



Strasbourg, 22 August 2007

CEPEJ-GT-MED(2007)8

**EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE
(CEPEJ)**

**WORKING GROUP ON MEDIATION
(CEPEJ-GT-MED)**

**THE QUALITY OF
PENAL MEDIATION
IN EUROPE**

by

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* I would like to thank most sincerely Daria SOLENIK, researcher at the Nancy Law Department (France) for her advice and expertise; I would also like to express my gratitude to Stéphane LEYENBERGER and Muriel DECOT, of the Secretariat of the European Commission for the Efficiency of Justice (CEPEJ) for their trust and their competence – the opinions in this article reflect solely my own personal views.

1. In the Europe of today, penal mediation is not just an autonomous approach to dispute resolution; it complements the traditional justice system with which it is interdependent. This emerging concept undoubtedly heralds an increased role for mediation in criminal-law policy in many European countries and will surely have an impact on mediation itself. However, the values, the philosophy and the “soul of mediation”, as it were, could paradoxically be threatened if penal mediation were to be fully incorporated into our familiar conventional procedures. This is a worrying prospect which has caused various distinguished writers to put us on our guard against the spectre of its being “appropriated”¹.

No doubt there is legitimate cause for concern. But there is certainly no reason to believe that penal mediation will inevitably lose its uniqueness as it becomes incorporated into what is reputed to be a centralised and highly regulated system.

2. What exactly is “penal mediation” (or mediation in penal or criminal matters) in the European context? The Council of Europe defines it in the following terms: “*any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)*”². The European Union describes it as “*the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person*”³. These two definitions are relatively close and highlight certain important aspects of penal mediation: “negotiation”, “active” process, “freely consented to” by both the “victim” and the “offender”. The emphasis is therefore not on the punishment but on the search for a solution, and this aim requires time, human and financial resources, significant emotional involvement and some margin for failure. These features are of such importance that the term “penal mediation” is gradually being replaced by “victim/offender mediation”, viewed as more accurate, specifically because the punishment is not the main concern⁴.

3. These aspects of penal mediation seem to conflict with one of the trends of modern justice in Europe⁵, namely the search for qualitative and quantitative performance which places such emphasis on management techniques, cost-effectiveness, speed and cost-cutting.

Just as judges did before them, mediators are pondering the very nature of their role and wondering whether there is more to be gained or to be lost in this emphasis on quality assessment which has taken Europe by storm. But unlike judges, for whom the debate has progressed significantly, mediators can for the moment perceive only the advantages of such a process. In order to improve or maintain the quality of mediation throughout Europe, the best way forward is clearly to institute a comparativist policy to define, with the help of practitioners, the criteria that could be used as benchmarks. It seems to me that the Council of Europe and the European Union would be the ideal institutions to carry out this task since, historically, these institutions have given the impetus for penal mediation to develop.

4. I shall first of all look at different ways of assessing justice, and more specifically penal mediation in Europe (I), and then look at the developments likely to take place, based on recent trends in this area (II).

I. ASSESSMENT OF PENAL MEDIATION IN EUROPE

¹ I. AERTSEN & T. PETERS, “Des politiques européennes en matière de justice restauratrice”, *International Journal of Victimology*, 2 (1), 2003.

² COUNCIL OF EUROPE, Appendix to Recommendation R(99)19 concerning mediation in penal matters, I.

³ COUNCIL OF THE EUROPEAN UNION, Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JAI, Official Journal L 082 of 22 March 2001, p.1, Article 1.

⁴ For the sake of clarity, I have however chosen to retain the term “penal mediation”, because this term and its variants are used to refer to victim/offender mediation in the various official European documents. The term “restorative justice” covers several procedures (mediation, reparation, warning, community service etc) and is therefore not synonymous with penal mediation, even though penal mediation is the most widespread method of restorative justice in Europe.

⁵ J-P. JEAN & H. PAULIAT, “L’administration de la justice et l’évaluation de sa qualité”, *D* 2005, Chron. p.598.

5. In order to identify common criteria for assessing the quality of penal mediation, I must first of all identify common criteria applicable to the justice system as a whole, including mediation (A). Subsequently, I shall look at the relevant quality standards to be put in place in view of the specific nature of penal mediation (B).

A. Penal mediation and overall assessment of justice in Europe

6. A brief overview of the conventional European standards in assessing justice (1) will make it easier to see the relevance, albeit somewhat limited, of these standards in the specific case of penal mediation (2).

1. Conventional European standards in assessing justice

7. The supranational principle of a fair trial which appears in both European human rights law⁶ and Community law⁷, is often highlighted as one of the qualitative standards of effective justice⁸. But fair administration of justice implies not only compliance with principles but also practicality: dispute resolution should not simply be guided by ethical requirements but should also prove itself to be effective.

Far from restricting the quality of justice solely to a matter of professional ethics⁹, both the European Court of Human Rights and the Court of Justice of the European Communities¹⁰ also adopt a more utilitarian approach¹¹. Their decisions are a perfect illustration of the dual requirement of quality and effectiveness when ruling on potential violations of Article 6 of the Convention (right to a fair trial) or on Articles 47 and 48 of the Charter (Right to an effective remedy and to a fair trial; presumption of innocence and right of defence). Although a study of the solutions adopted show some degree of convergence in their case-law¹², to date the decisions of the European Court of Human Rights in this field have been more detailed.

Accordingly, in the view of the European Court of Human Rights, because of the “prominent place held in a democratic society by the right to a fair trial”¹³, this right is a guarantee of the rule of law¹⁴; because this right is interpreted in the light of the need for flexibility and effectiveness. It protects rights which are not theoretical and illusory but concrete and operative¹⁵.

8. Article 6 of the Convention gives rise to various obligations, such as the independence and impartiality of the court vis-à-vis the parties and all executive authorities, public trials (unless there is a valid justification for holding them in camera), reasonable length of proceedings, the presumption of innocence and respect for the rights of defence, such as access to documents and the principle of adversarial proceedings. But the European Court of Human Rights also recognises that there must be a degree of procedural flexibility, failing which the quality of justice as a whole would be adversely

⁶ Article 6 of the European Convention on Human Rights (ECHR) is applicable both in disputes relating to civil rights and obligations and in assessing the merits of any criminal charges against an individual.

⁷ Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (Right to an effective remedy and to a fair trial; presumption of innocence and right of defence).

⁸ S. GUINCHARD, “Les normes européennes garanties d’un procès de qualité”, in M-L. CAVROIS, H. DALLE & J-P. JEAN (dir.), *La qualité de la justice*, Mission de recherches Droit et justice, La documentation française, Paris, 2002.

⁹ Which must be taken into account irrespective of the context; see A. BERTEN, “Déontologisme”, in M. CANTO-SPERBEN (dir.), *Dictionnaire d’éthique et de philosophie morale*, PUF, Paris, 1996, p.378.

¹⁰ For examples of pragmatism in securing effective justice in the Community context, see R. KOVAR, “La notion de juridiction en droit européen”, in *Mélanges J. WALINE*, Gouverner, administrer, juger, Dalloz, Paris, 2002, pp.607-628, especially p.613.

¹¹ J. RAWLS, *A Theory of Justice*, The Belknap Press of Harvard University Press, Harvard College, 1971, § 5.

¹² See, for example, CJEC, 4 December 2001, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, Case No. C-208/00, conclusions of the Advocate General, Ruiz-Jarabo Colomer, §§57-59.

¹³ ECHR judgment, 9 October 1979, *Airey v. Ireland*, A No. 32, §24. This formula has been used in many subsequent judgments.

¹⁴ P. WACHSMANN, “La prééminence du droit dans la jurisprudence de la Cour européenne des droits de l’homme”, in *Mélanges SCHWOB*, *Le droit des organisations internationales*, Bruylant, Brussels, 1997, pp.241-288.

¹⁵ *Idem*, see also J-C. SOYER and M. DE SALVIA, “Article 6”, in L-E. PETTITI, E. DECAUX and P-H. IMBERT (dir.), *La Convention européenne des droits de l’homme*, Economica, Paris, 1999.

affected¹⁶; for example, in the settlement of a dispute, it is not essential for a court¹⁷, offering all the guarantees of a fair trial, to rule at all stages of the procedure¹⁸: a non-judicial body could do this, even in criminal matters, thereby making for better management of a court's caseload¹⁹. This is however acceptable only if (i) the settlement of the dispute by a non-judicial body is subject to control in law and in practice by a national court satisfying all the requirements of a fair trial²⁰ or (ii) where no such control is possible, the parties have given their free and informed consent to waive certain procedural guarantees²¹, explicitly or tacitly²², but unequivocally²³.

Penal mediation, by offering an alternative and final means of dispute settlement falls into the second of the two above categories.

1. The relevance of conventional quality standards for penal mediation

9. It goes without saying that there must be absolutely no pressure brought to bear on litigants. The decision by victims and offenders to opt for penal mediation must be purely voluntary; indeed it *can* only be voluntary since for it to be effective there has to be co-operation between the offender and the victim.

Nonetheless, while opting for mediation presupposes voluntarily waiving the guarantees provided by a court as understood in European law, it does not necessarily mean waiving all aspects of the right to a fair trial: the end result (in pursuit of which litigants have opted for this approach) should make it possible to place the emphasis more specifically on one of the principles of a fair trial²⁴, even if this is at the cost of another.

Particular attention must therefore be focused on the specific nature of penal mediation since the reasons behind the decision to opt for it will determine the relevance of conventional quality standards in this respect. The idea is not so much a wish to take the dispute away from the court environment but rather to seek mutual acknowledgement²⁵, and to appeal to the feelings and reason of the offender and the victim²⁶. Penal mediation should make it possible to repair the damage, restore human relations, nurture in the offender a sense of responsibility and help him/her to reintegrate into society; it implies discussion, in other words a series of exchanges of views based on trust in the mediator.

Clearly, therefore, it is only natural for the procedure to be confidential rather than public; nor is it surprising that the independence and impartiality of the mediator are key factors in the quality of mediation; but what about the presumption of innocence²⁷? What about the reasonable length of proceedings when the emphasis has to be placed on the human, expressive and emotional aspects of the case, all of which take time? Is it not also the case that the concept of "equality of arms" (which is more akin to a duel than to dialogue) becomes somewhat meaningless in the case of mediation? It is

¹⁶ J-P. JEAN & H. PAULIAT, "L'administration de la justice et l'évaluation de sa qualité", quoted above, p.600

¹⁷ See J-P. COSTA, "Le droit à un tribunal et ses limites selon la jurisprudence de la Cour européenne des droits de l'homme", in Mélanges BUFFET, La procédure en tous ses Etats, LGDJ-Montchrestien-Petites Affiches, 2004, p.159.

¹⁸ ECHR judgment of 27 February 1980, Deweer v. Belgium, A No. 35, §49: "the "right to a court" [...] is no more absolute in criminal than in civil matters"; ECHR judgment of 23 June 1981, Le Compte, Van Leuven and De Meyere v. Belgium, A No.43, p. 25.

¹⁹ G. CANIVET, "Economie de la justice et procès équitable", JCP 2001, I, 2085.

²⁰ ECHR judgment of 10 February 1983, Albert and Le Compte v. Belgium, A No. 58, §29.

²¹ ECHR Deweer v, Belgium judgment, cited above, §49 refers to "absence of constraint".

²² ECHR decision, 30 November 2000, Kwiatkowska v. Italy, application No. 52868/99, p.6.

²³ ECHR judgment of 21 February 1990, Håkansson and Stureson v. Sweden, A No. 171-A, §66: the "waiver must be made in an unequivocal manner and must not run counter to any important public interest".

²⁴ G. CANIVET, "Economie de la justice et procès équitable", quoted above.

²⁵ On the importance of this mutual acknowledgement, see C. LAZERGES, "Médiation pénale, justice pénale et politique criminelle", Revue de science criminelle et de droit pénal comparé, 1997, p.190, and the reference to the ideas of P. RICCEUR, Le Juriste, Editions Esprit, 1995, p.190.

²⁶ J. CARBONNIER, "Réflexion sur la médiation", in Institut Suisse de droit comparé, *La médiation: un mode alternatif de résolution des conflits?*, Lausanne, 14 and 15 November 1991, Publications de l'Institut suisse de droit comparé No. 19, Schulthess Polygraphischer Verlag, Zurich, 1992, especially page 19.

²⁷ The starting point in mediation should, in principle, be recognition by both parties of the main facts of the case. Some instances of mediation even take place within prisons following conviction.

clear, therefore, that the conventional standards for the quality of justice are not entirely compatible with penal mediation.

10. In order to define the quality of penal mediation and approach it rationally, we need to identify specific standards. These, moreover, could help take us beyond the principles enshrined in the Convention and the Charter, which merely indicate the minimum standards with which the justice system in each member state should comply.

B. Penal mediation and drawing up of specific quality standards in Europe

11. The specific quality standards come mainly from the Council of Europe (1), the European Union (2) and non-governmental organisations (3).

1. Council of Europe standards

12. By focusing at a fairly early stage on how to reconcile consideration of the victim's situation and the effective functioning of the justice system, the Council of Europe undoubtedly contributed to the emergence of penal mediation.

While initially, references to penal mediation tended to be rather modest within Recommendations on the rights of victims, the cautious invitation to member states to consider the advantages of such mediation and encourage research and experiments in this field little by little became more visible and was included in Recommendations relating to social reactions and the management of criminal justice²⁸.

In parallel, penal mediation slowly gained in importance and became the primary focus of the Recommendation adopted on 15 September 1999 by the Committee of Ministers of the Council of Europe²⁹. The specific standards for evaluating the quality of mediation can in part be found in the appendix to the Recommendation; in addition to highlighting a number of general principles such as the consent of the parties, confidentiality and the availability and autonomy of the service, the Recommendation provides further explanation of mediation in terms of a variety of factors such as the legal basis, the operation of criminal justice with which it interacts, and the operation and continuing development of mediation services.

13. In calling on member states to take these principles into account³⁰, the representatives of the 46 Council of Europe member states laid down common specific standards which are particularly useful for enabling each member state to identify how developed it was in this respect³¹.

In order to monitor the impact of the Recommendation and its role as to the efficiency of justice, the Council of Europe regularly carries out studies on this matter; there are four I wish to mention here. The first, a follow-up study conducted by one of the Recommendation's draftmen, looks at the extent

²⁸ See Recommendations R (85)11 of 28 June 1985 on the position of the victim in the framework of criminal law and procedure; R (87)21 of 17 September 1987 on assistance to victims and the prevention of victimisation; R (87)20 of 17 September 1987 on social reactions to juvenile delinquency; R (88)6 of 18 April 1988 on social reactions to juvenile delinquency among young people coming from migrant families and R (95)12 of 11 September 1995 on the management of criminal justice (these Recommendations refer explicitly to penal mediation); see also Recommendations R (86)12 of 16 September 1986 concerning measures to prevent and reduce the excessive workload in the courts (reference to conciliation); R (87)18 of 17 September 1987 concerning the simplification of criminal justice (reference to out-of-court settlements in criminal matters) and R (92)16 of 19 October 1992 on the European rules on community sanctions and measures (reference to the co-operation of the offender).

²⁹ Recommendation R(99)19 concerning mediation in penal matters adopted one year after the Recommendation on family mediation (R (98)1 of 21 January 1998) and two and three years respectively before the Recommendation on alternatives to litigation between administrative authorities and private parties (R (2001)9 of 5 September 2001) and the Recommendation on mediation in civil matters (R (2002)10 of 18 September 2002).

³⁰ Supplemented indirectly by other subsequent Recommendations such as R (2000)19 of 6 October 2000 on the role of public prosecution in the criminal justice system and R (2006)8 of 14 June 2006 on assistance to crime victims.

³¹ The work of the United Nations on penal mediation has, moreover, partially drawn on Recommendation R(99)19 on mediation in criminal matters; see United Nations Office on Drugs and Crime, "Handbook on Restorative Justice Programmes", Criminal Justice Handbook Series, United Nations Publication, Vienna, 2006, pp.13 and 35.

to which the Recommendation has been implemented, the arrangements introduced and the changes that have taken place in victim/offender mediation³². The second, an opinion by the Consultative Council of European Judges (CCJE), attempts to define the conditions in which the judge may contribute to efforts to bring about rapid and effective settlement of disputes³³. The third, a report written by the CEPEJ's Working Group for the Evaluation of Judicial Systems³⁴, seeks to draw up statistical tools common to the whole of the Council of Europe. The fourth, a document written by another CEPEJ working group specialising in mediation³⁵, considers guidelines for improving implementation of the principles contained in the Recommendation.

These studies, carried out following consultation with mediators, judges, lawyers, researchers, representatives of ministries and non-governmental organisations, etc³⁶, highlight certain salient features of victim/offender mediation today: the Recommendation can help bring about changes in legislation³⁷ or national policies³⁸, it may also have led to the introduction of mediation in certain countries³⁹, but occasionally it might not go any further than a restricted circle of those specialising in this field⁴⁰, even though this fact is rarely unacknowledged⁴¹. To progress further, there has to be a cultural shift among criminal justice practitioners, accustomed to conventional trials and punitive justice. The quality indicators to be taken into account are clearly linked to the role of non-governmental organisations, to that of the state and that of the practitioners of traditional criminal justice; they presuppose monitoring of qualifications and training, of professional ethics (involving codes of conduct) and quality control of procedures, particularly with regard to the rights of the parties, protection of minors and the international harmonisation of mediation. More generally, there must be guaranteed access to mediation (in particular from the point of view of the cost of proceedings and the suspension of limitation periods) and accordingly, a change in mentalities is in itself a quality factor.

2. European Union standards

14. It was also a commitment to consider the protection of victims that prompted the European Union to take an interest in victim/offender mediation.

Deriving legitimacy for its action from the provisions of the Community Treaties⁴², the European Commission first of all co-financed a number of research projects submitted by university teams and victim support associations, primarily under the GROTIUS⁴³ co-operation programmes. Next, it invited the Council and the European Parliament to take a greater interest in mediation in criminal matters⁴⁴, as reflected in the Council Framework Decision of 15 March 2001 on the standing of victims in criminal

³² C. PELIKAN, Follow-up of Recommendation No. R (99)19 "Mediation in Penal Matters", Strasbourg, Council of Europe, 2003.

³³ Consultative Council of European Judges (CCJE), "on a fair trial within a reasonable time and the judge's role in trials taking into account alternative means of dispute settlement", Opinion No. 6, 2004.

³⁴ European Commission for the Efficiency of Justice (CEPEJ), "European Judicial Systems – 2006 edition", CEPEJ Studies No. 1, Council of Europe Publishing, Strasbourg, 2006; see also "European Judicial Systems – 2004 Edition", pilot exercise; The Working Group for the Evaluation of Judicial Systems is chaired by J-P. JEAN, judge and lecturer.

³⁵ European Commission for the Efficiency of Justice (CEPEJ), document CEPEJ (2007) 13. The Working Group on Mediation is chaired by R. SIMAITIS, Attorney-at-Law.

³⁶ Reports have been written on the basis of these consultations; see C. PELIKAN, "Follow-up", quoted above, and by the same author "The impact of Council of Europe Recommendation No. R (99) 19 on mediation in penal matters" in, Crime Policy in Europe, Council of Europe Publishing, Strasbourg, 2005; J. LHUILLIER, "Assessment of the impact of Council of Europe Recommendations concerning mediation", document CEPEJ (2007) 12; see also: www.coe.int/CEPEJ

³⁷ For example, Belgium, Cyprus, Finland, Italy, Poland and Slovenia.

³⁸ For example, France, Germany, Norway and Spain.

³⁹ For example, Ireland, the Netherlands, Portugal and Sweden.

⁴⁰ It is mainly NGOs, academic circles and professionals outside the judicial sphere who are most aware of it in Albania, Bulgaria, Czech Republic, Romania and Russia.

⁴¹ One example is Austria, although Austrian legislation in this field is very advanced.

⁴² Starting with the Treaty on European Union, in particular Articles 31 and 34.2.b.

⁴³ The "Victim-Offender Mediation: organisation and practice in the juvenile justice systems" project, JAI/2002/GRP/029, funded over 15 months, ended in January 2004; 15 European countries (not all were EU member states) took part in the project, focusing on the existence and theoretical content of national legal norms relating to victim-offender mediation, the advantages and drawbacks of the system, the structural organisation of mediation services and mediator qualifications.

proceedings⁴⁵. By simply calling on member states to seek, by 22 March 2006, to “promote mediation in criminal cases for offences which it considers appropriate for this sort of measure” and to “ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account”, Article 10 is somewhat vague in that it leaves national parliaments totally free to decide on the form and methods they wish to adopt.

15. However, the Framework Decision of 15 March 2001, which perhaps signals the fact that penal mediation had now become part of the sphere of competence of the European Union, has not only acted as a catalyst for acceptance of this process in the traditional system⁴⁶; Article 18 of the Decision, with its explicit reference to an assessment of the measures taken by member states to comply with the provisions in the decision, clearly thereby initiated a process of evaluating penal mediation by the European Union institutions. The comparison of the various national legislations undertaken since 15 March 2001 had been an opportunity to identify possible areas of incompatibility that could emerge between member states⁴⁷; by trying to harmonise legislation, the future instruments would not only place an emphasis on the quality of mediation in order to satisfy the needs of victims, they would also define common standards enabling each member state to identify its level of development in this field⁴⁸.

3. Non-governmental organisation standards

16. It is not only the major institutions that have turned their attention to penal mediation: the growth and quality of such mediation is also of interest to a fair number of both local and national non-governmental organisations in each member state⁴⁹, and indeed European NGOs.

One of these organisations, the European Forum for Victim-Offender Mediation and Restorative Justice⁵⁰ has developed a European transfrontier network; the aims set out in its constitution⁵¹ clearly show that it does not merely seek to promote existing tools but to stimulate research⁵², to explore and develop the theoretical basis of restorative justice, and to assist the development of principles, ethics,

⁴⁴ European Commission, “Crime victims in the European Union – Reflections on standards and action”, Communication of 14 July 1999, COM (1999) 349 final, not published in the Official Journal.

⁴⁵ Council of the European Union, Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JAI, Official Journal L 082 of 22 March 2001, page 1, Articles 10 and 17.

⁴⁶ V. VAN DER DOES, “Should we speed up or slow down?”, Newsletter of the European Forum for Restorative Justice, August 2006, vol. 7, issue 2, pp.6-7.

⁴⁷ The initial studies have shown (i) that the incompatibilities could undermine the purpose of harmonisation and improvement of victims rights, and (ii) that the very variable standing of penal mediation could lead to a violation of the international principle of *ne bis in idem*; in this connection, see VAN DER DOES, “Should we speed up or slow down?”, quoted above. For further details, see F. FARR, “Standing of Victims in criminal proceedings, Council of the European Union Framework Decision 2001/220/JHA”, in Conference Report “Protecting Victims of Crime in the European Union”, Trier, 5-6 November 2001; J. LELIEUR-FISCHER, “Comments on the Green Paper on Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings”, Max-Planck-Institut für Ausländisches und internationales Strafrecht, March 2006, §§31 and 35.

⁴⁸ For example, the Hague programme calls for an objective and impartial assessment of the implementation of European Union policies in order to increase mutual trust among states and the effectiveness of prosecutions with due regard for the proper administration of justice. See Council of the European Union, “The Hague programme: strengthening freedom, security and justice in the European Union”, JAI 559, 16054/4, 13 December 2004, especially pp. 27-29.

⁴⁹ NGOs would appear above all to play an influential role on the training and day-to-day practice of mediators by disseminating the standards of the Council of Europe and the European Union. This happens in Albania, Bulgaria, the Czech Republic, Portugal and the Russian Federation. See also, with regard to Belgium, D. EYCKMANS, “New Belgian Law on Mediation”, Newsletter of the European Forum for Restorative Justice, December 2005, vol. 6, issue 2-3, p. 9.

⁵⁰ Set up on 8 December 2000 after two years of preparatory work, the organisation has seven committees (information, communication, practice and training, research, editorial, selection, restorative approaches in schools).

⁵¹ <http://www.euforumj.org/About/constitution.and.regulations.htm>

⁵² The site has a particularly well-stocked Reading Room, mostly in English, and publishes a newsletter. The European Forum has also been heavily involved in the continuation of the COST project (COST Action A21) a European network of researchers from some 20 countries; the work, completed in November 2006, will be published; see I. AERTSEN, T. DAEMS & L. ROBERT (eds.), Institutionalising Restorative Justice, Willan Publishing, 336 pp, (to be published).

training and good practice. As a result of projects carried out in conjunction with the Council of Europe⁵³ and the European Commission⁵⁴, the European Forum has considerable influence on the emergence of common “quality” criteria in member states.

17. A study of the work on and the different assessment instruments for penal mediation gives an indication of the likely future developments in this field.

II. THE FUTURE FOR PENAL MEDIATION IN EUROPE

18. The work carried out and the instruments already in place give an indication not so much as to the uniformity of the different systems but as to their compatibility, as they are able to highlight certain common features. Is it, at least in principle, possible to bring about harmonisation in respect of penal mediation? The answer is a clear yes, thanks mainly to the remarkable impact of the work of the Council of Europe⁵⁵, the primacy of Community law⁵⁶ and the active role of NGOs⁵⁷. In practice, the introduction of European quality standards is something that is not only possible (A), but necessary (B).

C. The potential for introducing European quality standards

19. There are certain aspects of penal mediation which are systematically considered to be of particular importance. These quality standards, broadly accepted by those taking part in mediation, could serve as guiding principles in the future assessment of the quality of mediation in Europe (1). Although they are acknowledged in all member states, yet they do not seem to be sufficiently well known among different target audiences (2).

1. Guiding principles

20. While I do not intend here to list all the different quality criteria pertaining to each guiding principle, I shall mention some of the most important.

1.1. Mediator qualifications

21. Back when the first European work on penal mediation was carried out, particular importance was placed on mediator training⁵⁸. Such training must be of high quality not only for users but also for the judicial authorities likely to refer parties to mediation and for lawyers who have an advisory role. While the requirements to apply for the post of mediator are fairly similar in all member states⁵⁹, the same cannot be said for training or final selection⁶⁰.

In civil matters, recent studies have shown the influence that can be exerted on the profession of mediator by his/her former profession, even where accreditation is preceded by special mediation

⁵³ I. AERTSEN, R. MACKAY, C. PELIKAN, M. WRIGHT & J. WILLEMSSENS, *Rebuilding Community Connections - Mediation and Restorative Justice*, Council of Europe, Strasbourg, 2004; see also the articles by I. AERTSEN & C. PELIKAN in Council of Europe, *Crime policy in Europe*, quoted above.

⁵⁴ Final Report/JAI/2003/AGIS/129, “Working towards the creation of European training models for practitioners and legal practitioners in relation to restorative justice practices – Exchange of training models for Mediation Practitioners”, 2004 ; Final Report/JAI/2003/AGIS/088, “Challenges of introducing Victim-Offender Mediation in Central and Eastern Europe”, 2005; a third project, to be completed in June 2008, will be seeking to identify the potential role of the European Union in the future of mediation, and to provide effective support for mediation in the countries of southern Europe, see <http://www.euforumj.org/Projects/projects.AGIS3.htm>

⁵⁵ The Committee of Ministers shows a particular interest in, for example, the work of the CEPEJ.

⁵⁶ CJCE, 15 July 1964, *Costa v. Enel*, case. 6/64, rec. 1141, 1158s.

⁵⁷ While they have no coercive force, they do offer considerable leverage to justice professionals, in this case those taking part in mediation.

⁵⁸ See Recommendation R(99)19 on mediation in criminal matters, quoted above, V.2.

⁵⁹ Although there is no particular legal requirement in many member states, applicants for the post of mediator are often legal professionals or psychologists with educational or social experience, see J. LHUILLIER, “Assessment of the impact of Council of Europe Recommendations concerning mediation”, document CEPEJ (2007) 12, p.151.

⁶⁰ There is, for example, no systematic mediator accreditation arrangement in all member states, see CEPEJ, *European Judicial Systems 2002 – Facts and figures on the basis of a survey conducted in 40 Council of Europe member states*, Council of Europe, 2005, Table H, p.135.

training⁶¹. While there is no reason to believe that there would be any difference in criminal matters, such influence is not necessarily a bad thing; the range of different experiences⁶² could in fact be an advantage in a profession dealing with a wide variety of problems.

On the other hand, it is very important for the quality of penal mediation that certain common standards be upheld from one training centre to another, not only within one member state but also between the different member states because of the increasing movement of people in Europe. Accordingly, member states would be advised to define together the content of some of their specialist instruction⁶³ and harmonise their training procedures⁶⁴; if such were to be the case, a European Mediator certificate could one day emerge, no doubt with the input of the Council of Europe, giving rise to a seal of quality and better recognition of the role of mediator among the various target audiences⁶⁵.

1.2. Mediator independence and impartiality

22. Independence and impartiality are part of the very essence of the role of mediator⁶⁶. However, in criminal matters, there is yet no European code of conduct for mediators comparable to the code already available in the civil and commercial fields⁶⁷.

The latter sets out the ethical rules of independence and impartiality in greater detail than the Council of Europe Recommendation⁶⁸; it could serve as a basis for drafting a European Code of Conduct for mediators in criminal matters.

1.3. Upholding the rights of the victim and the offender

23. As we have said, penal mediation must be voluntary, for both victim and offender. The Council of Europe Recommendation on mediation in criminal matters placed this at the top of its general principles⁶⁹ and the guidelines drawn up recently by the CEPEJ in turn have reconfirmed this by spelling out certain aspects: for example, parties must be given timely clear and complete information about their rights, about the nature of the process and the possible consequences of their decision. This must include information about the possibility of mediation without a personal encounter between the presumed offender and the victim, and the potential risks for the victim inherent in mediation⁷⁰, in particular the risk of “secondary victimisation”. It is also important for the victim to have accepted the fact that by opting for mediation, the offender’s penalty could be reduced.

In practice, it may prove difficult to assess how genuine and sincere people’s motives are for agreeing to mediation; this could cause problems with regard to the requirements of the European Court of Human Rights or the Court of Justice of the European Communities: for example, it may be difficult to

⁶¹ N. ALEXANDER, “Mediation in Civil Procedure – a Comparative Perspective”, in General reports on the 16th International Congress of Comparative Law, Brisbane, Australia, 14-20 July 2002, *Convergence of Legal Systems – 21st Century*, Brussels, Bruylant, 2006, p.607.

⁶² Some mediators have been, or continue to be at the same time, lawyers, social workers, psychologists, academics, etc.

⁶³ In criminal matters, member states should ensure that special instruction is provided in their training centres on the basics of criminal law, the relationship between mediation and criminal law, communication techniques and working with victims and offenders, special skills for mediating with minors or in cases involving serious offences, the different methods of restorative justice, etc.

⁶⁴ Initial training should, for example, be systematically followed by supervision by a more experienced colleague and then by in-service training. At present training is given by a wide range of agencies, depending on the country; curricula are drawn up by different bodies; in the absence of strict requirements, the duration and frequency of this training can vary considerably, ranging from a few sessions (eg in Sweden) to three years in-service training (eg in Austria). Duration is sometimes left to the discretion of the instructor. For further details see J. LHUILLIER, “Assessment of the impact of Council of Europe Recommendations concerning mediation”, document CEPEJ (2007) 12, p.154.

⁶⁵ In criminal matters, the CEPEJ Working Group on mediation referred to the idea of such a certificate in its guidelines. See CEPEJ (2007) 13.

⁶⁶ Etymologically, the mediator is the person in the middle, equidistant from the parties.

⁶⁷ European Commission: European Code of Conduct for Mediators, adopted 6 April 2004. See http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

⁶⁸ Recommendation R(99)19 on mediation in criminal matters, quoted above, §26.

⁶⁹ Recommendation R(99)19 on mediation in criminal matters, quoted above, §1; see also §§10 to 13.

⁷⁰ In this connection, see Recommendation R (2006)8 of 14 June 2006 on assistance to crime victims, §13.

assess the genuine commitment of litigants in cases where the judge refers the parties to mediation, endorsing the result if it is successful, or taking their conduct into account in apportioning blame if it fails⁷¹. To avoid mediation being used by parties for strategic purposes, member states should ensure that judges referring parties to mediation explain to litigants the risks of such an approach.

24. The rights of the victim and offender warrant particular attention when a minor is involved⁷². Supplementing the substance of previous Recommendations, the CEPEJ has proposed that there be exchanges between member states to optimise the involvement of minors in mediation and improve the role of social workers, psychologists and persons having parental authority. With the input of the Council of Europe and perhaps the European Union, guidelines could be drawn up to ensure that there are appropriate and compatible procedures in each member state.

1.4. Confidentiality of the procedure

25. Confidentiality of the mediation procedure is particularly important in criminal matters. Within member states, the confidentiality principle is part of a strict legal framework⁷³: it lends itself less to “contractualisation” by the parties than in other matters. Moreover, it is much narrower in scope than in civil matters: the duty of confidentiality takes second place to the public interest in being provided with information about criminal offences.

The mediator is of course the first to be bound by the duty of confidentiality. While exceptions are possible⁷⁴, they must always be provided for in law. A breach of this duty, in the course of the mediation process and outside the legally provided exceptions, should lead to sanctions, at least disciplinary, proportionate to the seriousness of the breach. Once the procedure has been completed, the mediator should be bound by the same duty, apart from any professional obligations to present a report to the authorities⁷⁵, in particular to notify them of the failure by one of the parties to comply with the final agreement⁷⁶.

The parties themselves have a duty of confidentiality in relation to the facts revealed during mediation. This duty may occasionally be contractual in nature: the confidentiality agreement may then be waived by common consent of the parties⁷⁷. Furthermore, it can happen that after the process has been completed, the parties are no longer bound by the duty of confidentiality, unless there is some stipulation to the contrary⁷⁸. Nonetheless, the significant consequences of any information revealed would perhaps warrant the parties being bound by the duty of confidentiality throughout the process of penal mediation.

2. Principles broadly acknowledged but not yet widespread

26. In all member states, there is still limited awareness of the possibilities offered by penal mediation. If the different quarters were given appropriate information, this would no doubt help improve the efficiency of justice. The relevance of this would become all the more apparent if awareness-raising moves were to focus on the advantages of mediation which have come to light in each country as a result of the evaluation work carried out by the Council of Europe, the European Union and NGOs.

⁷¹ A. J. DE ROO, “Alternative Dispute Resolution in Continental Civil Law: Something Old, Something New”, in Academy of European Law, Trier, Creating a European Judicial Space, Series of Publications, No. 30, Bundesanzeiger, 2001.

⁷² A. MESTITZ & S. GHETTI (Eds.), *Victim-Offender Mediation with Youth Offenders in Europe – An Overview and Comparison of 15 Countries*, XIV, Springer, 2005, 379 p.

⁷³ For example, in Austria, Germany, Romania, Slovenia, Sweden and the United Kingdom.

⁷⁴ For example, the obligation to give evidence in court in the event of a criminal offence, attempted criminal offence or planned criminal offence revealed in the course of mediation (Germany, Slovenia, United Kingdom).

⁷⁵ For example, in Austria, Germany, Hungary and Romania.

⁷⁶ For example, in Sweden.

⁷⁷ For example, in Austria.

⁷⁸ For example, in the United Kingdom.

While the public at large can be reached through conventional communication means⁷⁹, this is not the case for professionals or litigants in direct contact with penal mediation. In comparison with other areas of mediation, penal mediation enables litigants to come into contact with a larger number of players: in addition to the judge and counsel, already present in civil matters, the police, the public prosecutor, victim support organisations and social workers may also have a key role to play.

However, the police services, public prosecutors and occasionally even judges are not always fully informed of mediation procedures, nor aware of the potential advantages of mediation; this shortcoming needs to be addressed in their training or indeed in the course of their professional activity through increased contact between restorative justice and conventional justice.

Lawyers could be sensitised more effectively if member states and Bar associations introduced fee arrangements encouraging them to advise clients to opt for mediation.

D. Need for European quality standards

27. As stated above, not only is it possible to introduce European quality standards, it is also essential for two reasons. First, member states are in agreement about the possible future direction of penal mediation, and want to be able to compare their judicial systems in order to identify and, where appropriate, adopt best practices that have proved their worth elsewhere. Second, there are two trends that have to be taken into account: European citizens are becoming increasingly more mobile and more demanding regarding the quality of justice.

Introducing European quality standards should be seen as an opportunity to address two key objectives: improving access to justice (1) and promoting recognition of penal mediation (2).

1. Improving access to justice

28. The idea that mediation could play a key role in access to justice is not a new one: it goes far beyond the framework of criminal law and the borders of Europe⁸⁰.

From a qualitative angle, penal mediation certainly gives the victim more opportunity to speak and is able to take his or her needs more into account than the traditional procedure⁸¹; it also takes a new approach to crime, seeking to promote the reintegration of the offender into society following reparation of the damage caused⁸².

From a quantitative point of view, the results have to be qualified: it is not always clear-cut, unlike in civil and family mediation, that penal mediation reduces the workload of the judicial system. The Consultative Council of European Judges (CCJE) issued an opinion in 2004 pointing in the opposite direction⁸³. However, some member states have already reported very positive results⁸⁴, and predict that in future the benefits of mediation for the administration of justice will be even greater. The CCJE itself recognises that penal mediation may have “a preventative effect in respect of future crimes”⁸⁵,

⁷⁹ The CEPEJ's working group on mediation has drawn up a non-exhaustive list of the different means of communication it considers relevant; it also calls for mediation awareness to be part of the school curriculum; see CEPEJ (2007) 13.

⁸⁰ M. CAPELLETTI & B. GARTH, “Introduction” in M. CAPELLETTI (ed.), *Access to Justice and the Welfare State*, Le Monnier Florence, Sijthoff & Noordhoff Int, 1981: describing the improvement in access to justice as a succession of waves, the authors identify the third wave, occurring in the late 1970s, as the emergence of alternative methods of dispute resolution, first and foremost mediation.

⁸¹ I. AERTSEN & T. PETERS, “Mediation for reparation: The victim's perspective”, in *Essays dedicated to the memory of Prof. F. MC CLINTOCK*, in *Support for crime victims in a comparative perspective*, Leuven University Press, Leuven, Belgium, 1997, p.229.

⁸² I. AERTSEN, R. MACKAY, C. PELIKAN, J. WILLEMSSENS & M. WRIGHT, *Rebuilding community connections - mediation and restorative justice in Europe*, Council of Europe Publishing, Strasbourg, 2004.

⁸³ CCJE, “on a fair trial within a reasonable time and the judge's role in trials taking into account alternative means of dispute settlement”, Opinion No. 6, 2004, §145.

⁸⁴ In Slovenia, for example, mediation has reduced the workload in the criminal justice system: with 837 fewer trials in 2000, *i.e.* the equivalent of the workload of five judges in a first instance court, mediation enables the resources freed up to be deployed to other cases. See A. MEZNAR, “Victim Offender Mediation in Slovenia”, *Newsletter of the European Forum for Restorative Justice*, February 2002, vol. 3, issue 1, p.1-3.

⁸⁵ CCJE, Opinion No. 6, quoted above.

which is interesting not only in terms of crime policy but also in terms of case-flow management. In some member states, however, the savings brought about by penal mediation undoubtedly have to be viewed in the context of the customary arrangements concerning recourse to mediation: when mediation is used to deal in real time with cases, for example, instead of a discontinuation of proceedings, it is a factor strengthening access to justice⁸⁶; conversely, it has much less of an influence the further away from the event it takes place, or where courts take advantage of the possibility for trivial cases on which no further action would normally be taken, or simply to clear their backlog⁸⁷.

29. Accessibility to mediation is also in itself a criterion of access to justice. It is therefore particularly important that once the relevant social or judicial authorities are aware of it, they should encourage litigants to avail themselves of the possibility. The CEPEJ's working group on mediation suggests, moreover, that lawyers' codes of conduct include an obligation to provide information on penal mediation and an obligation to offer advice tailored to the circumstances of their client⁸⁸.

Of course, access to mediation will be easier in member states which support, particularly financially, penal mediation initiatives. But the role of member states could – and no doubt should – go far beyond that, in two specific ways. First, when – by way of exception – the parties (and in particular the offender) are asked to make a financial contribution, it should be proportionate to their income: for the sake of equality before the law, financial resources should not be an obstacle to mediation. Second, the mere fact of opting for mediation should never entail a risk for the victim that the time-limit for prosecution will expire: member states should see to it that the limitation period is suspended for the duration of the procedure.

2. Promoting recognition of penal mediation

30. The introduction of European quality standards is essential for reasons of clarity and legal certainty. The status of mediation needs to be clarified as for cross-border disputes, for which there should ideally be a system of mutual recognition of mediation agreements (2.1.) so in the national context, where the status of mediation could perturb what might be termed the “preserve” of traditional justice (2.2.).

2.1. The status of penal mediation vis-à-vis cross-border disputes

31. Just as confidence in the decision of a foreign court presupposes confidence in the judicial system of that country, confidence in a foreign mediation agreement presupposes confidence in the mediation system in question. A mediation agreement concluded abroad will be all the more accepted and recognized if there is some degree of harmonisation over mediation. In the case of a cross-border dispute, where different procedures may co-exist in different states, possibly in the form of penal mediation, such harmonisation is particularly desirable.

Legal certainty for the litigant is clearly an issue regarding harmonising penal mediation. While the *ne bis in idem* principle⁸⁹ comes into play when a judicial authority has ruled on a dispute, as this constitutes *res judicata*, unfortunately the same is not true when the dispute is resolved through penal mediation where there is no intervention by a judicial authority.

The appendices to the Council of Europe Recommendation on mediation in criminal matters establish the importance of the *ne bis in idem* principle⁹⁰ but the explanatory memorandum to the

⁸⁶ According to C. LAZERGES, “Médiation pénale, justice pénale et politique criminelle”, article quoted above: in such conditions, penal mediation is a “means of case-flow management to which consideration should clearly be given”.

⁸⁷ F. DENAT, “La médiation pénale”, in Institut suisse de droit comparé, *La médiation: un mode alternatif de résolution des conflits?*, Lausanne, 14 and 15 November 1991, Publications de l'Institut suisse de droit comparé No. 19, Schulthess Polygraphischer Verlag, Zurich, 1992, especially p. 59.

⁸⁸ CEPEJ (2007) 13.

⁸⁹ The “*ne bis in idem*” principle is a fundamental principle guaranteed in particular by Article 4 of Protocol No. 7 to the European Convention on Human Rights and Article 50 of the Charter of Fundamental Rights. It sets out the principle that no-one should be tried or punished again in criminal proceedings for an offence for which he or she has been finally acquitted or convicted.

⁹⁰ Recommendation R(99)19 on mediation in criminal matters, quoted above, §17.

Recommendation seems to indicate that this principle is to be implemented in each member state. There is nothing to indicate that the authors wished to extend it to cross-border disputes.

Today, however, this is an increasingly important matter, especially since a decision by the Court of Justice of the European Communities, whereby the termination of criminal proceedings entailed the application of the *ne bis in idem* rule, including in another member state⁹¹.

While it is only fairly recently that the European Union seems to have focused its attention on this matter⁹², the CEPEJ working group on mediation had explicitly introduced the cross-border dimension of the *ne bis in idem* principle in its guidelines⁹³.

2.2. The status of penal mediation vis-à-vis traditional justice

32. It seems to me that attacks on all social values, such as attacks on persons, property, honour, human dignity⁹⁴, etc. could lend themselves to an attempt at mediation⁹⁵. There is nothing surprising in this given that victims themselves often want to obtain information about and explanations directly from the perpetrator.

However, throughout Europe there seems to be a clear prevalence of minor offences among cases referred to mediation⁹⁶. Some countries have set a level of seriousness beyond which mediation is precluded in criminal matters⁹⁷. There are no doubt two reasons for this. First, penal mediation is often seen as a sort of favour, and this seems out of place in the case of more serious offences. Second, the offences considered to be the most serious involve, in theory, violations of the most sacrosanct of values (first and foremost, incest and parricide); resolving the matter could not therefore amount to merely seeking a just and reciprocal apportionment of right and wrong, sealed by an agreement: when the most sacrosanct of values are attacked, for victims to have closure there is an expectation that any ethical uncertainty is brought to an end by the public and official naming of the aggressor⁹⁸. Restricting mediation to less serious offences would therefore seem to provide a guarantee that society would make a sufficiently clear statement of disapproval vis-à-vis the perpetrator.

33. Nonetheless, the validity of this systematic “preserve” of traditional justice could one day be challenged: the need for explanations and information is no less great for victims of serious offences and a growing number of programmes are experimenting with mediation, in Europe⁹⁹ and elsewhere¹⁰⁰, in the context of the most serious offences (crimes of passion, theft or abduction involving murder, parricide, rape, incest, sexual attacks, etc). Carried out in tandem with prosecution proceedings or following a custodial sentence, these experiments seem to be producing promising results¹⁰¹, subject to a number of very strict conditions: the idea of mediation must come from the parties, mediators must have sound experience and particular skills, and must be able to refuse, if they so choose, cases pre-selected by a judge; long preparation (several months) must go into the cases accepted, which means that there would be few cases per mediator, and each one must be regularly monitored.

⁹¹ CJCE judgment of 11 February 2003, Gözütok and Brügge, cases C-187/01 and C-385/01.

⁹² J. LELIEUR-FISCHER, “Comments on the Green Paper on Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings”, article quoted above, §§31 and 35.

⁹³ See CEPEJ (2007) 13.

⁹⁴ Especially in the case of racist acts; in this connection, see 5th International Conference of the World Mediation Forum, “Mediation, a new culture of change”, 9-11 September 2005, Crans-Montana, Switzerland: <http://www.mediate.com/world/index.cfm>

⁹⁵ J. LHUILLIER, “Assessment of the impact of Council of Europe Recommendations concerning mediation”, document CEPEJ (2007) 12.

⁹⁶ I. AERTSEN, “Victim-offender mediation with serious offences”, in Council of Europe, Crime Policy in Europe, Strasbourg, Council of Europe Publishing, pp. 75-84.

⁹⁷ In Hungary, for example, the level is a custodial sentence of five years.

⁹⁸ This idea, rooted in the distinction between Themis and Dike, is addressed to great effect by A. GARAPON, “Qu’est ce que la médiation au juste?”, in Institut suisse de droit comparé, La médiation: un mode alternatif de résolution des conflits?, op. cit., especially p. 215.

⁹⁹ Particularly in Belgium, the Netherlands and the United Kingdom.

¹⁰⁰ Particularly in the United States and Canada

¹⁰¹ I. AERTSEN, “Victim-offender mediation with serious offences”, article quoted above.

Introducing such approaches on a wider scale would require a genuine change in mentality regarding the status of mediation. In practice, given that special skills are required at all levels, states should pool their experiences and discuss the matter with an open mind. Consequently, it will be essential to have European standards so that the effectiveness of these modern methods can be more readily perceived.

III. CONCLUSION

34. It might seem difficult to introduce harmonised quality standards in all member states, as each judicial system has its own procedural rules. Studies show, however, that there are many points, problems and interests in common; this should give us encouragement to press ahead with purpose.

Comparing practices in penal mediation will be extremely worthwhile. This could help explain why, given identical circumstances and with similar or identical legal texts, mediation is highly successful in one place but fails or is not even considered in another. Clearly, there are many avenues to explore and many prospects for improvement.

The Council of Europe, in particular the CEPEJ, the European Union and the different NGOs are, through their work, helping to build mutual trust between states, to pave the way for an exchange of best practice, to guarantee the rights of citizens having to deal with criminal justice, and to increase user satisfaction. In this respect, assessing mediation is a means of ensuring a modern and secure justice environment for the citizens of all member states.