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Abstract

[extract] Unlike in other countries, especially common law jurisdictions, mediation in Germany is most frequently used not in the civil law but within the criminal justice field by victim-offender mediation (VOM) programs. However, the conceptual orientation and enforcement of victim-offender mediation programming within the criminal justice system (especially in Germany) brings some dangers with it – dangers for the traditional criminal justice system as well as for the mediation schemes. Theoretically, there may be more challenges for the criminal justice system, yet in this article I am going to deal with some problematical aspects and consequences of the present predominant implementation of the Täter-Opfer-Ausgleich (TOA), the implementation of victim-offender mediation in Germany.

Keywords

victim-offender mediation, Germany, criminal justice system, alternative dispute resolution, Täter-Opfer-Ausgleich

VICTIM-OFFENDER MEDIATION IN GERMANY – ADR UNDER THE SHADOW OF THE CRIMINAL LAW?¹

By Thomas Trenczek⁺

Introduction

Overview

Although mediation is often presented as an alternative to the adversarial court process it operates within the ‘shadow of the law’.² This is especially true for mediation schemes within the criminal justice context. Unlike in other countries, especially common law jurisdictions, mediation in Germany is most frequently used not in the civil law but within the criminal justice field by victim-offender mediation (VOM) programs. However, the conceptual orientation and enforcement of victim-offender mediation programming within the criminal justice system (especially in Germany) brings some dangers with it – dangers for the traditional criminal justice system as well as for the mediation schemes. Theoretically, there may be more challenges for the criminal justice system, yet in this article I am going to deal with some problematical aspects and consequences of the present predominant implementation of the Täter-Opfer-Ausgleich (TOA), the implementation of victim-offender mediation in Germany. The thoughts I present are not meant to be a ‘killer argument’ against the implementation of mediation within the criminal justice system; however, they might be a reason to reconsider the current use and status of mediation in the criminal justice system and its further development.

1 Paper presented at the Fourth Asian Pacific World Mediation Forum, Adelaide, 28 November – 1 December, 2001.

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2 The phrase ‘shadow of the law’ has very different connotations (cf L Boule: *Mediation: Principles, Process, Practice* (1996) 33, 259). It comes originally from R Mnookin and L Kornhauser, ‘Bargaining in the Shadow of the Law’ (1979) 88 *Yale Law Journal* 850. However it was introduced to the German law discussion by Detlev Frehsee, a great German law and criminology professor who has influenced the discussion about victim-offender reconciliation in Germany and Europe probably more than anyone else. Detlev Frehsee died on 29 January, 2001 at the age of 56.

Definitions

First of all, I need to explain the German word 'Täter-Opfer-Ausgleich' which one can find in the statutes as well as the routinely used acronym TOA. Literally translated it is 'Offender-Victim-Balancing'; it means both conflict settlement and reconciliation. In their approach and procedure TOA-programs are quite similar to Victim-Offender Mediation Programming (VOMP) in Australia³ or the United States.⁴ Even the Community Conferencing schemes for juveniles in Australia have in some respects similarities to the German VOM Programs. The aim of VOMP, however, is to emphasize a process of dispute resolution and reconciliation and to see restitution and reparation to the victim as the (symbolic) end of a conflict-resolving process. Contrary to restitution schemes, VOMPs have wider aims whereby the actual process of mediation is viewed as being as important as any specific outcome.⁵ Beyond restitution and reparation, VOM implies a dynamic dimension and an interactive process between at least two parties. Although TOA is integrated in the criminal code, it can only take the form of an offer to both, absolutely to victims and - at least in the sense of leaving a choice - also to offenders. Based both on the theory of restorative justice as well as on the ideas of dispute resolution, a neutral mediator will assist the

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- 3 Cf the definition of the National Alternative Dispute Resolution Advisory Council 1997 (<http://law.gov.au/aghome/advisory/nadrac/adrdefinitions.htm>): Victim-offender mediation is a process in which the parties to a dispute arising from the commission by one of a crime against the other, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Cf also (Parliament of Victoria Law Reform Committee: Restitution for Victims of Crime, Interim Report 1996, chapter 6: Mediation and Reparation <<http://www.parliament.vic.gov.au/lawreform/restitution/interim/contents.htm>).
 - 4 Worldwide there are all sorts of terms and acronyms used for similar approaches, like Victim-Offender Mediation Programming (VOMP), Victim-Offender Reconciliation Programming (VORP), Victim-Offender Dispute Resolution (VODR), Crime-Act Mediation, or as in Germany, Offender-Victim Balancing.
 - 5 T Trenczek, 'A Review and Assessment of Victim-Offender Reconciliation Programming in West-Germany' in B Galaway & J Hudson (eds), *Criminal Justice, Restitution, and Reconciliation* (1990) 109-124; T Trenczek, Restitution – Wiedergutmachung, Schadensersatz oder Strafe? Restitutive Leistungsverpflichtungen im Strafrecht der USA und der Bundesrepublik Deutschland (*Restitution – Making Good, Compensation or Punishment?*) Baden-Baden: Nomos (1996) 21 ff; E Weitekamp & S Tränkle, 'Die Entwicklung des Täter-Opfer-Ausgleich in der Bundesrepublik Deutschland. Neueste Ergebnisse und Befunde' in Friedrich-Ebert-Stiftung (ed), *Der Täter-Opfer-Ausgleich (TOA). Moderner Beitrag zur Konfliktregulierung und zur Sicherung des sozialen Friedens* (1998) 9-33.

parties in finding a consensual solution to the conflict which led to or arose from a criminal act.⁶

In Germany there are currently about 400 programs operating, mostly community based and/or state financed; about two thirds operate within the juvenile justice context and one third of the programs work also with adult offenders. Both get most of their cases referred through the prosecutor's office. However, several programs accept self-initiated cases directly from victims or offenders.

Victim-Offender Mediation within the Criminal Justice System

The Danger of Cooptation

The term TOA has acquired an integral position in the German criminal codes. However, I take the view that at the implementation of VOM in Germany some important courses were set incorrectly and have not been changed until today.⁷ From the very beginning we have tried to establish victim-offender mediation by way of *diversion* models or as alternative educational measures for juveniles; our reason was an understandable attempt to gain acceptance for VOM and acquire finances.⁸ And this is precisely the problem. In connection with reformatory efforts in the criminal law system, Malcom Feeley (1979) and Howard Zehr (1985) draw attention to the problem that good innovative ideas are not immune to cooptation by powers within the system. The criminal justice system seems to be 'so impregnated with self-interest, so adaptive, that it takes in any new idea, moulds it and changes it until it suits the system's own purposes'.⁹ From an organization-related sociological perspective, such

6 This insight, the revival of the understanding of crime not (only) as an offence against the State, rather and first of all as a cause, expression and consequence of conflicts, difficulties and problems between the victim and the offender, is crucial for understanding any ADR, even within the criminal justice system. We owe this insight to Nils Christie (1977), the famous Norwegian criminologist. From the wide range of literature about this conflict-oriented approach to crime, cf. also G Hanak, J Stehr & H Steinert, 'Ärgernisse und Lebenskatastrophen' (1989); A Kuhn, *Körperverletzung als Konflikt* (1987); H Steinert, *Kriminalität als Konflikt*, *Kriminalsoziologische Bibliographie*, 58/59 special, (1988) 11-20; T Trenczek, *Hacia una reprivatización del control social? Una evaluación de víctima-delincuente-reconciliación* (Towards a reprivatization of social control? An assessment of victim-offender-reconciliation) in Centre d'Estudis Jurídics i Formació Especialitzada (eds), *El derecho penal y la víctima* (1992) 23-42.

7 I mean that without a self-righteous approach, because as a founder and supporter of VOM programs in Germany I have often compromised myself in the same criticized beliefs.

8 cf T Trenczek, *A Review and Assessment of Victim-Offender Reconciliation Programming in West-Germany* in B Galaway and J Hudson (eds), *Criminal Justice, Restitution, and Reconciliation* (1990) 109-124.

9 H Zehr, *Restitutive Justice, Restorative Justice* (1985) 3.

a self-referencing cooptation is almost necessary because the alternatives seem threatening to the system. Feeley and Zehr consider that the reason why simple reformatory solutions are bound to fail. Victim-offender mediation has not failed yet but if we do not take care it will be coopted, changed and adapted to the purposes of the penal system.

Provisions in German Criminal Law Referring to Victim-Offender Mediation

In regard to the analysis of the German system we have to take into account that the law system in Germany is not a common law system but a highly statutory one. Basically, that means all actions of governmental or public bodies, especially criminal justice officials, have to be based on a specific statutory provision. Several provisions in the German (Juvenile) Criminal Code, however, make it possible to consider victim-offender mediation within the judicial decision process. Since 1991 TOA/VOMP is explicitly mentioned in the juvenile criminal code as a judicial measure (sec 10 par 1 No 7 JGG). The district attorney, as the public prosecutor, can also refrain from a formal procedure if the juvenile makes a serious attempt at victim-offender reconciliation (sec 45 par 2, 2 Alt JGG). And though the legality principle in German law (sec 152 StPO/German Criminal Procedure Code) in regard to adult offenders does not allow extensive use of discretion within law enforcement (the common law systems offer much more possibilities), there are some unique exceptions to the requirement of mandatory prosecution referring explicitly to TOA/VOM. According to the Criminal Procedure Code (sec 153a par 1, No 5 StPO) the prosecutor can defer and finally refrain from formally charging an accused person in a misdemeanor case if a serious attempt of VOM with the victim is undertaken.

In 1994 a new provision in the German Penal Code (sec 46a StGB) was introduced which refers explicitly to VOM and allows the judge not only to mitigate a sentence but even to refrain from imposing a sentence in cases where there is a maximum of 1 year imprisonment. Even before sentencing, the prosecutor can drop the charge in such cases (sec 153b StPO).

Finally in 1999 several regulations were established in the Criminal Procedure Code referring explicitly to VOM. Now, prosecutors and judges have to check in every phase of the trial if VOM between victim and offender is attainable (sec 155a StPO); if necessary they have to initiate attempts and they have to foster all reconciliation attempts by the parties. For that purpose the Criminal Procedure Code (sec 155b StPO) allows them to refer the case to a VOM-Program run by a criminal justice agency (like a probation service), or to a TOA-Program (a dispute resolution program) run by an association outside the criminal justice system.

The practical use of VOM - Empirical observations

The number and content of the provisions in Germany seem to be an ideal basis for substantial use of victim-offender mediation within the criminal justice system. However, TOA/VOM still leads a shadowy existence and its quantitative and qualitative significance are inversely proportional to public and political interest. This assessment is based on five empirical observations:

- During the last few years the total number of restitutive discontinuance of proceedings by public prosecutors and courts which may include restorative elements has risen from about 7,000 (6,798) in 1993 to 11,000 (10,865) in 1997 and maybe 15,000 today.¹⁰ Altogether this does not extend to more than five percent of all cases. Therefore, the practical use of restorative justice elements in German criminal proceedings, is correctly described as 'stagnation on a low level'.¹¹ In contrast to that, the fine dominates (85 to 90 percent of) the dismissals, and takes the money away from the victim and shifts it to the state. Is this because the fine fits better the experience and the sanction repertoire of the criminal justice system?
- A similar process can be observed with regard to VOM programs. Most institutions supporting victim-offender mediation deal with fewer than 50 cases a year. The biggest program is the Waage in Hannover which handles about 440 cases a year, involving about 500 offenders and even more victims. Until 1995, the roughly 400 VOM programs that were registered at the national VOM service bureau dealt with a total of about 9,000 cases a year. Although that number may by now have risen to 25,000 cases a year, it is not truly impressive compared to the

10 All figures are from M Kilchling, TOA-E versus ATA-E – empirische Befunde zur Praxis des Täter-Opfer-Ausgleichs mit Erwachsenen im deutsch-österreichischen Vergleich. Paper presented on the conference of the New Criminological Society (NKG) *Herausforderungen der Kriminologie im Europa des 21. Jah.* (30.09. – 02.10.1999) in Göttingen, Germany (1999); in 1997 the restitution conditions played a role in only 2.3% of the public prosecutors' dismissals according to §153a I No 1 StPO (without important changes to the previous years). The number grew a little with the judicial dismissal of the proceeding according to §153a II (7.8%) and with the decisions according to § 15 I JGG (3.4% of the imposed conditions).

11 cf R Böttcher, Täter-Opfer-Ausgleich. Eine kritische Zwischenbilanz bisheriger Praxiserfahrungen und Forschungsergebnisse. *Bewährungshilfe*, (1994) 48; E Weitekamp & S Tränkle, Die Entwicklung des Täter-Opfer-Ausgleich in der Bundesrepublik Deutschland. Neueste Ergebnisse und Befunde. In Friedrich-Ebert-Stiftung (ed), *Der Täter-Opfer-Ausgleich (TOA). Moderner Beitrag zur Konfliktregulierung und zur Sicherung des sozialen Friedens* (1998) 11: 'a little, delicate seedling'.

number of approximately one million criminal trials carried out in the courts.¹² Furthermore, the caseload of VOMP concentrates on juvenile cases; victim-offender reconciliation in the adult system occurs in less than one third of all VOMP cases.

- The observations with regard to numbers are reflected by similar observations with regard to the nature and quality of cases: victim-offender mediation is used mostly in the treatment of offences which are perceived by legal officials as minor cases and criminal justice marginalia.¹³ Although the criminal law in Germany does not contain any restrictions with reference to the nature of the offences, the cases that are referred to the VOMPs are usually limited to misdemeanors and minor offences. Because of the previous connection between VOM and the idea of diversion (especially sec 153a StPO) specific elements like minor offences and exclusion of felonies were linked up with the idea and character of victim-offender mediation. In actual practice one has to argue with the public prosecutor's office about the appropriateness of a case for mediation without distinguishing between the two aspects of 'appropriateness': the adequacy of conflict mediation and the judicial criteria for dismissing the criminal procedure. On the other hand, in an effort to keep up good relations with criminal law officials, representatives and commentators of VOM-programs announce at every (in)appropriate opportunity that victim-offender mediation 'obviously' is not suitable for heavy crimes:

In cases of aggravated assault with considerable physical and psychological damage, it is quite clear that measures like mediation or restitution do not work. Therefore it would be more sensible to concentrate on offenses of minor and medium severity, because there we have the highest amount of cases.¹⁴

- A questionable development occurs when VOM is used as an educational (or rehabilitative) measure in juvenile proceedings. In this regard the German VOM theory clearly differs from the Australian model of community conferencing. However, VOM is often misused as a way of rounding off all possible sanctions (a so-called 'sanction-cocktail') under the slogan 'education can never be bad'. In almost all concepts of VOMP with young people the educational effects of VOMP are pointed out - surely in the justified hope of making TOA popular with

12 Cf Heinz, Wolfgang: Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882 - 1998 (Stand: Berichtsjahr 1998) Internet-Publikation: <www.uni-konstanz.de/rtf/kis/sanks98.htm> Version 8/2001; Schaubild 4.

13 This assessment by criminal law standards has of course no significance for the participants in a conflict.

14 U Hartmann, Victim-Offender-Reconciliation with Adult Offenders in Germany, paper presented at the 8th international Symposium on Victimology, Adelaide 1994; KFN-Forschungsberichte Nr 27, Hannover: Institute of Criminology in Lower-Saxony (1994) 6.

ambitious decision makers in justice, youth services, and household committees.¹⁵ Although VOM clearly has an intrinsic educational (as well as rehabilitative) value, using a specific juvenile (welfare) construction strengthens the danger of misjudging the character of mediation and abusing it as an educational (or rehabilitative) instrument. A little while ago an engaged TOA mediator did not realize the problem when he confessed: 'If a young person doesn't want to apologize, I will make him do so'. Of course, he then will have a 100% success rate in this regard, but what value does this 'success' have in regard to the victim and the autonomous growth of the young person? Unfortunately, it is not an exception that so-called educational solutions are forced upon a young person to close down a case 'successfully' – always, of course, 'in their own best interest'.

- Another questionable development takes place in adult as well as juvenile proceedings when the public prosecutor or the court sets preconditions that are conceived as the result of the mediation process or insists on (further) penal sanctions in addition to the agreed mediation outcome. The same thing occurs when the amount of a fine or the level of any other sanction demanded by the prosecutor is made dependent on the amount of restitution to which the participants agree. If the victim renounces part of the compensation for what ever reason (both parties might agree on some other – symbolic - form of compensation), it is often the public prosecutor's office which demands more compensation because otherwise the offender would 'get away too easily'. Obviously – as a German saying goes – 'punishment must be'!

Official reasons and hidden agendas – a critical assessment

Since the first introduction of victim-offender mediation into the (juvenile) criminal code as a judicial 'educational' measure for juveniles (sec 10 paragraph 1, No 7 JGG),¹⁶ the Federal Ministry of Justice has tried to improve its legal position and significance by other changes to the law. The German criminal justice officials, however, acted

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- 15 The reason for this is quite clear. The juvenile welfare provisions in Germany only allow the financing of remedies if juveniles are in educational need (cf. sec 13, 27 ff. SGB VIII/Juvenile Welfare Code). As nearly every single program for juveniles in Germany is financed by the juvenile welfare departments, victim-offender reconciliation becomes an educative tool by the magic of its definition, despite the fact that the established VOMP-standards in Germany rightly distinguish victim-offender mediation (both in contents and methods) from educational measures of the juvenile law and the juvenile welfare system (cf T Trenczek, 'Strafe, Erziehung oder Hilfe? Neue ambulante Maßnahmen und Hilfen zur Erziehung - Sozialpädagogische Hilfeangebote für straffällige junge Menschen im Spannungsfeld von Jugendhilferecht und Strafrecht' (1996)).
- 16 The introduction of VOM as a judicial instruction to juveniles ('jugendrichterliche Weisung') has been criticized by practitioners and academics from the very beginning. Among other things, it was considered contradictory, even absurd, to sentence a young person to a solution that needs to be balanced by another party.

with conspicuous caution towards victim-offender mediation. The reaction to this came in December 1999 when VOM was anchored into the Criminal Procedure Code; a duty was established for prosecutors as well as the courts to recognize or initiate a mediation or reconciliation process at every stage of the criminal procedure (sec 155a StGB). This was done with the express purpose 'of giving TOA a wider area of application'.¹⁷ Nevertheless, it is doubtful whether criminal justice officials will change their decision-making in substantial dimensions. The German provisions still leave too much room for interpretation and discretion.¹⁸ To give an example: which are the 'suitable' cases in which public prosecutors should make use of victim-offender mediation according to the law (sec 155a StPO)? Which measures are 'suitable' for removing a case from criminal prosecution (sec 153a, par 1, sentence 1 StPO) in the public interest and what standards are relevant for deciding if a trial 'can' (not 'must') be dismissed? It did not come as a surprise that in the new instructions TOA and mediation were turned into tools by and for criminal justice officials themselves (cf. sec 155b StPO). The state attorneys and judges may, but need not, refer a case for mediation to a specialized institution; they also have a right 'to reconcile parties' themselves – that means: the public prosecutor can act or take on the role of a mediator! Why then do we need (trained and specialized) mediators?

To make the scale of the problem quite clear: according to the present practice of sanctioning of German criminal courts, the law (sec 46a StGB, sec 153a StPO) would make it possible to renounce a criminal sanction in about 95-97% of all criminal procedures, provided a serious attempt at victim-offender mediation was carried out.¹⁹ As far as that goes, VOM is already a partially abolitionistic concept! Actually, a law to give VOM 'a wider area of application' was not really needed. If criminal justice officials wanted to, they might use VOM already as an alternative to traditional criminal law sanctions. But apparently, for whatever reason, they have not done that so far. So, what is the hidden agenda?

Criminal justice representatives, especially state attorneys mostly offer economic reasons. Individual prosecutors have often refused initiating victim-offender mediation because it is perceived as a time-consuming process. The obvious time

17 cf Explanation of the Federal Government to the law proposal of 29 October 1999, BT-Drs [German Federal Congressional Publication] 14/1928, 1.

18 In an overall assessment (cf Löschnig 2000, 2) one can criticize the German provisions as not strictly binding (with regard to §155a StPO), without a definite content (with regard to §153a, 153b, 155a StPO) and finally as contradictory: they are strange and even detrimental to the character of victim-offender mediation (with regard to §153a StPO).

19 cf Dölling/Weitekamp (1998) 2; M Kilchling, Aktuelle Perspektiven für Täter-Opfer-Ausgleich und Wiedergutmachung im Erwachsenenstrafrecht. Eine kritische Würdigung der bisherigen höchstrichterlichen Rechtsprechung zu § 46a StGB aus viktimologischer Sicht. *Neue Zeitschrift für Strafrecht*, 16, (1996) 311; P König & H Seitz Die straf- und verfahrensrechtlichen Regelungen des Verbrechensbekämpfungsgesetzes. *Neue Zeitschrift für Strafrecht*, 15, (1995) 2.

advantage (especially the release and exoneration effects with regard to appeal or a civil law trial) does not give credit to the person who initiated the mediation. But based on empirical data we know that the argument that a victim-offender mediation procedure is too time-consuming is usually given by officials who refuse mediation for other reasons: either they feel insufficiently informed, or they have (too) little experience with mediation, or the idea of mediation is just too strange to them.²⁰ These factors indicate the actual, deeply rooted reason for the minor readiness to use victim-offender mediation within a criminal justice setting. It cannot be sufficiently explained by belated, rationalistic reasons of expenditure; its origins rather spring from a peculiar way of thinking typical of criminal law officials.²¹

Although the judicial system is regarded as an official body whose function is to guarantee a fair trial under the law, in practice prosecutors apparently consider themselves guardians of a so-called 'governmental claim of punishment'. In that perspective, victim-offender mediation is seen as a subversive tool, because it does not focus on punishment but on a mutually acceptable solution of a conflict. Mediation requires that victim and offender actively and autonomously find a common, future-orientated settlement or solution to their conflict. It is not concerned with a past-orientated, necessarily repressive reaction to the crime. In the view of many criminal justice officials VOM appears to be a measure that withholds just punishment from the offender. One reason for this view might be that mediation in Germany is mainly carried out through social workers and psychologists, who are suspects in their view of lawyers anyway. Ed Watzke, an Austrian colleague, described this view humorously and impressively:

In one way or another, they [the mediators] are accomplices of the offenders because they intend to find hundreds of excuses to remove responsibility from the offenders. They blame traumatic events in early childhood, they blame the parents if there are any or the absence of parents if they are no longer living, they blame the absence or existence of all possible social relationships, they blame schools, homes, homelessness, society, unemployment, and so on. All these excuses are impossible to prove but they are helpful in making the offender look like the true victim and withdrawing him from just punishment.²²

20 cf B Meier, *Wiedergutmachung im Strafrecht? Empirische Befunde und kriminalpolitische Perspektiven*, paper presented at the conference of the New Criminological Society (NKG) *Herausforderungen der Kriminologie im Europa des 21. Jah.* (30.09. – 02.10.1999) in Göttingen, Germany (1999).

21 This pattern of thought has a predominant effect on the every-day action of justice especially in the interpretation of indefinite law terms and the field of legal discretion. If one has to decide about matters like interpretation, assessment and discretion margins within non-obligatory decision structures, basic standards acquire inevitable relevance.

22 E Watzke, 'Von Strafruristen und Sozialarbeitern' in E Watzke (ed), *Äquibristischer Tanz zwischen Welten* (1997) 81.

The fundamental mistrust by prosecutors and criminal justice officials of social work is reflected in their mistrust of mediation, which in their eyes is more connected with a suspect, counterculture movement than with the basic requirements of law.

Instead of putting an end to these mistakes, they get strengthened by the way VOM is often presented by program managers and reform movements who want to justify their actions. Many program officials risk corrupting themselves by aiming at 'the highest amount of cases'.²³ The assessment that 'it is quite clear that measures like mediation or restitution won't work' in cases of severe crime is a purely speculative assumption. Why is it 'quite clear' that mediation does not work? And what are the criteria of success or failure? In regard to mediation the opposite seems to be true. In practice we observe that 'minor' neighborhood disputes and the underlying conflicts are often more complex and more difficult to mediate than cases of severe crime, in which the roles of the participants are quite clear.

In the understandable attempt to attract a wider criminal-political acceptance, efforts are made to explain the typical criminal law relevance of victim-offender mediation and its compatibility with the system of criminal law sanctions and the goals of punishment. Victim-offender mediation is presented in criminal justice as a measure besides punishment and incapacitation, as 'a third lane' meeting 'the punishment purposes and the need of the victim well or even better than a traditional sanction alone'.²⁴ This perspective, however, is the dilemma of an 'alternative' measure. On this yardstick victim-offender mediation can only replace traditional punishment and be accepted by criminal justice, if it promotes 'punishment purposes ... well or even better than a traditional sanction alone'. This provokes the decisive question: how much reparation and reconciliation is required and how punitive should victim-offender mediation be in order to serve as well or even better for punishment purposes than punishment itself?

In this comparison the chronic overestimation of punishment purposes is as disturbing as the premise that the traditional sanctions of criminal law do justice to or meet the needs of the victim. There is enough empirical evidence that they do not.²⁵ However, it is disastrous for the acceptance of VOM and other restorative devices that this dimension does not focus on the essential character of mediation, reparation and reconciliation. Victim-offender mediation (unlike the restitution order, the diversion measures or incarceration alternatives) do *not* fit in with traditional punishment purposes and the vertical system of criminal sanctions. Although restorative remedies

23 Cf Hartmann, above n 14.

24 J Baumann et al, *Alternativentwurf Wiedergutmachung (AE-WGM)* (1992) 37; C Roxin, *Die Wiedergutmachung im System der Strafzwecke*. in H Schöch (ed) *Wiedergutmachung und Strafrecht* (1987) 52.

25 Cf Albrecht/Dünkel/Spieß 1981; Heinz 1991, 303 ff; Lipton/Martinson/Wilks 1975; Kaiser 1988 § 37 Rn. 67 ff, § 115 Rn. 29f; Petersilia/Turner 1986; Schöch 1992a; Schumann/Berlitz/Guth/Kaulitzki 1987; US Department of Justice 1989.

may have inherent, relevant effects with regard to restitution and punishment purposes, they go *beyond* these by including the victim and leaving space for an active and autonomous settlement of the conflict by the parties concerned.²⁶

We have reliable empirical data that public acceptance of restorative conflict resolution by way of mediation and reparation is a lot greater than many criminal justice officials can imagine; the victims of crimes are especially unsuitable advocates of a repressive criminal policy.²⁷ The need of the population for punishment is 'if not a psycho-hygienically useful fiction of criminal law practitioners, first of all a need of justice and an acknowledgement of the victim as victim'.²⁸ The simplistic holding on to punishment needs and claims has its source in a *judicial authoritarianism* that emphasizes formal order without but does not care for social peace.

Conflict mediation and punishment cannot be considered on the same level. Mediation is not a higher or lower form of punishment but it is qualitatively an 'aliud', a different material legal principle that plays its own part in the reparation of peace under the law. However important it is to stress the perspective of the victim and the damage he or she has suffered, it does not make much sense to subordinate them to the evil-adding function of punishment. It is to be feared that with such a benchmark victim-offender mediation can neither run its proper course nor produce an appropriate result on account of the demands, the overburdening and the restriction of the traditional view of the judicial system, which is constantly reproduced in German law schools.

Conclusion: Where do we go from here?

Despite initial enthusiasm, it now seems to be very difficult to establish a higher degree of acceptance for victim-offender mediation within the criminal justice system without adaptation and cooptation. The inner perspective of criminal law gives VOM hardly any chance to become the 'most hopeful alternative' to the punishment-oriented catalogue of criminal-law measures, as announced in the late eighties.²⁹ It also

26 cf T Trenczek, 'Restitution – Wiedergutmachung, Schadensersatz oder Strafe? Restitutive Leistungsverpflichtungen im Strafrecht der USA und der Bundesrepublik Deutschland (Restitution – Making Good, Compensation or Punishment?)' (1996) 217.

27 cf K Sessar, 'Strafbedürfnis und Konfliktregelung – Zur Akzeptanz der Wiedergutmachung im und statt Strafrecht in E Marks & D Rössner' (eds), *Täter-Opfer-Ausgleich. Vom zwischenmenschlichen Weg zur Wiederherstellung des Rechtsfriedens* (1989) 42-56.

28 H-J Kerner, 'Täter-Opfer-Ausgleich. Modererscheinung auf ihrem Höhepunkt oder realistische Sanktionsalternative' in Bundesministerium der Justiz (ed), *Täter-Opfer-Ausgleich. Bonner Symposium* (1991) 208.

29 cf J Schreckling and L Pieplow, 'Täter-Opfer-Ausgleich. Eine Zwischenbilanz nach zwei Jahren Fallpraxis beim Modellprojekt 'Die Waage''. *Zeitschrift für Rechtspolitik*, 22, (1989) 10.

gives VOM little chance to achieve more than a marginal effect. The practice of VOM in Germany is far from corresponding to the basic ideas of conflict resolution as well as with the established victim-offender mediation standards. Most conspicuous are the multiple searches for niches of acceptance and the adaptation to inappropriate ideas from the world of juvenile welfare and the penal law. This hides the real nature and character of mediation and prevents elements of restorative justice giving up its shadowy existence. As far as the conceptions and the normative orientation of VOM encourage the penal, functional way of thinking they are not primarily and consistently directed at conflict resolution; as a result victim-offender mediation will subordinate itself to an unsatisfactory system of penal purposes that is conceptually poor, unaffected by empirical doubts and constantly perpetuates itself. As long as the concept of VOM as a third lane (besides punishment and incapacitation) supports a vertical pattern of repressive sanctions, it is obvious that victim-offender mediation cannot meet penal and incapacitative aims. As a (more or less) meaningful sanction annexation for minor offenses and triple cases VOM actually will have no real impact on the current criminal law practice. If VOM has to become an adequate form of punishment, one cannot blame criminal justice officials for holding on to the original concept instead of getting involved in a 'functional equivalent'. Therefore, the path that was taken until now needs to be reconsidered. We must insist that even though victim-offender mediation and eventually reconciliation may be acknowledged by the criminal justice system, they are definitely not methods of the formal judicial or criminal justice system.

Of course, the new restorative paradigm and VOM seem to be frightening, since they question the traditional point of view of the penal law, focusing on the behavior-controlling power of the law rather than the aspect of punishment. But the retraction of the supposed 'claim to punish' by the state is not identical with the removal of the social control of behavior. The fears of an uncontrolled 'free game of the powerful' at the cost of the weak and the victims are used to discredit mediation. But though mediation is an informal, extra-judicial settlement of a conflict, still it is only possible under the law's shadow and the 'rule of law'.³⁰ The law defines in advance what is a legally protected right, and in what way - in case of a violation of the norm - it can be determined who is the victim and who the offender. Maybe we have forgotten that 'the characteristic of the criminal law system is state control, not punishment'.³¹ Even while favoring mediation we should not forget that force and compulsion belong to the law as inherent instruments of public social control like the brakes to a car or the reins to a horse. The 'autonomous regulation of the conflict after a crime lives from the

30 H Silving, "'Rule of Law" in Criminal Justice' in GOW Mueller (ed), *Essays in Criminal Justice* (1961) 77-89; cf D Frehsee, Täter-Opfer-Ausgleich aus rechtstheoretischer Perspektive. In Bundesministerium der Justiz (ed), *Täter-Opfer-Ausgleich. Bonner Symposium* (1991) 56.

31 D Rössner, 'Mediation as a basic element of crime control – Theoretical and empirical comments' (1999) 3 *Buffalo Criminal Law Review*, 219.

fact that there are coercive measures ready in the background³² and these can be activated for the defense of the law and the protection of the weak. However, it is necessary to point out that the restoration of peace under the law is not a criminal purpose but a general purpose of the law. The point is that even if we free ourselves from the penal (part of the) law, the law itself must remain. It is decisive that 'the law is effective through its shadow rather than through the actual execution of force'.³³ ADR is supported by and supposed to be effective under the protecting shadow of the law. Therein lies, beyond the short-term functional usage, the wide-ranging potential of victim-offender mediation. If victim-offender mediation has an essential meaning, it is not because of the modest attempts at practical realization but because the connected ideas and vision make the essential tasks of law clear to us.

We have to supersede the traditional 'retributive paradigm' with a new ethically-founded *restorative paradigm* of justice, which will lay special emphasis on conflict resolution, even reconciliation of the partners in a conflict.³⁴ Dismissing all these suggestions as pure idealism or a utopian dream clearly demonstrates how far dogmatic ideas in criminal law have departed from the basic principles of law. The change of view from a penal, punishment-orientated model to a model of justice that is predominantly laid out to influence the future behaviour and the change of paradigms from repression to restoration and prevention, open up the vision of a community-related conflict culture that is close to the people's orientation. In the practice of German VOMPs it has been shown more and more that citizens are not prepared to wait until a case is referred by the state attorney's office or by other criminal justice agencies but that they take up the offer of mediation right away by themselves.³⁵ Those close community connections should be extended and - like in

32 D Rössner, 'Autonomie und Zwang im System der Strafrechtsfolgen' in G Arzt et al (eds) *Festschrift für Jürgen Baumann* (1992) 271.

33 D Frehsee, 'Täter-Opfer-Ausgleich aus rechtstheoretischer Perspektive' in Bundesministerium der Justiz (ed), *Täter-Opfer-Ausgleich. Bonner Symposium* (1991) 59.

34 H Zehr, *Restitutive Justice, Restorative Justice* (1985). The demands for a new orientation of social control by criminal law are not new but it is not accidental that in this context, following T Kuhn, *The Structure of Scientific Revolutions* (2nd ed, 1970), we speak of a *new paradigm*. cf K Sessar, A Beurskens & K Boers, Wiedergutmachung als Konfliktregelungsparadigma? (1986) *Kriminologisches Journal* 18, 86-104. In the late 1970's, Randy Barnett described restitution as a new paradigm of criminal justice but his suggestions focussed on the material component of the reparation of damage: R Barnett, 'Restitution. A New Paradigm of Criminal Justice' (1977) 87 *Ethics* 279; cf B Galaway, 'Restitution as innovation or unfilled promise?' (1988) 52 *Federal Probation* 3-14.

35 A TOA-case is mostly referred to the VOMP by the state attorney's office or sometimes by the judge (cf T Trenczek, 'A Review and Assessment of Victim-Offender Reconciliation Programming in West-Germany' in B Galaway & J Hudson (eds), *Criminal Justice, Restitution, and Reconciliation* (1990) 109-124). However, due to the growing reputation of the VOMP, esp the WAAGE in Hanover, victims or perpetrators themselves contact the VOMP in order to resolve their conflicts and problems. If the case has already been

Australia and the USA - outside the penal system increase the low-threshold access to mediation and reconciliation. The practical experience in Germany shows that victim-offender mediation is not the only or ideal way but it is a useful means in a continuum of possible steps in the treatment of conflicts. A community justice centre, where criminally relevant conflicts as well as civil-law conflicts (eg neighborhood, commercial and family conflicts) can be mediated, meets the needs of citizens for participation, justice and security. Such a dispute-resolution culture cannot, and shall not, completely replace the judicial system, but the parallel system of ADR can fill in a gap that exists between the self-organized regulating mechanism in the population, where things are often left to chance, and the judicial system that is quantitatively and qualitatively overstrained with the resolution of conflicts.

reported to the police (too), then the WAAGE informs the state attorney about the imminent mediation procedure. In all other cases, the conflict resolution procedure remains private.

Appendix I

Provisions in German Criminal Law relating to victim-offender mediation

(Translation and highlights by Thomas Trenczek.)

Juvenile Criminal Law Book (JGG)

Sec 10 [Judicial Measures for Young Offenders]

Par 1 No 7 - TOA [victim-offender mediation] as a judicial measure

Sec 45 [Non-Prosecution and Provisional Termination of Proceedings against Young Offenders]

Par 2, 2 alt - ... Public prosecutor can refrain from formal proceedings if the juvenile makes a serious attempt at victim-offender-reconciliation.

Criminal Procedure Code (StPO)

Sec 152 [Indicting Authority; Principle of Mandatory Prosecution]

- (1) The public prosecution office shall have the authority to prefer public charges.
- (2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications.

Sec 153 [Non-Prosecution of petty offenses]

Sec 153a par 1 [Provisional Dispensing / Termination of Proceedings]

Prosecutor can – with consent of the court and the accused person - defer and finally refrain from formally charging an accused person in a misdemeanor case, if

- No 1 reparation/restitution is made
- No 2 a fine is paid in favour of a charitable organization or the state
- No 5 if a serious attempt of VOM with the victim and making good of the damage caused is undertaken.

Sec 153b [Dispensing with Court Action; Termination]

- (1) If the conditions exist under which the court may dispense with imposing a penalty, the public prosecution office may, with the consent of the court which would have jurisdiction over the main hearing, dispense with preferment of public charges.
- (2) If charges have already been preferred the court may, with the consent of the public prosecution office and of the indicted accused, terminate proceedings prior to the beginning of the main hearing.

[→ In cases where sec. 46a applies, prosecutors can terminate/dismiss the case.]

Sec 155a [Victim-offender-Balancing/Mediation/Reconciliation]

... Prosecutors and judges have to check in every phase of the trial if TOA/VOM between victim and offender is attainable. In appropriate cases they have to initiate such attempts and they have to foster all reconciliation attempts by the parties. However, there are not allowed to do so if the victim opposes this.

Sec 155b [Referral to Victim-offender Mediation Agency]

... The Prosecutor and the judge are allowed to refer a case to a victim-offender mediation agency, either a public service (e.g. probation officer) or community based, private agency.

Criminal Law Book (StGB)**1.1 Title Two – Determination of Punishment****Sec 46 Principles for Determining Punishment**

- (1) The guilt of the perpetrator is the foundation for determining punishment. The effects, which the punishment will be expected to have on the perpetrator's future life in society, shall be considered.
- (2) In its determination the court shall counterbalance the circumstances which speak for and against the perpetrator. In doing so consideration shall be given in particular to:
 - the motives and aims of the perpetrator;
 - the state of mind reflected in the act and the willfulness involved in its commission;
 - the extent of breach of any duties;
 - the manner of execution and the culpable consequences of the act;
 - the perpetrator's prior history, his personal and financial circumstances; as well as
 - his *conduct after the act*, particularly his efforts to make restitution for the harm caused as well as
 - the perpetrator's efforts to achieve *mediation* with the aggrieved party.
- (3) Circumstances which are already statutory elements of the offence may not be considered.

Sec 46a Mediation Between the Perpetrator and the Victim, Restitution for Harm Caused

If the perpetrator has:

1. in an effort to achieve *mediation* with the aggrieved party (mediation between perpetrator and victim), completely or substantially made restitution for his act or earnestly strived to make restitution; or
2. in a case in which the restitution for the harm caused required substantial personal accomplishments or personal sacrifice on his part, completely or substantially compensated the victim,

then the court may mitigate the punishment pursuant to Section 49 subsection (1), or, if the maximum punishment which may be incurred is imprisonment for not more than one year or a fine of not more than three hundred sixty daily rates, *dispense* with punishment.