

## Victim-centred restorative justice

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# Victim-centred restorative justice

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In the 1985 Council of Europe (CoE) Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure, one of the earliest European legal instruments on victims' rights, mechanisms that are currently known as restorative justice (RJ) were not included in the primary recommendations but listed under a secondary, tamer framed recommendation 'to examine the possible advantages of mediation and conciliation schemes'. In the same year, the General Assembly of the United Nations adopted the UN Victims Declaration, Article 7 of which exhorts member states to utilise informal mechanisms 'where appropriate to facilitate conciliation and redress for victims'. This is one of the subjects about which European victimologists were at the time more cautious than those experts from other regions, notably North America, who elaborated the draft of the Victims Declaration in Milan at the UN Crime Congress. The other area where diverging views surfaced was the right to express views and concerns in criminal proceedings, which found its way into the UN Declaration despite opposition and a formal reservation from the UK. Such a recommendation was nowhere to be seen in the CoE Recommendation of the same year. Clearly American and Canadian opinions in Milan prevailed over the European reservations that dominated the deliberations in Strasbourg.<sup>1</sup>

Since then the position of mediation, or RJ as it is now called in relevant legal instruments, has evolved. In 2000 the Economic and Social Council (ECOSOC) of the UN took note of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. This legal text no longer refers to the concept of reconciliation but is in other respects more ambitious than the previous one in the UN Victims Declaration. It states that RJ 'should be generally available at all stages of the criminal justice process'. However, two years later the ECOSOC took note of a revised text which states that RJ 'may be used at any stage of the criminal justice process, subject to national law'. However the verb

<sup>1</sup> The author was a member of the ad hoc committee elaborating the 1985 CoE Recommendation and took part in the debate in Milan at the UN Crime Congress as a member of the Dutch delegation.

'should' should have been preferred to the auxiliary verb 'may'. This change suggests that political support for RJ had lost some of its momentum on the global stage around 2000. In this regard it should also be highlighted that the two texts on RJ were adopted not by the General Assembly but by the considerably less authoritative ECOSOC and that the language used—'takes note' of the document, rather than 'adopts it'—shows a lack of political consensus. It suggests that at least some countries represented in ECOSOC were unwilling to adopt or even welcome the draft text.

In the meantime, on the European stage, support for RJ had begun to grow. The Council of Europe adopted its Recommendation on Mediation in Penal Matters in 1999. In this recommendation it is stated that mediation in penal matters should be generally available and that to this end legislation and guidelines are required. The CoE Recommendation of 2006 on Victim Assistance duly refers to the 1999 Recommendation on Mediation in Penal Matters. However, the EU Framework Decision of 2001 on the Standing of Victims in Criminal Proceedings is nuanced and less straightforward in its support of RJ. It states that member states 'shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure'. Here again one senses a turning of the tide around 2000. The belated European enthusiasm for RJ had apparently already waned somewhat.

Considering this historical background, it comes as no surprise that in the long-awaited new EU Victims Directive (2012/29/EU) RJ is positioned as an option rather than as an obligation, and that the emphasis is on due process for victims. The provisions under review could in my view rightly be characterised as a plea for victim-centred RJ, a label inspired by the new concept of victim-friendly victim–offender dialogues in the USA, replacing older concepts such as victim–offender reconciliation schemes.

These 'notes from the field' give me the opportunity to reflect on my own evolving ideas on these matters over the past three decades. In the mid-1980s, as chair of the Dutch Victim Support Organisation, established in 1984, I was advocating easily accessible victim support and better treatment of victims in criminal justice, including effective forms of compensation. These reformist ideas emanated from and were grounded in the idea that the welfare state should be expanded to reach out to crime victims. I was at the time sceptical about the victim's right to speak up in court as advocated by American victimologists, and even more so of mediation, advocated in The Netherlands as a method to divert cases away from criminal justice, *inter alia* by abolitionists like Louk Hulsman and Herman Bianchi. I suspected those promoting RJ in The Netherlands of just paying lip service to the interests of victims and actually being more on the side of the offenders than of the victims. I was also suspicious of the situation in North America, where early RJ promoters advocated reconciliation and forgiveness as the aim of RJ rather than as one of its possible outcomes. Such supporters seemed to ignore the anger of victims and their search for vindication and compensation. In my view the development of victim support organisations and victim-centred reforms of the criminal justice system should

be the first priorities of the victims movement and I regarded RJ as a distraction and, possibly, even a trap for victims. In my experience, victims themselves rarely asked to have their cases diverted away from criminal justice. They tend to ask for better treatment by the system, or in other words, for victim-friendly reforms of the system and not for an alternative system.

In the meantime two factors have influenced my views of the role of victims in formal or informal proceedings, including RJ. The first is that increasing empirical evidence has been presented that participation in both criminal trials and RJ programmes can indeed benefit victims. Secondly, much progress has since been made with the empowerment of victims through victim support and better treatment within criminal procedure. The victim has been put in a stronger social and legal position and this has undeniably increased his/her agency and freedom to act effectively as a party in proceedings. In the current situation in The Netherlands, for example, victims of serious crimes can rely on support from a case manager of Victim Support Netherlands and from a legal counsel paid for by the state. They also have their own seat in the courtroom. In this new context, I think the right of victims to speak up in court and present their views is now to be welcomed as an option for those victims who feel ready for it. I am now also more positive towards RJ mechanisms as an option for victims who feel ready for it than I was 30 years ago. My fears that victims would be manipulated and possibly mistreated in the course of RJ procedures by overzealous mediators have diminished because of the improved cultural environment for victims. Victims seem to me now to be sufficiently empowered to take part in RJ procedures without the risk of secondary victimisation.

Considering these changes, I now welcome the plea for victim-friendly RJ in the new Directive. I also agree with the criticism that the text is disappointingly weak on the right of victims to benefit from RJ when they opt for such a procedure. The right of voice in the trial to some extent allows the victim the right to confront his/her offender but this is and will remain an option in only a minority of cases. Many less serious cases are never brought before the court. It is a great breakthrough that victims should, according to the Directive, have the right to appeal a decision not to prosecute. This may in fact prove to be the most revolutionary element of the Directive. However, I would also like to give victims the right to access an RJ programme in such cases as an option. In other words, if the prosecutor drops the case for reasons of expediency, the victim should have the right to request a RJ programme instead, besides having the right to appeal against the dismissal. This is an important right in view of the increasing tendency of prosecutors in many European countries to enter into forms of plea bargaining with the suspect in order to speed up the proceedings. These forms of plea bargaining are likely to undermine the newly gained participatory rights of the victims and this negative effect could in part be counter-balanced by participation in RJ programmes. Finally, I would also want to argue in favour of the right of victims of serious crimes to arrange a meeting with the offender after his/her conviction. To my knowledge such meetings are desired

by a good many victims for a variety of reasons—certainly not always a desire for reconciliation but also to confront the offender with the consequences of his/her crime or to ask for an explanation. In my opinion, the satisfaction of this legitimate need of victims ought to be facilitated by the state.

To conclude, I agree with Katrien Lauwaert that the time has come to acknowledge access to victim-friendly RJ as a victim's right at all relevant stages of the proceedings. In this respect the Directive, however welcome otherwise, falls short of expectations. Regarding RJ the European Commission seems to have erred on the side of caution.