seriousness of the crime, the degree of damage, the repeated violation of physical, sexual or psychological integrity of a victim, the power imbalances and the age, maturity or intellectual capacity of the victim-. In any case, a restorative measure should never take place when the security of victims could be compromised or when victims may suffer any further injury.

### Recommendation

In order to encourage mediation as a restorative practice which has proven to be effective, it would be desirable to implement new practices that guarantee the protection of victims during the process, and to offer them the necessary security protection needed when they participate in mediation.

## CONCLUSION 4

The implementation of restorative practices could prevent the possible secondary victimization deriving from legal proceedings, especially when taking into account the consequences that this incurs when the victim is a minor or especially vulnerable (recital 57 and Chapter IV "Protection of victims and recognition of victims with specific protection needs" Directive 2012/29/EU).

### Recommendation

It is necessary to expand and make specific provisions for the protection of particularly vulnerable victims in juvenile justice, such as the victims of violent crime and crimes against sexual freedom, disabled people or victims of domestic violence and violence against women.

## CONCLUSION 5

Restorative practices can reduce the risk of the tertiary victimization of the young offender; in these cases, legal action by means of a criminal process and the exposure to the media to which the juvenile offender could be subjected to in cases of particular social concern, can lead to a process of tertiary victimization. When the young offender is subject to social rejection or exclusion it can be reasonably assumed that, in the long term, this jeopardizes their re-education and social rehabilitation and affects, ultimately, their recidivism potential.

### Recommendation

As a way of encouraging the use of restorative practices it is necessary that the different Member States assess the results of these practices via a system of quantitative indicators that allows comparison with other type of measures.

## CONCLUSION 6

Different studies have shown that at least 85% of the participating victims in the restorative justice processes express satisfaction, reducing secondary victimization.

### Recommendation

It would be advisable to increase the use of restorative justice processes in the judicial systems of Member States, promoting the role of the victim in the procedure as long as conditions allow it.

## CONCLUSION 7

Restorative Justice has among its objectives, in addition to the reintegration of offenders, to equip them with tools that facilitate the reparation of the victim and that prevent future attacks.

### Recommendation

It would be advisable to ensure that Member States put together different projects and programs which are carried out in the field of restorative justice and focused on the development of the prosocial behaviors of offenders.

## CONCLUSION 8

Restorative Justice Processes aims to provide the victim with both material and emotional reparation in the form of the repair of damage caused and an apology. Nonetheless, material reparation is not always possible in this type of process.

### Recommendation

It is necessary that restorative justice systems have a wide budget line that enables the material reparation of the victim in all cases, even if the perpetrator does not have the means to provide such material reparation.

## CONCLUSION 9

Article 25 of the Directive 2012/29/EU proposes the development of specific training for police, prosecutors, lawyers, judges and court workers to meet the victims' needs in an impartial, respectful and professional manner. Nonetheless, as a general rule a lack of specific training in this regard was observed.

### Recommendation

The implementation of restorative measures requires encouraging the specialization and training of professionals who come into contact with victims in the context of the juvenile justice system to generate confidence in the practice within the justice system, to ensure the safeguarding of their rights and to avoid the secondary victimization of the victim as a result of professional malpractice. In this regard, it is necessary to establish specific training in all Member States aimed at professionals who come into contact with the victims of crime to ensure adequate attention is paid to their needs and any difficulties that may arise concerning the understanding of the legal proceedings.

## CONCLUSION 10

Emphasis must be placed on the disparities in the collection of statistical data on restorative processes, differences were observed in terms of the classification of practices and with regard to regional collection vs. national collection.

### Recommendation

The harmonization of criteria for the collection of data on restorative processes will favour statistical studies that would enable us to carry out European wide comparisons concerning the impact and effectiveness of these procedures.

### CONCLUSION 11

Through the comprehensive analysis of restorative practices which are carried out in Member States it was demonstrated that there is no specific terminology to refer to Restorative Justice. This hinders the use of a common language among participating countries, given that translation into the mother tongue of each country does not convey the same meaning.

### Recommendation

It is necessary to establish a common terminology for all Member States in order to ensure the same meaning of key terms is preserved when translated into the different languages of the EU members.



