Has Probation Any Impact in Terms of Reparation to Victims and Communities? Complicating a Simple Question

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Introduction

In the list of topics and questions addressed with regard to probation, that of reparation cannot be neglected. Indeed, for a couple of decades now, the prominence of reparation and restoration in the list of goals of public intervention in the aftermath of crime has been obvious. The original justification of criminal justice (CJ) as a symbolic re-confirmation of moral order as a 'public good' has tended to give way to a modernist, pragmatic approach. Herein the notion of 'justice' is conceived as a 'function' in a society focussed upon maximising a climate of security, likely to promote an atmosphere of well-being among the citizens. In this line, and more in particular after the Second World War, doing justice was seen more and more as a matter of public service, to be managed as efficiently as possible. In a context of worldwide disintegration of traditional communities, the theme of victims' need for reparation showed up as a matter of political credibility. The individual 'victim' became recognised as the

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holder of specific group of civil rights, to be responded to by the state. Moreover, the victim's social surroundings were also to be recognised as an important stakeholder in the provision of criminal justice. Doing justice thereby was seen as, at least partly, an aspect of community-building with prominence given to the role and to the interest of the individual or the communal–collective victim, with both in a position of claiming the right to be properly compensated for the damage done through the offence.

The notion of 'restorative justice', with origins in the USA and Canada from the 1970s onwards (Aertsen 2004) found its way with remarkable ease through the UK and Western Europe to actually become a criminal policy approach that is well known everywhere and respected in circles both of the UN and of the Council of Europe. The general idea is the elaboration of a criminal justice system focussed upon the actual reparation of harm rather than upon retribution of the 'wrong' done (Zehr 1990; Aertsen 2004; Walgrave 2008). The symbolic and the abstract have to give way to the 'real' and the tangible. This is one reason at least to question punishment, as well as its alternatives, on their reparative potential.

In answering the question in the title of this chapter, my point of view is that of a pedagogue and a formal practitioner in victim–offender mediation in all sorts of criminal cases. More in general, I have been—and still am—a promoter of restorative justice in Flanders for more than twenty years. In April 2015 I completed a PhD research project analysing the development in Flanders of '*forensisch welzijnswerk*', a scheme launched in the late 1970s that focuses on every attempt in the sphere of criminal justice to promote the well-being of any person in any way involved, and thus including probation, victim assistance and restorative justice alike.

By practical experience as well as by research I feel strongly stimulated not to isolate CJ development and policies from their historical backgrounds or from their socio-political contexts. To really know what we're talking about, we cannot ignore the dynamics within which all sorts of decisions have been taken and all sorts of practices have appeared worth being considered and put into practice. This makes it difficult to answer the question on the reparative impact of probation, either *in abstracto* or in general.

For starters, it's no secret of course that probation and the notion of 'restorative justice' are both rooted in the no-nonsense, straightforward approach of self-organisation characteristic of the USA in particular and of the Anglo-Saxon countries in general. Reading the work of de Tocqueville (1963 [1835]) today in the surroundings of a country like Belgium, it is still hard not to share, at least partly, some of the fascination of this French aristocrat with the differences between a continental European and an 'overseas' conceptualisation of both democracy and (criminal) justice alike. Moreover, it's still far from difficult to recognise the same 'cultural' differences in discussions that take place today outside official discourses. For similar reasons, seen from a Belgian perspective and taking a position some mental distance from what appears to be actually considered universal 'common sense', the question in the title of this chapter seems very Anglo-Saxon to me. Therefore, in trying to answer it, I'd like to contextualise and somehow develop the terms in which it was formulated.

The Notion of Reparation: Is There Something to Repair?

Literally, 'reparation' as a goal of CJ intervention suggests the reconstruction of the situation, just as it was before the incident. And using instead the word 'restoration' might even sound worse.

We might wonder whether these goals are at all realistic. To the extent that crime is perceived as an intersubjective 'event', some philosophers would see it as something that cannot be undone, and that should, apart from every temptation to dramatise, be appreciated as such in the pursuit of justice (Arendt 2007[1964]; Derrida 2003; Biesta 2009). We might wonder also whether something such as the 'reparation' of the harm done to the victims can be taken care of by a system or some organised procedure, and then result in a predictable an measurable outcome, without stealing it from the parties involved (see Christie 1977). Unless, that is, reparation could actually be reduced to the transfer of an amount of money, objectively determined.

> Experience shows that in Belgium at least, victims of crime often perceive the promise of being 'repaired' as an insult. Confronted with this systemic 'goal', they don't feel they have been taken seriously in regard to what they have experienced. This probably is one of the reasons why victims of serious offences would—at first—rather reject 'reparative/ restorative measures' as buying off their right to further complain and as a theft of their place and identity in 'their' case. (Van Garsse 2004)

Advocates of victim's rights might perceive such resistance as an indicator of secondary victimisation caused by the very offer of mediation (The European Forum for Victims' Services 2004). Their plea is for a rigid and careful selection of the few cases that are considered 'safe' enough for a victim–offender dialogue, or 'light' enough to allow for a responsible application of a 'merely reparative' measure. A recent directive of the European Parliament on victims' rights aims to achieve the same protective atmosphere and stresses the right of the victim to refuse to accept formally any attempts at reparation, beyond a unilateral financial transaction (Dir. 2012/29/EU: art. 12).

Other scholars have for quite some been warning of the inherent limitlessness of the victim's right to reparation. They consider it at the least a false, misleading promise within the context of modern judicial proceedings, bound as they are by such principles as equality, legality and proportionality (Fijnaut 1983; Gutwirth and De Hert 2002, 2011). Moreover, the victim might feel forced into the role of 'good victim', so as to be likely to fit expectations of being not only damaged but 'hurt' as well, and therefore 'in need of reparation' (Van Dijk 2008). Many mediators would confirm that having to play the role of the victim, especially in cases of minor crime, can indeed be perceived as a burden: During my work in developing victim-offender mediation in Flanders, I got both surprised and fascinated by the heterogeneity within the group of those identifying with the position of 'victim'. The notion of 'victimship' appeared to be constituted by a broad range of different emotions and expectations. Still, looking closer, in every case one need was present as a prominent constitutive factor: the need the gain some ownerschip of their situation, to be of influence, not to be overruled (again), even if – paradoxically- the desire was not to be involved any longer (Van Garsse 2004, 2012, 2013).

Inspired by research on 'procedural justice' (Rawls 1999) and by quite some experience in victim–offender mediation, I too would advocate careful use of the word 'reparation' and even 'restoration' as aims for any public intervention in the sphere of formal criminal justice, let alone as criteria for a successful policy. Popular pleas for the victim's right to be repaired tend to formalise, organise and 'instrumentalise' what ought to be respected as aspects of the atmosphere of the personal, the subjective and the unpredictable (Van Garsse 2004; see also Derrida 2003 and Biesta 2006). Maybe we should change our vocabulary from 'reparation' and 'restoration' to 'respectful co-involvement in doing justice' (Derrida 2001, 2003). Thereby the focus shifts from the authoritarian projection of a desired outcome to an open, process-oriented invitation of civic capacity (Van Garsse 2012).

The Notions of 'Community' and/as 'Victim': Between Reality and Projection

In the same line of thinking, even the notions of 'victim' and 'community' are lacking clarity.

On the one hand, the concept of 'victim' can be defined broadly as 'every person/organisation economically, emotionally … affected by the event'. This broad definition includes the families of the offenders, the neighbours, the friends, the school and so on. In a republican view like that of Braithwaite and Pettit (1990), they'd all have a say in the outcome of the case. But what about legal security of the parties involved (Gutwirth and De Hert 2002)?

On the other hand, the notion of 'victim' can also be restricted to those recognised by the judicial authorities as formal stakeholders in a specific file. But then, of course, many concerns among citizens would be neglected and doomed to appear as 'irrelevant' for the case. In this approach, criminal justice risks becoming alienated from social reality and is likely to cause forms of secondary victimisation to citizens not being taken into account by public authorities. This brings us back to the original motifs for the promotion of restorative justice (Christie 1977; Zehr 1990; Aertsen 2004).

Putting the victim and the community on the same line is a common feature of restorative justice literature (Braithwaite and Pettit 1990; Walgrave 2008). But I still have some uneasy feelings about it. The very Anglo-Saxon concept of 'community' does sound rather vague in a very much urbanised, bureaucratised and multi-cultural Belgian society. The term tends to provoke feelings of nostalgia, with reference to the fading of the '*community*' under the still growing pressure of a neo-liberal '*socialisation*' (Bauman 2000; Sachβe 2003). Compared with the era of small rural villages where generations of people used to have a strong common sense of values in life, today an average street in a Belgian city is generally characterised by people who are not really connected, unless by merely 'functional' bounds. Of course, even then, communities exist, be it in a fluid and hardly visible form (see Bauman 2000). Placed within the context of the struggling modern welfare states, the notion of community even carries the slight suspicion that it is composed of people looking out for their mutual benefits, even at cost of those of 'the others' (Huyse 1993). Obviously there's a growing difference between 'the community' and 'the collective'. This makes the idea of 'the damaged community in need of reparation', as one of the crucial stake-holders in 'doing justice', far from self-evident. Seen from everyday Belgian reality, the attribution of the victims' role to the community in the context of criminal policy risks being reduced to a cheap justification of—every—public intervention (see Duff 2001). This becomes obvious on looking into the discussions about what kind of activities can be considered '*community* service', and which ones are likely to please only *some* citizens. As we could observe in practice, even the cleaning of a public garden, an offering of community-service applied often, carries an enormous lot of presumptions that only marginally compare to by people's actual experience.

As a result, the popularity of the community service order among the judiciary, be it as an alternative measure or as an autonomous sanction, sharply contrasts with the increasing scarcity of places of work that are ready to collaborate. More and more, one has to *organise* community service, and pay people to provide and supervise it, for the sake of alternative punishment. What are we really talking of here?

One might even say that the call for community involvement in the aftermath of a crime tends to be an attempt at constituting some sort

of community rather than actually repairing it. This social-constructivist thinking in terms of the 'function' of handling delinquency comes close to the ideas of Durkheim and others at the beginning of the twentieth century. But can our democracies still afford such a radical modern rationale, after the questioning of this instrumental reasoning by post-war postmodernity? Shouldn't we redefine such a friendly notion as that of community?

Inspired by Hannah Arendt and Jacques Derrida, scholars like Biesta (2006, 2009) and Mouffe (1989, 2005) state that democracy is in great danger of becoming itself a victim of the overall supremacy of a 'needs' approach, linking democracy to the tangible effects of equal distribution of 'satisfaction' and 'contentment' among its citizens. They wonder whether a democratic society can ever be a community unless it is one where the members have nothing in common and where communicating their mutual differences is a source of everlasting political debate and development (Biesta 2006). Like Derrida (2003), they don't see democracy as a way of organising the state, but as a perspective, always 'to come' ('*la démocatie à venir*') throng confrontation with the unexpected of the appearance of the respectable different. In their view, 'doing justice' in a democratic way is not restricted to compensating the community and/or the victim for the harm done. It is about restoring them in their ability to engage in as process of change, proper to democratic dynamics. (Derrida 2003; Biesta 2009).

This line of thought questions the actual widespread popularity of restorative justice as a potential emanation of a merely conservative aspiration to reconstruct existing power balances, amicably but quite effectively disciplining those who oppose. In these terms, there's no clear, everlasting model for democratic justice, neither is there one for the practices and procedures to promote it. And the first question to be asked to a community presenting itself as being in a position to claim the right to be restored cannot be but: 'Who exactly are you?' Put like this, the reparation of the community is not so much a matter of compensating the harm done by the person accountable as a question of the attribution of identity and thus of social pedagogy through political debate (Biesta 1998, 2004, 2006, 2009; Valverde 1999a, b; Derrida 2003).

Anyhow, it seems to be obvious that, from its appearance, the introduction in criminal policy of the concern for 'repairing the victims' has

seen an emergence of ideological views, to a certain extent contradicting each other while all having to do with the balance of political power between the presupposed community of citizens and the state (Van Beek 1970; Gutwirth 1993). But to what extend is this type of approach still compatible with a concept and a practice like the one of probation?

The Notion of Probation: Repairing the Community or Testing the Offender?

Looking then not at the effect of probation as such but rather at its socio-political context, what probation offers comes more fully into focus. Therefore, besides the terms 'reparation', 'victim' and 'community', even the notion of probation does not escape contextual contamination. This is obvious when we look at the variety of practices and policies that the umbrella of probation actually covers, some of them focussing on assisting vulnerable ex-offenders to maintain themselves in society, others designed to control and prevent the phenomenon of delinquency as such (Fitzgibbon 2008; McNeill et al. 2009). Probation sometimes aims to prevent a public sanctioning, but sometimes serves, for the deserving offender, as a conditional alternative to a more repressive sanction.

One common feature among all these differences is an obvious link between probation and community. In international circles probation is actually referred to as 'community-oriented sanctions and measures'. But, even this apparent constitutive community involvement does not make clear the nature of the 'community orientation', leaving open whether the offender is addressed *inside, because of, together with,* or rather *by* the community.

Originating in the United States in the middle of the 19th century, the notion of probation goes back to the private sphere, with citizens wanting to contribute to handling deviant behaviour in a context of civil solidarity and mutual care (Verheyden 1975; Peeters 1982). Very much in line with the pragmatic but very nuanced American way of building democracy (Tocqueville 1963), this contribution from the 'community', in its critical dialogue with the state, was able to manifest itself as a valuable and considerable alternative to state intervention. Step by step it provoked wider

interest and was given official legal status. In 1925 it was introduced into US federal law, as a way of doing justice to be made concrete in a variety of applications according to local circumstances in one or another American state (Verheyden 1975). In a way, practising probation was a matter rather of pedagogy than of justice, as it provided the offender and the community a perspective on citizenship, seen as a cornerstone of the democratic project (Cornil 1937). From this point of view, the understanding of breaking a rule as damage to the community at the same time appears as a reality and—probably even more—a socio-political construct to be implemented to those applying for full citizenship. As observed by the Belgian scholar Cornil (1937), even in the USA the volunteering by citizens in probation practice was generally symbolic rather than substantial.

Already, during the first half of the 20th century, criminal policymakers were quite aware of the US practices on probation (Peeters 1982; Verheyden 1975). But at the same time, they were fascinated by the political translation of modernity in Germany, transforming the nation into a 'society' that was directed by firm, goal-oriented central state power and identifying ethical as functional and useful for collective progress (Natorp 1964[1905]; Nohl 1965[1925]; Sachβe 2003; Fijnaut 2014). Moreover, the young and very much industrialised Belgian state was also rooted in a strong liberal rationale.

This interesting intermediate position of Belgium made that country's criminal policy the birthplace of the doctrine of 'social defence'. The idea was to protect the citizens against the disease of social disintegration and delinquency, which was leading to a growing disbelief in the project of a democratic national state (Prins 1910; Cornil 1934; Tulkens 1988). Seeking to reconcile individual responsibility and social determinism, social defence called for a nationwide mobilisation of forces to stimulate people to take a constructive part in society rather than give in to contamination by deviance. Under the medical motto that prevention is always better than cure, some socialist ministers of justice engaged in making the state take the lead in setting up actions to prevent victimisation rather than to make reparation for it.

Education was seen as the strategy *par excellence* to improve the situation of those who on one hand were vulnerable to be affected by delinquency (an offender being in fact also a victim) but also on the other

still able to integrate into society. It was seen also as a tool to carefully select those now beyond rescue, against whom society had to be protected, and to preventively isolate them—for always, if necessary. Tulkens (1993) observes that, under the doctrine of social defence, criminal policy tended to distract itself from the criminal, the crime and the problem of punishment and justice. It did so in order to instead address, assist, educate and/or discipline society as a whole.

In the context of social defence the idea of probation was above all promoted as an interesting testing period, starting from the presumed capacity of every human being to take up responsibility. The same promoters of probation problematised the use of repressive detention for being counterproductive from an educational point of view and in fact pointless from a strictly political one (Cornil 1937). After the Second World War however, very much in line with the ideas of the upcoming movement of 'New Social Defence' (Ancel 1965), they were dreaming of making probation the motor of a radical and urgently needed repositioning of 'doing justice' in post-war democratic societies. The idea was to focus upon the collaboration with the offender, approaching him as a citizen, a holder of democratic rights, and upon his meaningful contribution to the debate on how to handle the event. Notwithstanding their well-elaborated pleas, and given the quite promising results of some successive experiments, it took probation in Belgium till 1964 and many years of intensive and long-lasting political debate to be given a legal status. In comparison with its enormous, almost revolutionary potential as a politically motivated concept (Verheyden 1975), the Belgian law on probation carried the smell of resistance and suspicion to what voices of civil society ('the community') could bring to the fore. Peeters (1982) suggests that the preparation of the law lacked sufficient communication with the judiciary. I would suppose, rather, that the post-war Belgian government very much wanted to strengthen the state in order to defend at least the formal unity of a Belgian nation, which was then internally more deeply divided than ever before (see also Huyse 1993).

Be that as may, instead of exploiting the opportunity of a radical repositioning of 'justice', the eventual law on probation rigidly restricted its scope to certain kinds of cases. Notwithstanding the fact that the legislator claimed the embracing of the 'subsidiarity' of traditional punish-

ment was a basic *principle* (Cornil 1964), the application was restricted to a *practice* of special individual treatment for only some cases that were considered too inconsequential to justify 'real' punishment. Instead of restricting repression in the name of subsidiarity, probation ran an enormous risk of becoming a measure of net-widening, with all the ambivalence of a favour (Cornil 1965).

These initial fears were strongly confirmed by practice. After a first period of practice, many voices of probation officers, academics and penal policy-makers expressed disappointment and frustration (Verheyden 1975; Dupont 1980; Peters 1980, 1982; Peeters 1982; Neirinckx 1981).

In 1985 in the Louvain district some local probation officers set up an isolated experimental practice of community service, conceived as a symbolic gesture made by the offender of respect to 'society', and as a means to prevent recidivism (Baeyens 1993). The idea was partly copied from the 1965 law on juvenile protection(!), which provided the possibility of a measure of 'philanthropic' work. It was a promising idea which, however—for decades—was applied merely in some isolated cases and was hardly ever put into practice. Even in the context of probation it would take until the 1990s to have this optional supplement in the package of probation conditions to be more or less generalised. Not by coincidence, this sudden promotion of community service took place as part of a crisis policy in the aftermath of a series of brutal murders. The goal was to demonstrate government's ability to counteract any impression of impunity. In 2002 the measure, given the legal status of an autonomous sanction, suddenly started years of an enormous expansion, suggesting that, notwithstanding the educative and restorative potential, apparently almost all the slightly repressive aspect of a newborn 'sanction' was what public opinion and the judiciary were most interested in (Beyens and Aertsen 2006).

Putting the Victim Back on Stage

The entry into Belgium of victim–offender mediation was the result partly of a discovery, partly of an 'invention'. Belgian practice used to be far from in the lead in spending time and attention on the victim's

rights to reparation. In fact, Belgium happens to have been one of only the most recent countries to follow the international recommendations on installing an official fund for victims' financial compensation and to finance, from 1984 on, some specialised professional care for victim assistance (Peters and Goethals 1993).

Compared with Anglo-Saxon countries, until the late 1990s there was no real bottom-up victim's movement in Belgium. Instead, the late development of victim assistance—in the midst of successive episodes of Belgian state reform, consisting of a gradual changing of the Belgian state into a federation of autonomous 'communities' (*Gemeenschappen*)—was, from the very start, an area of intensive ideological as well as strategic debate on where to position and how to justify this new public intervention, which had not arisen in response to any substantial request from citizens.

At the academic level, promoters of social work opposed the view of a group of critical criminologists. The former saw the development of specialised victim assistance as a logical step for the communities in their formal responsibility to promote, by means of a proper policy, a common atmosphere of well-being. Until then, victim assistance was seen as an empathic response to individual needs of a category of citizens, holders of specific civil rights, to be taken care of and—if necessary—to be protected against further harm. These same academics embraced the perspective of a victimology, that was separate from considerations of crime and justice as such. The criminologists opposing them however wanted to address the victim above all as a crucial stakeholder in a process in doing justice, not in a detached, abstract and authoritarian way, but as communication between meaningful approaches to a criminal event. Their view was above all oriented towards changing criminal policy, rather than towards responding to individual needs (Peters and Goethals 1993).

From the beginning of the 1990s onwards, the choice of the Flemish authorities, in search of how to establish a tangible sphere of autonomy for the provision of well-being, was obviously the first of those just outlined. At the same time the federal minister of justice saw his department confronted with a growing crisis in credibility owing to a perceived increase in crime and public insecurity. If (criminal) justice were to be transformed from an archaic symbol into a performant public service,

then the (potential) victim obviously was easier to reach and to please than the members of the growing group of offenders. Moreover, in the context of a constant increase in prison overcrowding, the growing policy-investment in responding to victim's needs went also to serve as an implicit justification of the implementation of a more rigid and repressive penal policy (Peters 1993). In this reasoning, we got pretty close to returning to the original doctrine of social defence.

In the very same period, as a member of a small NGO working on alternative and educative measures for juvenile delinquents, I participated in an intuitive development leading towards a restorative approach (Van Garsse 2001, 2013). Starting from the idea of community service, a hitherto unused provision of the 1964 law, we discovered that in fact, given the concrete social context, this measure was rather more likely to stigmatise, shame and discipline than to actually make good any harm. Therefore we decided to include the voice of the victim, presuming that average citizens would be likely to encourage and appreciate 'their' young offender's engagement in some voluntary work for a common good. Interestingly enough, this nice presumption regarding the victim's attitude obviously did not fit the reality. However, victims in general appeared to be very open to the position and the interests of the youngster. Moreover, they were almost always very grateful to be approached and asked for their opinion on 'their' case. But, far from reacting vindictively or selfishly, they above all wanted to be taken seriously by the system. They were afraid that their being abused might be an easy justification for some kind of manipulative concept, like that of the victimised citizen being part of a real 'community', waiting for reparation.

This sobering finding obliged us to radically redraw the whole project, transforming it from an alternative education of a misbehaving youngster into a process of critical communication. Such a process couldn't do without the involvement of the parents and couldn't escape the very pragmatic issues surrounding bills and insurance claims. Finally, it couldn't be blind to the logic of the right of the stakeholder to have at least a say in what should be done next, how and by whom, as well as a proper insight into the reasons behind the eventual decision. Without any in-depth notice on restorative justice or mediation, we were in a way constructing them intuitively, a fascinating and very rich experience, which was observed by some

local prosecutors with an increasing scepticism almost leading to a radical refusal to further refer any cases. Indeed, in quite some cases the process resulted in an outcome that nobody could have foreseen, and one not automatically in line with a rigid confirmation of the social rule or with the logic of public intervention as such. To give one example: most victims appeared to be not pleased at all by the apparent signs of net-widening. They then felt somewhat abused by being made cheap excuses for public disciplining. In the same sense they criticised any reference to the suffering of 'the community' as nothing more than an ideological construct. Instead they appeared to claim a certain ownership of their case, without however aspiring to take over the responsibility to judge or punish.

From 1993 onwards I took part in a research project of Louvain Catholic University, on the introduction of pre-trial victim–offender mediation for adults in more serious cases of every sort of crime. Whereas the minister of justice announced the introduction of 'penal mediation' as a modality of 'praetorian probation'—a conditioned dismissal of rather lighter cases at the level of prosecution—the Louvain research explicitly aimed to explore the mutual influence of the communication between on the parties involved, and the judicial process of coming to a decision. Dealing now with cases like severe violence, armed robbery, rape and even murder, it was quite surprising to observe to what an extent our mediation practice confirmed our previous findings with juveniles, and opened up not so much a route to a practice of systematic 'reparation' for the victim as a perspective on a repositioned way of doing justice (Aertsen and Peters 1997; Van Garsse 2012).

In June 2005 the Belgian parliament approved a bill generalising the possibility for victim and offender to request the intervention in their case of a neutral mediator, at any stage of criminal proceedings. It also formally allows judges and prosecutors to take a mediation outcome into account and obliges them to at least mention this in setting out the motivation for their decision on a case. Mediation is now available for cases ranging from a simple insult up to murder. It can be initiated immediately after the event at the level of the police, during court proceedings or even during an offender's imprisonment.

Of course, mediation can also be combined with probation. Moreover, the mediation agreement could inspire the judge or the prosecutor to

consider certain probation conditions as an argument to for postponing or suspending imprisonment. In practice, however, such self-evident links between probation and mediation in whatever direction are rather weak.

Like probation, mediation appears to be vulnerable to recuperation by the still dominant repressive culture among the judiciary and policy-makers, as they seek clear-cut solutions rather than running the risk of exposure to critical questioning coming from victim, offender or/and their respective contexts (Van Garsse 2012, 2014). More generally, it cannot be denied that the promise of the legislation on mediation is far from being fulfilled as far as it is reflected in facts and figures, except perhaps in less serious cases (mostly involving young offenders), where the victim–offender dialogue is likely to come down to organising financial compensation to avoid further public intervention. In such circumstances, from the perspective of the judiciary, there is a kind of a logic in not mixing probation and mediation, but rather to use both in parallel way, as instruments to combat the impression of impunity in minor cases, and to preventively ease as a matter of management and routine the victims' voice.

Towards a Conclusion

This chapter has addressed a theme that lies in line with current developments in criminal policy worldwide. In search of arguments to rebuild or reinforce credibility, criminal justice as a whole is likely to present itself as providing a service to citizens, in terms of contributing to a climate of security and respect. The post-war rediscovery of the victim stressed their status as a holder of civil rights, in particular the right to have their interests and personal integrity to be safeguarded. In the logic of the market, paying for justice through taxation requires the satisfaction of the expectations of the 'clients'. The same logic tends to provoke among the different practices in doing justice a kind of competition in doing 'better'. In public debates and even among academics, victim satisfaction is quite an issue in the current evaluation of punishment, let alone of its alternatives. And for those who would still question or resist this development, the popular literature on 'restorative justice' seems to be offering plenty of reasons to cede victory.

However, I haven't got very far in answering the question this chapter started from. Whether probation has any impact on the reparation of victims and communities cannot be answered as such. As a practice of criminal justice, probation is always part of a culture in which its potential weight and its conceptual meaning are in a great part determined by its surroundings. This goes above all for restorative justice and the range of practices of mediation, which are in full development in almost every area where private interests risk collapse in an escalation of conflict. Being a former practitioner and a promoter of victim–offender mediation in Flanders, I have still been unable to resist the temptation to question critically the dynamics behind the current popularity, both of restoration and of repairing the victim, as criteria for successful (criminal) justice in general and probation in particular.

Looked at from a Belgian perspective, my brief overview has led to a sobering finding. However much we strive towards the common goal of discouraging the blind use of imprisonment, and do so by demonstrating, through constructive alternatives, its irrational character, these aren't really joint efforts. This finding is the more surprising when we look at the evident conceptual potential in combining their approaches by allowing victim and offender and their social surroundings to contribute in circumscribing and proposing suitable probation conditions. The other way round, probation could be a way of creating a proper framework to engage in getting victim and offender alike to actually come to a way of 'repairing' that they perceive as fitting the particular circumstances. Going back in history shows even more the communalities between both probation and mediation, as they were received in Belgium. Both appeared as coming from overseas, with some flavour of the exotic. Both practices were balancing two attracting poles, that were likely to provide adversarial ideological standpoints on common ground. On the one hand they opened a perspective of substantially contributing to making the existing criminal justice system more effective and more tangible in its outcomes. On the other hand they both seemed to open a window on a radical repositioning of the existing power balances between the citizens and the state. It a fair to say that the awareness of the latter was at the same time most probably the reason why Belgian probation needed decades of political discussion to obtain a—still very restricting—legal

status. And it cannot be denied that the sudden breakthrough in mediation was part of the crisis management of a government suffering a spectacular loss of credibility.

As a last common feature, both probation and the embracement of restorative justice through mediation shared a prominent vulnerability to recuperation as friendly instruments within a commonsensical discourse. Undone from its political connotation as a counterbalance to sovereign state power, the notion of 'community' easily meets that of '*Gemeinschaft*'. Probation discourse could never really escape the dominant social-defence rationale under state-responsibility. Undone from its inherently unpredictable outcome, the current emphasis on evaluating restorative justice in terms of degree of 'restoration' and 'reparation' is likely to deprive mediation of its critical potential. Reducing a victim to a person 'in need' and whose 'needs' justify a professional 'service' prevents us from seeing 'harm' as the essence of what the problem of crime is all about. In the current state of the art, probation and mediation services alike on the one hand tend to survive only as friendly social-work practices on the margins of what 'real justice' is all about. There lack of structural connection is making this scenario ever more probable, so that they both become competing fishermen on the restricted lake of minor-case criminal justice that authority usually permits them to obtain their referrals from. On the other hand, in striving to end this dominance by criminal justice, they tend to drown themselves in the seas of subjective needs, becoming pedagogues of reparation and satisfaction, desperately calling for a mandate to 'rightly' choose and select what they do and for whom.

As long as probation is applied by way of a lenient sentence in cases of minor offences committed by youngsters or first-offending adults, it is doomed to be seen as a favour, in reality taking neither the victim's perspective nor the offender's public responsibility seriously.

Obliging (or 'proposing') the offender to reimburse the victim, to engage in mediation, or to do 'something for the community' inevitably presupposes the victim or the community to be carriers of needs and expectations fitting their role in this controlling and vaguely educative approach. This does not mean that the actual application of probation doesn't have any restorative value at all. Undoubtedly in quite some cases it might contribute to satisfactory reparation for victims and their sur-

roundings affected by the event. But these benefits are not capable of compensating for the defensive signal transmitted by the restrictive use of probation's restorative potential within criminal justice. The same goes for mediation tending to focus on individual needs rather than on common issues.

This approach sees probation not as a set of alternative measures to 'real' punishment but as an appeal for civic participation, respecting legal protection and open to public control, in constructing and constantly reconstructing in practice what the notion of 'justice' means in a democratic society. This kind of justice leaves great space for restoration, not as an easy way to get repaired or reimbursed, but as a process of repositioning oneself in relation to the criminal event and its consequences, even in the most serious of crimes (Van Garsse 2004). My point of view doesn't oppose the struggle for victims' rights, but it does oppose the popularity of the humiliating and authoritarian identification of victim assistance with victim protection. It sees probation work and mediation as a common social–pedagogical challenge related to the promotion of human dignity in terms of civic capacity and of democracy as a shared political perspective. As such it is far from abstract. It might suffice to listen carefully to ideas and to identify with reasoning expressed by victims, offenders and communities 'beyond' the roles given to them through routine-based offerings, however unlikely they might sound.

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