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Thomas Trenczek

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Developments in European ADR

Victim offender mediation and restorative justice in Europe – a short overview*

Thomas Trenczek

Victim offender mediation (VOM) is a process which is offered to the parties of a dispute arising from the commission of a crime to so that they can talk about and deal with the offending behaviour. With the assistance of a neutral third party (the mediator) the parties identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement, which often involves restitution. The mediator has no advisory or determinative role in the dispute or the outcome of its resolution. VOM is not a completely new or unique process. It finds its roots in the way many indigenous cultures traditionally dealt with deviant, disruptive or victimising behaviour within their communities.

VOM is just one, and in the present European context the most important, model of restorative justice. Restorative justice is seen as a broad approach to crime oriented towards repairing as far as possible the harm which it causes. In 'modern', 'western' societies the criminal justice system defines crime in terms of violation of the laws of the state. Therefore, the state alone becomes responsible for determining punishment, and the accused is protected from the personal revenge or retribution which might be exacted upon them by a victim or victim supporters. The function of the criminal justice system is to protect rights, to determine guilt and to decide punishment. Therefore the focus is on due process and a fair trial. However, victims often feel that they are left out of, or even used by, the system rather than it attending to their needs. When victims are included in the procedure it is usually to act as witnesses in the contest between the accused and the state. In this role their story of victimisation is often questioned and

consequently victims often report feeling re-victimised by the court process.

Restorative justice places the victim with the offender at the centre of the process. Instead of defining crime in terms of the breaking the law, it defines crime in terms of violation of one person by another. The point of interest is not the abstract violation of the peace under the law but rather on the problems of the persons directly involved: victim and offender. This is a revival of the understanding of crime as a cause, expression and consequence of a conflict, of difficulties and problems of and between victim and offender. Instead of understanding justice simply in terms of guilt and punishment, the restorative justice framework attempts to understand justice in terms of responsibility and reparation. From this perspective justice is achieved through offenders accepting responsibility for their actions and taking steps to make amends. The goal is that the victim, the offender and therefore also the community are restored to well-being.

The active participation by the victim, the offender and possibly other parties concerned forms a core element of restorative justice. Restorative processes are characterised by a meeting of victim and offender. Discussion exists on which other parties should be involved, and in particular whether criminal justice officials - as representatives of the community or the state – should play a direct role in restorative justice processes. The discussion is most relevant for the more communityoriented models of restorative justice, such as community conferencing or family group conferencing. The conferencing approach strengthens aspects of restorative justice, following evolutions in New Zealand, Australia,



Canada and the US. There has been much interest in it in some European countries, and schemes are operating mainly in the United Kingdom and on an experimental basis in the Netherlands, Sweden and Belgium.

The debate on how the consequences of an offence could be faced and resolved by those immediately involved, namely the victim and the offender, started in Europe in the early 1970s. The discussion took place at the same time the first experiments with victimoffender mediation were set up in Canada and the US. Moreover, some of the first North American initiatives were influenced by the theoretical work of European scholars such as Christie.1 In European countries, the present form of VOM came into existence in the 1980s. A first pilot project began in Norway in 1981 and Finland followed two years later. In Austria the model is called 'out-of-court offence resolution' (Außergerichtlicher Tatausgleich -ATA) and was introduced nationwide first in juvenile courts in 1988 and later in the Criminal Procedural Law in general from 1 January 2000. In England, after small-scale experiments from 1979 onwards, the Home Office funded and researched four projects from 1985-87, but they have not expanded nearly as rapidly as in Germany, which started at about the same time but now has over 400 services which offer VOM, in both juvenile and adult crime cases.2 In France, where work also began in the mid-1980s, VOM was linked from the outset with victim support.

Initially VOM had a slow development. Although experiments were deemed positive, not least by the victims and offenders involved, the movement did not immediately attract the influence and support that was hoped for. The approach was very new within the culture of legal professionals and criminal justice policy makers. In most countries more than a decade had to pass in order to develop a practice of some significance. The creation of a legal framework sometimes provided an important impetus, but did not lead generally to the expected breakthrough.

From a quantitative point of view the practice remained rather limited. From a qualitative point of view, however, many small-scale experiments and programs provided conclusive evidence that this way of responding to crime contained strong innovative potential.

During the 1990s the number of mediation programs and the volume of cases dealt with on an annual basis increased steadily in European countries and VOM has now become a well-founded practice. In some of these

especially to general principles of VOM, to its legal basis as well as practice and training standards. In some countries (especially Austria, France, Germany, Norway and the UK) the development of VOM practices and of VOM legislation has taken place in the years – or even decades – prior to the issuing of the Recommendation, however this has contributed to and enhanced a national policy establishing VOM. In other countries (eg Ireland, the Netherlands, Portugal, Spain and

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countries volunteers play an important role in daily mediation practice, whereas in others, like Austria and Germany, the intervention is highly professionalised. Diversity is equally shown in the type of relationship that the mediation services have with the criminal justice system: from exclusively system-based, to primarily community-based. The practice contrary to common belief - does not in any way remain limited to property or less serious offences. Although the focus of VOM in some European countries is still predominantly on juveniles, the application in general criminal law is gaining more acceptance. Although most programs work within a diversion approach with pre-trial cases, experience of mediation in the succeeding stages of the criminal justice process, including after sentencing, is growing and promoting restitution and redress as eminent principles of criminal justice in general.

At the end of the 1990s, a new phase in the European development of VOM could be identified. In September 1999 the European Committee of Ministers adopted Recommendation No R (99) 19 – Mediation in Penal Matters, which can be viewed as a milestone in the development of VOM in Europe. The Recommendation (and its Explanatory Memorandum) refers

Sweden) the Recommendation has contributed to the introduction of VOM or served as an important instrument to provide orientation and support and has influenced the national legislation (such as in Belgium, Cyprus, Finland, Italy, Poland and Slovenia). The 'European Forum for Victim Offender Mediation and Restorative Justice' founded in December 2000 regards the Recommendation as one of its policy guidelines and as a pivotal instruments for achieving its objectives. The Recommendation even had a marked influence on the work and the final draft of the United Nations Basic Principles on Restorative Justice.

Dr Thomas Trenczek, MA is Professor of Law and a practising mediator in Germany and can be contacted at mediation@trenczek.net.

Endnotes

- * The text is based partly on material of the European Forum for Victim-Offender-Mediation and Restorative Justice see <www.euforumrj.org>.
- 1. Christie N 'Conflicts as property', 13 *British Journal of Criminology* 104 (1977)
- 2. Trenczek T 'Victim-Offender-Mediation in Germany – ADR under the Shadow of the Criminal Law?' 13 *Bond Law Review* 364 (2001).

